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CHASE'S POCKET CODE

New York (State) Laws, statutes, etc. = Codes, Civil procedure

THE CODE OF CIVIL PROCEDURE

OF THE

STATE OF NEW YORK

AS AMENDED TO THE CLOSE OF THE LEGISLATIVE SESSION OF 1916

WITH

TABLE OF CITED CASES

WHICH HAVE CONSTRUED THE SECTIONS OF THE CODE;

WITH, ALSO, THE GENERAL CONSTRUCTION LAW, AND A LIST OF CITED CASES CONSTRUING THE SAME; THE CONSTITUTION OF THE STATE; THE RULES OF THE COURT OF APPEALS; THE GENERAL RULES OF PRACTICE; THE RULES OF THE APPELLATE DIVISIONS OF THE SUPREME COURT; THE SPECIAL RULES OF THE SUPREME COURT IN THE FIRST DISTRICT; THE RULES OF THE SURROGATES' COURTS IN NEW YORK, BRONX, KINGS, AND QUEENS COUNTIES; THE DECEDENT ESTATE LAW; THE RULES OF THE CITY COURT OF NEW YORK CITY; THE MUNICIPAL COURT CODE OF NEW YORK CITY; AND THE RULES OF SAID MUNICIPAL COURT

BY

GEORGE CHASE

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PREFATORY NOTE

The "Consolidated Laws" of the State, prepared by the Board of Statutory Consolidation, were enacted by the Legislature as part of the statutes of the year 1909. This Board did not, however, make a revision of the Code of Civil Procedure. "It was deemed advisable at this time," says its report, "not to attempt a revision of the practice, but merely to remove substantive provisions, and to this extent to prepare the way for actual revision."

The Board accordingly transferred nearly 600 sections of the Code to the "Consolidated Laws," where, it was considered, they more properly belonged; and, on the other hand, transferred a few sections from the general statutes to the Code. Of the remaining sections of the Code, about seventy-five were amended by the Board, but these amendments were chiefly in the way of inserting cross-references, to connect these sections with those which had been transferred.

This Code, therefore, remained the same, in the main, as it was before the "Consolidated Laws" were enacted. But the omission of almost 600 sections without changing the numbering of those that were retained rendered the section-numbers no longer consecutive. Moreover, though many of the transferred sections might be more appropriately placed where they are now found, it was certainly very convenient to have them (since they related to procedure) in the Code itself, with the other provisions as to procedure. Before 1909, for example, the method of proceeding to punish contempt of court, and what constitutes such contempt, was contained in the Code, but since that time it has been found in the "Judiciary Law." To have such provisions in a handy edition of the Code has certainly had some advantages over the condition that now prevails of having to seek them in the bulky volumes of the "Consolidated Laws."

Until the suggested revision of the Code is accomplished, which may not be for some years, the present Code must continue to be published, and the changes which have been made indicated therein. In the present edition every section that has been transferred to the "Consolidated Laws" has prefixed to it the words **[Omitted; see Table, p. iii.]** This is the Table printed immediately after this Prefatory Note (pp. iii to xx, inclusive), and a reference to it will show at a glance to which Law of the "Consolidated Laws" the particular section has been transferred. Sometimes the transferred sections are still, by reason of their importance and for convenience' sake, printed in full in this edition, but the heading shows that they no longer belong to the Code, but are a part of the other statutes.

The new Surrogates' Courts Act (L. 1914, c. 443) which went into effect September 1, 1914, is embodied in this edition (pages 682 to 802). It is, in the main, a rearrangement and condensation of the former sections of the Code upon the same subject, but it also confers important powers upon the Surrogates' Courts which they did not previously possess. Tables on pages xxa to xxf show what sections of the new Surrogates' Act correspond with those of the old.

The Decedent Estate Law (contained in the Consolidated Laws) bears so close a relation to this Surrogates' Courts Act, that the one forms the complement of the other, and it is a daily experience that consultation of the one leads necessarily to an examination of the other. In the belief, therefore, that lawyers and law students will find it very convenient to have both these statutes in the same volume, I have included the Decedent Estate Law in this edition as Appendix II (pages 1022a to 1022u).

The new Municipal Court Code of New York City (L. 1915, c. 279) is also incorporated in this edition. It went into effect September 1, 1915.

G. C.

New York, May, 1916.

SECTIONS OF THE CODE OF CIVIL PROCEDURE AMENDED BY THE LAWS OF 1916

§ 283.	Added by	chap.	343
284.	"	"	343
390.	Amended by	"	536
443 (subd. 5).	"	"	439
477a.	Added by	"	440
635.	Amended by	"	441
744a.	"	"	442
747.	"	"	443
1345.	"	"	84
1380.	"	"	625
1594.	"	"	330
1627.	"	"	331
1671a.	Added by	"	518
1678.	Amended by	"	589
1679.	"	"	585
1743.	"	"	605
1744.	"	"	605
1845.	"	"	444
2342.	"	"	535
2531.	"	"	445
2544.	"	"	446
2574.	"	"	588
2664a.	Added by	"	588
2665.	Amended by	"	624
2753.	"	"	596
2768 (subd. 18).	"	"	447
3146.	"	"	448
3228 (subd. 5).	"	"	50
3311.	"	"	160

SECTIONS OF THE NEW YORK MUNICIPAL CODE AMENDED BY THE LAWS OF 1916

§ 5.	Amended by	chap.	479
§ 27.	"	"	610
§ 118.	"	"	123
§ 142.	"	"	508

TABLE I

Showing Distribution of Sections of the Code of Civil Procedure in the Consolidated Laws, Arranged Numerically.

Where it appears that a part only of a section is transferred to the Consolidated Laws, the remainder is left in the Code.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
2	Judiciary	2	Courts of record.
3	"	3	Courts not of record.
5	"	4	Sittings of courts to be public.
6	"	5	Sitting of courts on Sunday.
8	"	750	Punishment for criminal contempts.
9	"	751	Punishment for criminal contempts.
10	"	751	Contempts in view of court.
11	"	752	Commitment for criminal contempts.
12	"	754	Punishment for civil contempts.
13	Penal	602	Indictment for contempt.
14	Judiciary	753	Contempts punishable civilly.
15	Civil Rights	20	Imprisonment for costs.
16	" "	21	Imprisonment for nonpayment of money on judgment or contract.
17	Judiciary	93, 94	Appellate division; rules of practice.
18	"	52, 95	Publication of rules.
19	"	154, 193	Printing court calendars.
20	County	240	Expense of court calendars.
	State Finance	46	
21	Judiciary	87	Destruction of certain papers.
27	"	29, 158, 194	Court seals.
	Code Civ. Pro.	2507	
28	County	245	County seals.
29	Judiciary	29	Court seals.
31	County	42	Necessaries for court terms.
	Greater New York Charter	62	
32	Penal	1790	Liquors not to be sold in courthouse.
33	"	1790	Penalty for selling liquors in courthouse.
34 pt.	Judiciary	7, 534, 540	Adjournment of terms.
35	"	6	Adjournment of terms.
36	"	6	Adjournment of terms.
38	"	8	Place of holding term.
39	"	8	Filing appointment of term.
	State Finance	46	
40	Judiciary	9	Place of holding court of record.
41 pt.	"	10	Adjournment of actual session.
42	"	11	Holding court in New York.
43	"	12	Changing place of court outside New York.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
46	Judiciary	15, 22	Judge not to act in certain cases.
47	"	20	Judge must not be interested in costs.
48	"	16	Judge not disqualified because a taxpayer.
49	"	17, 21, 471	Judge prohibited from practicing.
50	"	18, 471	Practice by judge or his partner.
51	"	19	Judge prohibited from taking certain fees.
54	Executive Judiciary	29 28	Certificate of judge's age and service.
56	"	53, 56, 88, 400-465, 467	Examination and admission of attorneys.
57	Executive Judiciary	30 53	Rules for admission.
58	"	53	Exemptions of graduates of law schools.
59	"	264, 466	Attorney's oath and certificate.
60 pt.	"	470	Attorneys residing in adjoining states.
61	"	250	Clerks not to practice.
62	"	478	Court officers not to practice.
63	Penal	271	None but attorneys to practice in New York city.
64	"	272, 1877	Penalty for practicing in New York contrary to last section.
66	Judiciary	474, 475	Compensation of attorneys.
67	"	88, 477	Suspension from practice.
68	"	88, 476	Suspension of attorney, notice.
69	"	478	Removal effective in all courts.
70	Penal	273	Punishment of attorney for deceit.
71	"	273	Punishment for wilful delay of action.
72	Judiciary	479	Attorney not to lend name.
73	Penal	274	Attorney not to buy claims.
74	"	274	Attorneys prohibited from making certain loans.
75	"	274	Penalty for violation of last two sections.
76	"	275	Limitation of three last sections.
77	"	276	Application of preceding sections.
78	..	278	Partner of district attorney not to defend prosecutions.
79	"	278	Attorney not to defend when he has been public prosecutor.
80	"	278	Penalty for violation of last two sections.
81	"	279	Limitation of preceding sections.
82	Judiciary	290, 291, 293, 294	Qualifications of stenographers.
83	" Code Civ. Pro.	14, 24, 295-297, 301 1323a	General duties of stenographers.
84	Judiciary	292, 298, 299, 302	Presentation of stenographic notes.
85	"	300	Stenographic minutes to be written out.
86	"	303	Furnishing copies of proceedings
87		504	Assistant stenographers.
88	County	12	County charge; stenographers' compensation.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
89	County	170	Appellate division clerks.
	Judiciary	101, 156, 159, 264, 280, 281	
90	"	251	Clerks in New York county.
91	"	169, 199, 365, 366	Criers of courts of record.
92	"	406	Sheriff or constable as crier.
93	"	30	Seals of former courts.
94	"	167, 200, 381, 386	Interpreters in Kings and Queens counties.
95	"	168, 200	Attendants in Kings, Queens and Richmond counties.
	Code Civ. Pro.	2512	
96	Judiciary	230, 349, 351, 354	Duties of attendants in Kings, Queens and Richmond counties.
	Code Civ. Pro.	2512	
97	Judiciary	160, 170, 201, 231-233, 279, 408, 405	Court officers in certain counties.
	Code Civ. Pro.	2512	
98	Judiciary	343	Attendants in certain counties.
99	"	407	Deputy sheriff must attend court.
104	"	400	Sheriff may command power of county.
105	"	401	Certification of persons resisting mandate.
106	Penal	2501	Refusal to assist sheriff.
107	Military	321	Governor may order out militia.
112	County	240	Support of poor prisoners.
113	Prison	340	Charges by sheriff for food prohibited.
114	"	341	Gratuities to sheriff prohibited.
115	"	342	Rates of charges against persons arrested.
116	"	343	Prisoner kept in house.
117	"	344	Charges for rent in prison prohibited.
119	Civil Rights	22	Privilege of officers and prisoners from arrest.
120	Prison	420	Jail in New York city.
121	County	90	County jails.
122	Prison	347	Either of several jails may be used.
123	"	345	Civil and criminal prisoners to be kept separate.
124	"	346	Males and females to be kept separate.
125	Penal	1876	Violation by sheriff of certain provisions relating to prisoners.
126	Prison	348	Jail physician.
127 pt.	"	355	Removal of sick prisoner.
128	"	349	Sale of liquor in jail.
129	"	350	Permit to bring liquor into jail.
130	Penal	1791	Penalty for bringing liquor into jail.
135	Prison	351	Designation when jail unfit.
136	"	352	Annulment of designation.
137	"	353	Designation of jail in contiguous county.
143	"	354	Removal of prisoners in case of fire.
144	"	356	Certain officers may make designation of jails.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
145	Prison	356	Jail libertics.
146	"	358	Jail liberties.
147	"	359	Laying out jail liberties.
148	"	360	Resolution establishing jail liberties to be posted.
159	Penal	1839	Connivance at escape by sheriff.
182	County	195	Proceedings when new sheriff assumes office.
183	"	195	Powers of former sheriff.
184	"	195	Duties of former sheriff when new sheriff assumes office.
185	"	195	Former sheriff to execute instrument of delivery.
186	"	195	Former sheriff to execute certain process.
187	"	195	Return of new sheriff to certain orders.
188	"	195	Proceedings on neglect or refusal of former sheriff.
189	"	195	Person performing duties of sheriff.
193	Judiciary	51, 53	Court of appeals; rules.
196	"	54	Court of appeals; terms.
197	"	54	Court of appeals; terms.
198	"	57	Court of appeals; appointment of officers.
199	"	62, 256	Court of appeals; clerk.
200	"	257, 258	Court of appeals; deputy clerk.
201	"	257, 258	Court of appeals; clerk.
202	"	58, 259, 262	Court of appeals; judges' clerks.
203	County Judiciary	12 55	Court of appeals; judges' offices.
204 205 206 207 208	[Repealed in 1894]		
209	Judiciary	800	State reporter; reporter of court of appeals.
210	"	60, 61, 431	State reporter; duty.
211	"	433	Publication of reports of court of appeals.
212	Executive Judiciary	31 435	Copyright of reports of court of appeals.
213	Executive	32	Distribution of reports of court of appeals.
214	Judiciary	432	Unreported decisions of court of appeals.
215	"	432	State reporter; expiration of term.
216	"	256, 434	Unreported opinions of court of appeals.
219	"	70	Appellate division; departments.
220 pt.	"	71, 72, 77, 81, 82, 85, 90	Appellate division; organization, location and powers.
221	"	101, 106, 109, 111, 267, 268, 270, 271, 307, 347	Appellate division; clerks, attendants and stenographers.
222	"	73	Appellate division; revocation of designations.
223	"	72	Appellate division; designations to be filed.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
224	[Repealed in 1895]		
225	Judiciary	78	Appellate division; terms.
226	Executive Judiciary State Finance	33 79 46	Appellate division; appointment of terms.
227	[Repealed in 1895]		
228	Judiciary	80	Appellate division; associate justice to preside in certain cases.
229 pt.	"	148	Holding special and trial terms.
230	"	81	Appellate division; justices necessary to a decision.
232	"	84, 96, 148-150, 264	Supreme court; appointment of terms.
233	Executive Judiciary State Finance	33 151 46	Supreme court; publication of appointments.
234	Judiciary	79, 158	Extraordinary terms of appellate division and supreme court.
235 pt.	"	155	Supreme court justices in Erie county.
237	"	86	Designation of trial justices in certain cases.
238	"	152	Place of holding special and trial terms.
239 pt.	"	148, 276, 364, 404	Special terms at chambers.
242	"	89, 264, 342, 402	Appellate division; officers attending.
243	"	342, 402	Fees of officers attending term of appellate division.
244	"	90	Supreme court reporter; appointment.
245	"	91	Supreme court reporter; special meeting for appointment.
246	"	92, 264, 437, 439-441	Supreme court reporter; duties.
247	"	442, 443	Supreme court reporter; publication of reports.
248	"	264, 438	Papers for use of supreme court reporter.
249	Executive Judiciary	31, 32 444	Supreme court reporter; copyright of reports.
250	"	445	Supreme court reporter; compensation.
254	"	161, 309, 316	Stenographers in Kings county.
255	"	312	Assistant stenographer in Kings county.
256	"	161, 309	Stenographers in second and ninth districts; appointment.
257	"	316	Stenographers in second and ninth districts; salaries.
258	"	161, 309, 313	Stenographers for certain judicial districts; appointment and salaries.
259	"	313	Stenographers in certain judicial districts; payment of salaries.
260	"	164, 314	Stenographers in certain judicial districts; expenses.
261	[Repealed in 1890]		
262	Judiciary	162, 163	Temporary stenographers.
834	Penal	1634	Misconduct of interpreters in New York city.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
355 pt.	Judiciary	190, 191	Terms of county court.
356	County Judiciary	240 192	Appointment of terms of county court.
357	"	583, 541	Jurors for county court.
358	County Judiciary	12 197	County court stenographers.
359	"	196, 197, 285, 318, 319	County court stenographers in Kings and Queens counties.
360	" Code Civ. Pro.	198, 382-385 2513a	County court interpreters in Kings county.
361	Judiciary	197, 318, 319	County court stenographers in certain counties.
432 pt.	Gen'l Corporation Code Civ. Pro.	16 931a	Designation by foreign corporation of person upon whom to serve papers.
450 pt.	Domestic Relations	51	Married woman's property.
548	Civil Rights	23	Arrest in civil proceeding.
565	" "	24	Privilege from arrest of officers of courts.
716 pt.	Gen'l Corporation	248	Certain receivers can hold real property.
744	County State Finance	240 4	Supervision of court funds by state comptroller.
746 pt.	Banking	44	Depositories of court funds to give bonds and pay interest.
752 pt.	"	45	Depositories of court funds to keep books of account.
851	Penal	1622	Swearing falsely in any form, perjury.
860	Civil Rights	25	Witness exempt from arrest.
863	" "	25, 26	Certain arrests void.
864	" "	26	Liability of sheriff for making arrest of exempt person.
961 pt.	County Judiciary Penal Public Officers	161 255 1875 66	Officers to search files and make transcripts.
977 pt.	Judiciary	88	Power of appellate division as to calendars.
1007 pt.	"	305	Apportionment of stenographers' salaries.
1027	"	502	Qualifications of trial jurors.
1028	"	502	Qualifications of trial jurors.
1029	"	503	Certain public officers disqualified to serve as jurors.
1030	"	546	Exemption from jury duty.
1031	"	547, 548	Evidence of exemption.
1032	"	550	Discharge, when not qualified or exempt.
1033	"	544	Persons excused from serving.
1034	"	590, 600, 680, 687	Certain public officials disqualified.
1035	"	500	Jury lists.
1036	"	501	Names to be taken from assessment rolls.
1037	"	505	Duplicate jury lists to be made and filed.
1038	"	508	County clerk to make and deposit ballots.
1039	"	509-512	County clerk to destroy old ballots and notify town clerk in case of failure to receive jury lists.

Code Section	Consolidated Laws Law	Consolidated Laws Section	Subject
1040	Judiciary	506	Jurors to serve three years.
1041	"	507	Application of provisions to cities.
	Code Crim. Pro.	229	Drawing grand jurors in Albany county.
1042	Judiciary	513, 528, 543, 545	Drawing of jurors.
1043	"	514	Notice of drawing.
1044	"	26, 515	Officers to attend drawing.
1045	"	516	Officers to attend on adjourned day.
1046	"	517	Certain officers required to be present at drawing.
1047	"	518-520	Mode of drawing.
1048	"	536	Sheriff must notify jurors.
1049	"	504	Jury lists must be furnished applicants.
1050	"	521, 522	Matter of keeping jurors' names.
1051	"	523	Jurors who have served must be drawn again when other lists exhausted.
1052	"	524	Third jury box.
1053	"	525	Destruction of old ballots in third box.
1054	"	526	Drawing from third box.
1055 pt.	"	537	Sheriff must notify jurors from third box.
1056	"	527	Drawing of additional jurors.
1057	"	529, 530	Proceedings on drawing additional jurors.
1058	"	513, 528, 543, 545, 566	Drawing of additional jurors.
1059	"	531, 532, 538	Additional jurors drawn during term.
1060	"	539, 542	Attendance of jurors at county court.
1061	"	535	Powers of deputy county clerk as to jurors.
1062	"	560, 680	Application of provisions to New York and Kings counties.
1072	"	551	Fine of juror for non-attendance.
1073	"	552, 553	Fine of juror for non-attendance.
1074	"	554	Fine for non-attendance at trial term.
1075	"	555, 556	Duty of clerk and sheriff.
1076	"	557	Proceedings on order to show cause.
1077	"	558	Discontinuance of proceedings against delinquent juror.
1078	"	560, 680	Application of provisions to New York and Kings counties.
1079	"	598	Qualification of trial juror; New York.
1080	"	599	Qualification of trial juror; New York.
1081	"	635	Persons exempt in New York.
1082	"	636	Evidence of exemption in New York.
1083	"	637	Duty of military officers.
1084	"	549, 641-644	Jury year.
1085	"	650, 647	Jurors excused in New York.
1086	"	609, 616, 631	Jurors excused in New York.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
1087	Judiciary	682, 683	Duty of juror applying to be excused.
1088	"	645	Service in court not of record as an excuse.
1089	"	634	Clerk to make return to commissioner after term.
1090	"	591, 592, 595, 601, 638, 640	Duty of commissioner in New York.
1091	"	593, 594	Assistants to commissioner.
1092	"	602	Public officers must aid commissioner.
1093	"	800	Expenses of commissioner's office.
1094	"	597, 639	Preparation of lists of jurors in New York.
1095	"	603	Failure to testify as to liability to serve.
1096	"	604	Commissioner to return the lists to county clerk.
1097	"	606, 607	Commissioner to make and deposit ballots.
1098	"	610	Number of jurors to be drawn.
1099	"	612	Officers to attend drawing.
1100	"	611	Notice of drawing.
1101	"	613	Officers attending on adjourned day.
1102	"	614	Jury must not be drawn on adjourned day unless officers attend.
1103	"	615, 617	Mode of drawing jurors in New York.
1104	"	618	Drawing where term consists of parts.
1105	"	623	Commissioner to notify jurors.
1106	"	619, 624, 625	Commissioner to notify jurors.
1107	"	628, 629	Proceedings when less than majority of persons drawn are notified.
1108	"	621, 622, 626, 627	Drawing of additional jurors.
1109	"	648, 649	Fine for non-attendance.
1110	"	643	Arrest for failure to attend.
1111	"	800	Jurors for district courts.
1112	"	605, 609, 620	Sheriff's jury.
1113	"	650-659	Remitting and enforcing jury fines.
1114, 1115, 1116	[Repealed in 1880]		
1117	Judiciary	660-663	Uncollected fines.
1118	"	664	Commissioner to receive fines and account therefor.
1119	"	665-667	Corporation counsel to prosecute.
1120	Penal	1232	Penalty for physician giving false certificate.
1121	Judiciary	596	Persons required to furnish information.
1122	Penal	1235	Bribery of officer by juror.
1123	"	1235	Officer accepting bribes.
1124	"	1235	Penalty for concealing offer to take bribe.
1125	"	1233	False swearing, perjury.
1126	Judiciary	986	Qualification of jurors in Kings county.

Code Section	Consolidated Laws Law	Consolidated Laws Section	Subject
1127	Judiciary	720	Exemption in Kings county.
1128	"	721, 722	Evidence of exemption.
1129	"	714, 715	Jury service.
1130	"	716	Jurors excused.
1131	"	718, 719	Return by clerk after adjournment of term.
1132	"	681, 688, 690, 723	Selection of trial jurors.
1133	"	692, 693	Commissioner to collect fees for county.
1134	"	800	Expenses of commissioner.
1135	"	691, 692	Selection of jurors.
1136	"	693, 694	Commissioner to publish notice of list.
1137	"	695	Commissioner to prepare list and file transcript.
1138	"	696, 698	Supplemental lists.
1139	"	697	Commissioner to make and deposit ballots.
1140	"	699, 700	Officers to attend drawing.
1141	"	701	Proceedings preliminary to drawing.
1142	"	702	Mode of drawing.
1143	"	703	Certificate to be made and boxes sealed.
1144	"	704	Subsequent drawings.
1145	"	705	Proceedings when first box exhausted.
1146	"	706, 709	Commissioner to notify juror.
1147	"	710, 717, 725	Notification of jurors.
1148	"	711	Commissioner to make return of jurors notified.
1149	"	707, 712	Additional jurors.
1150	"	708, 713	Jurors in certain special proceedings.
1151	"	26	Compensation to judges attending drawing.
1152	"	734	Fine for non-attendance.
1153	"	726	Arrest for non-attendance.
1154	"	727-729	Commissioner to notify jurors fined to appear.
1155	"	730, 731	Commissioner to collect jury fines.
1156	"	732-735	Fines not collected to be docketed.
1157	"	736	Discharge of lien created by docket.
1158	Penal	1224	Commissioner omitting name; felony.
1159	"	1234	Commissioner's wilful neglect; misdemeanor.
1160	"	1236	False information; misdemeanor.
1161	"	1232	Physician giving false certificate.
1162	Judiciary	684, 685	Commissioner to report and pay over money.
1190	pt. Civil Rights	12	Alien not entitled to special jury.
1192	" "	14	Jurors not to be questioned for verdicts.
1193	Penal	375	Penalty when juror takes gift.
1194	"	377	Penalty for embracery.
1195	Judiciary	669	Fine of trial juror for non-attendance in special proceeding.

Code Section	Consolidated Laws		Subject
	Law	Section	
1196	Judiciary	560	Fine for neglect or misconduct of officer in charge of jury from special proceeding.
1197	"	561	Notice of fine in special proceeding.
1198	"	562	Special return of delinquency and fine to county court.
1199	"	563, 564	Collection or remission of fine.
1206	Domestic Relations	51	Judgment for or against married woman.
1268	Debtor & Creditor	150	Discharge of bankrupt from judgment.
1273 pt.	Domestic Relations	51	Confession of judgment by married woman.
1737	Lien	206	Action to foreclose lien on chattel.
1738	"	207	Warrant to seize chattel and proceedings thereupon.
1739	"	208	Judgment in action to foreclose lien on chattel.
1740	"	209	Action to foreclose lien on chattel in inferior court.
1741	"	210	Application of sections.
1761	Domestic Relations	8	Marriage after divorce for adultery.
1781	Gen'l Corporation	90	Action against officers of corporation for misconduct.
1782	" "	91	Who may bring such an action.
1783	" "	92	Visitatorial power over corporation.
1784	" "	100	Action by judgment-creditor for sequestration.
1785	" "	101	Action to dissolve a corporation.
1786	" "	102	Action to dissolve a corporation.
1787	" "	103	Temporary injunction.
1788	" "	104, 106	Temporary and permanent receiver.
1789	" "	105	Powers and duties of temporary receiver.
1790	" "	109	Officers and stockholders may be made parties.
1791	" "	110	Separate action against officers and stockholders.
1792	" "	111	Proceedings in such actions.
1793	" "	112	Distribution of property by judgment.
1794	" "	113	Recovery of stock subscriptions.
1795	" "	114	Liability of directors and stockholders.
1796	" "	115	Construction of provision relating to dissolution and enforcement of liability
1797	" "	130	Action by attorney-general to annul corporation when legislature directs.
1798	" "	131	Action by attorney-general to annul corporation by leave of court.
1799	" "	132	Notice of application for leave to commence action.
1800	" "	133	Jury trial.
1801	" "	134	Injunction and receiver in final judgment.

Code Section	Consolidated Laws Law	Consolidated Laws Section	Subject
1802	Gen'l Corporation	125	Temporary injunction.
1803	" "	126	Filing and publishing judgment.
1804	" "	360	Certain corporations excepted from certain provisions.
1805	" "	301	Testimony of officers and agents.
1806	" "	302	Injunction staying action in certain cases.
1807	" "	303	Proving claims of creditors.
1808	" "	304	Action by attorney-general against corporations or officers.
1809 pt.	" "	305	Requisites of injunction in certain cases.
1810	" "	306	Appointment of receivers.
1811	" "	307	Judicial suspension or removal of officer of corporation.
1812 pt.	" "	308	Application of last three sections.
1813 pt.	" "	309	Misnomer not available.
1842	Decedent Estate	101	Liability of heirs and devisees for death of decedent.
1859	" "	102	Liability of heirs and devisees where will provides for debts.
1868	" "	26	Action by child born after making a will or by subscribing witness.
1909	Personal Property	41	Rights of transferee of claim or demand.
1910	" "	41	Transfer of claim.
1911	General Business	378	Transfer of cause of action for usury.
1912	Personal Property	41	Assignment of judgment.
1942	Debtor & Creditor	230, 231	Compositions by joint debtors.
1944	" "	232, 233	Compositions by joint debtors.
1966 pt.	County	201	District attorney to bring action on forfeited recognizance.
1967	County	202	District attorney to pay over certain moneys collected.
1968	"	202	District attorney to render certain account.
2149	Debtor & Creditor	50	Insolvent's discharge; who may be discharged.
2150	" "	51	Insolvent's discharge; application.
2151	" "	52	Insolvent's discharge; petition.
2152	" "	53	Insolvent's discharge; consent of creditors.
2153	" "	54	Insolvent's discharge; consent of representative or trustee.
2154	" "	55	Insolvent's discharge; consent of corporation.
2155	" "	56	Insolvent's discharge; consent of partnership.
2156	" "	57	Insolvent's discharge; effect of consent where petitioner is joint debtor.
2157	" "	58	Insolvent's discharge; consent of purchaser of debt.
2158	" "	59	Insolvent's discharge; consenting creditor must relinquish security.
2159	" "	60	Insolvent's discharge; penalty when creditor swears falsely.
2160	" "	61	Insolvent's discharge; affidavit of consenting creditor.

Code Section	Consolidated Laws Law	Consolidated Laws Section	Subject
2161	Debtor & Creditor	63	Insolvent's discharge; non-resident creditor to annex accounts.
2162	" "	68	Insolvent's discharge; petitioner's schedule.
2163	" "	64	Insolvent's discharge; petitioner's affidavit.
2164	" "	65	Insolvent's discharge; order to show cause.
2165	" "	66	Insolvent's discharge; publication and service of order.
2166	" "	67	Insolvent's discharge; hearing.
2167	" "	68	Insolvent's discharge; putting cause on calendar.
2168	" "	69	Insolvent's discharge; filing specifications and demanding jury trial.
2169	" "	70	Insolvent's discharge; opposing creditor to file proofs.
2170	" "	71	Insolvent's discharge; proceedings if jurors do not agree.
2171	" "	72	Insolvent's discharge; non-resident wife.
2172	" "	73	Insolvent's discharge; examination of insolvent.
2173	" "	74	Insolvent's discharge; discharge.
2174	" "	75	Insolvent's discharge; assignment.
2175	" "	76	Insolvent's discharge; assignment.
2176	" "	77	Insolvent's discharge; trustees.
2177	" "	78	Insolvent's discharge; effect of assignment.
2178	" "	79	Insolvent's discharge; discharge.
2179	" "	80	Insolvent's discharge; order to show cause where trustee refuses to give certificate.
2180	" "	81	Insolvent's discharge; proceedings on return of order.
2181	" "	82	Insolvent's discharge; recording papers.
2182	" "	83	Insolvent's discharge; effect of discharge.
2183	" "	84	Insolvent's discharge; effect of discharge.
2184	" "	85	Insolvent's discharge; effect of discharge.
2185	" "	86	Insolvent's discharge; release from imprisonment.
2186	" "	87	Insolvent's discharge; void discharge.
2187	" "	88	Insolvent's discharge; invalidity may be proved.
2188	" "	100	Insolvent's exemption; who may be exempted.
2189	" "	101	Insolvent's exemption; petition.
2190	" "	102	Insolvent's exemption; petitioner's schedule.
2191	" "	103	Insolvent's exemption; petitioner's affidavit.
2192	" "	104	Insolvent's exemption; order to show cause.
2193	" "	105	Insolvent's exemption; hearing.
2194	" "	106	Insolvent's exemption; assignment.
2195	" "	107	Insolvent's exemption; discharge.

Code Section	Consolidated Laws Law	Consolidated Laws Section	Subject
2196	Debtor & Creditor	108	Insolvent's exemption; recording papers.
2197	" "	109	Insolvent's exemption; release.
2198	" "	110	Insolvent's exemption; debts and demands not affected.
2199	" "	111	Insolvent's exemption; void discharge.
2200	" "	120	Judgment debtor's discharge; who may be discharged.
2201	" "	121	Judgment debtor's discharge; application.
2202	" "	122	Judgment debtor's discharge; petition.
2203	" "	123	Judgment debtor's discharge; contents of petition.
2204	" "	124	Judgment debtor's discharge; affidavit of petitioner.
2205	" "	125	Judgment debtor's discharge; notice to creditors.
2206	" "	126	Judgment debtor's discharge; notice when service cannot be made.
2207	" "	127	Judgment debtor's discharge; notice when State a creditor.
2208	" "	128	Judgment debtor's discharge; hearing.
2209	" "	129	Judgment debtor's discharge; adjournment.
2210	" "	130	Judgment debtor's discharge; proceedings on adjournment.
2211	" "	131	Judgment debtor's discharge; assignment.
2212	" "	132	Judgment debtor's discharge; discharge.
2213	" "	133	Judgment debtor's discharge; petitioner's property still liable.
2214	" "	134	Judgment debtor's discharge; new execution.
2215	" "	135	Judgment debtor's discharge; trustee.
2216	" "	136	Judgment debtor's discharge; creditor may notify debtor to apply for discharge.
2217	" "	137	Judgment debtor's discharge; failure so to apply.
2218	" "	138	Judgment debtor's discharge; discharge of debtors to state or United States.
2219	Prison	390	Care of prisoner's property; application.
2220	"	391	Care of prisoner's property; who may apply.
2221	"	392	Care of prisoner's property; creditor must relinquish security.
2222	"	393	Care of prisoner's property; petition.
2223	"	394	Care of prisoner's property; copy of sentence and affidavit.
2224	"	395	Care of prisoner's property; proceedings on presentation of papers.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
2225	Prison	396	Care of prisoner's property; proceedings on return of order.
2226	"	397	Care of prisoner's property; order appointing trustee.
2227	"	398	Care of prisoner's property; removal of trustee.
2228	"	399	Care of prisoner's property; distribution of property.
2229	"	400	Care of prisoner's property; property to be delivered to prisoner on discharge.
2230	"	401	Care of prisoner's property; application of article.
2266	Judiciary	754	Contempt proceedings; application.
2267	"	755	Contempt proceedings; summary punishment.
2268	"	756	Contempt proceedings; warrant without notice.
2269	"	757	Contempt proceedings; order to show cause or warrant to attach.
2270	"	758	Contempt proceedings; notice to delinquent officer.
2271	"	757	Contempt proceedings; orders granted out of court.
2272	"	759	Contempt proceedings; contempt before referee.
2273	"	760-762	Contempt proceedings; effect of order and warrant.
2274	"	763	Contempt proceedings; affidavit and warrant to be served on accused.
2275	"	764	Contempt proceedings; undertaking.
2276	"	765	Contempt proceedings; execution of warrant.
2277	"	766	Contempt proceedings; undertaking for discharge.
2278	"	767	Contempt proceedings; habeas corpus.
2279	"	768	Contempt proceedings; sheriff to file undertaking.
2280	"	769	Contempt proceedings; interrogatories.
2281	"	770	Contempt proceedings; final order directing punishment.
2282	"	771	Contempt proceedings; punishment on return of habeas corpus.
2283	"	772	Contempt proceedings; punishment on return of order to show cause.
2284	"	773	Contempt proceedings; amount of fine.
2285	"	774	Contempt proceedings; length of imprisonment.
2286	"	775	Contempt proceedings; release of offender.
2287	"	776	Contempt proceedings; indictment of offender.
2288	"	777	Contempt proceedings; proceedings when accused does not appear.

Code Section	Consolidated Laws Law	Consolidated Laws Section	Subject
2389	Judiciary	778	Contempt proceedings; prosecution of undertaking.
2390	"	779	Contempt proceedings; prosecution of undertaking in name of people.
2391	"	780	Contempt proceedings; sheriff liable for taking insufficient sureties.
2392	"	781	Contempt proceedings; misconduct at trial term.
2393	"	790	Collection of fine, schedule of fines imposed.
2394	"	791	Collection of fine; warrant.
2395	"	791	Collection of fine, warrant when delinquent non-resident of county.
2396	"	792	Collection of fine; execution of warrant.
2397	"	793	Collection of fine; return of warrant.
2398	"	794	Collection of fine; proceedings if fine not collected.
2399	"	795	Collection of fine; contents of schedule annexed to warrant.
2400	"	796	Collection of fine; liability of sheriff for omission of duty.
2401	"	797	Collection of fine; special provisions for collection.
2411	Gen'l Corporation	60	Change of name; by corporation.
2412 pt.	" "	61	Change of name; contents of petition.
2413 pt.	" "	62	Change of name; notice of presentation of petition.
2414	County Gen'l Corporation	161 63	Change of name; order changing name.
2415	" "	64	Change of name; when to take effect.
2416	" "	65	Change of name; substitution of new name in pending action.
2417	County Executive Judiciary	161 34 254	Change of name; reports of names changed.
2419	Gen'l Corporation	170	Voluntary dissolution of corporation; grounds for petition.
2420	" "	171-173	Voluntary dissolution of corporation; petition when directors or trustees divided.
2421	" "	174	Voluntary dissolution of corporation; contents of petition.
2422	" "	175	Voluntary dissolution of corporation; affidavit to be annexed.
2423	" "	176, 178, 181, 182, 184	Voluntary dissolution of corporation; presentation of petition, temporary receiver.
2424	" "	179	Voluntary dissolution of corporation; order to be published.
2425	" "	180	Voluntary dissolution of corporation; service of order.
2426	" "	185-187	Voluntary dissolution of corporation; hearing.
2427	" "	188, 189	Voluntary dissolution of corporation; papers.

Code Section	Consolidated Laws: Law	Consolidated Laws: Section	Subject
2428	Gen'l Corporation	190	Voluntary dissolution of corporation; application for final order.
2429	" "	191, 192, 194	Voluntary dissolution of corporation; final order.
2430	" "	193	Voluntary dissolution of corporation; certain sales and transfers void.
2431	" "	177, 195	Voluntary dissolution of corporation; certain corporations excepted.
2431-a	" "	277	Voluntary dissolution of corporation; commissions of receiver.
2431-b	" "	268	Voluntary dissolution of corporation; final accounting.
2471-a	Public Officers	80	Delivery of public books and papers.
2529	Judiciary	472	Attorney who is surrogate's father or son prohibited from practicing before him.
2611	Decedent Estate	23-25	What wills may be proved.
2628	" "	46	Validity of purchase notwithstanding devise.
2633	" "	42	Record of wills in county clerk's office.
2634 pt.	" "	43	County clerk's index of recorded wills.
2660 pt.	" "	108	Action against husband for debts of deceased wife.
2694	" "	47	Validity and effect of testamentary dispositions.
2703	" "	44	Recording will found in another State or country.
2704	" "	45	Authentication of papers from another State or country.
2732	" "	98	Distribution of personal property of decedent.
2733 pt.	" "	99	Advancements of personal estates.
2734	" "	100	Estates of married women.
3280	Judiciary	252	Fees of clerks and officers.
	Public Officers	67	
3281	" "	67	Fees of public officers.
3282	" "	67	Fees of public officers.
3283	Judiciary	256	Clerk of court of appeals must account for fees.
3285	County	161	County clerks must account for fees.
3286	Public Officers	70	Accounting for fees generally.
3289	" "	69	Fee for administering certain official oaths prohibited.
3290	Executive	84	Certain searches ordered by state officers to be gratuitous.
3291	Public Officers	68	Allowance of additional fees and expenses.
3295	State Finance	46	Comptroller to audit and pay certain fees and charges.
3303	Judiciary	253	Clerk's fees upon naturalization.
3390	Gen'l Corporation	70	Sale of corporate and joint-stock association real property; method.
	Joint-Stock Ass'n	8	
3391	Gen'l Corporation	71	Sale of corporate real property; petition.
3392	" "	72	Sale of corporate real property; hearing.

Code Section	Consolidated Laws Law	Consolidated Laws Section	Subject
2393	Gen'l Corporation	72, 73	Sale of corporate real property; order of sale.
2394	" "	74	Sale of corporate real property; insolvent corporations.
2395	" "	75	Sale of corporate real property; service of notices.
2396	" "	76	Sale of corporate real property; practice in cases not provided for.
2397	" "	380	Sale of corporate real property; time title takes effect.
2396	Lien	40	Mechanics' liens; construction.
2399	"	41	Mechanics' liens; enforcement.
2400	"	42	Mechanics' liens; enforcement of lien for public improvement.
2401	"	43	Mechanics' liens; action in court of record.
2402	"	44	Mechanics' liens; parties.
2403	"	45	Mechanics' liens; equities to be determined.
2404	"	46	Mechanics' liens; action in court not of record.
2405	"	47	Mechanics' liens; service of summons.
2406	"	48	Mechanics' liens; answer; judgment by default.
2407	"	49	Mechanics' liens; trial and judgment.
2408	"	50	Mechanics' liens; execution.
2409	"	51	Mechanics' liens; appeals.
2410	"	52	Mechanics' liens; transcripts of judgments.
2411	"	53	Mechanics' liens; costs and disbursements.
2412	"	54	Mechanics' liens; judgment in case of failure to establish lien.
2413	"	55	Mechanics' liens; payment into court.
2414	"	56	Mechanics' liens; preference over contractors.
2415	"	57	Mechanics' liens; terms of judgment.
2416	"	58	Mechanics' liens; judgment for deficiency.
2417	"	59	Mechanics' liens; vacating lien.
2418	"	60	Mechanics' liens; judgment in action on account of public improvement.
2419	"	61	Mechanics' liens; judgment in action to foreclose lien on property of railroad.
2419(bis)	"	85	Lien on vessel; enforcement.
2420	"	86	Lien on vessel; application for warrant
2421	"	87	Lien on vessel; undertaking.
2422	"	88	Lien on vessel; execution of warrant.
2423	"	89	Lien on vessel; order to show cause.
2424	"	90	Lien on vessel; notice to be published and served.
2425	"	91	Lien on vessel; trial.

Code Section	Consolidated Laws		Subject
	Law	Section	
3426	Lien	93	Lien on vessel; order of sale.
3427	"	93	Lien on vessel; sale and proceeds.
3428	"	94	Lien on vessel; notice of distribution.
3429	"	95	Lien on vessel; liens for which no warrants are issued.
3430	"	96	Lien on vessel; contested claims.
3431	"	97	Lien on vessel; trial of issues and appeal.
3432	"	98	Lien on vessel; distribution of proceeds.
3433	"	99	Lien on vessel; payment of uncontested claims.
3434	"	100	Lien on vessel; distribution of surplus.
3435	"	101	Lien on vessel; application for discharge of warrant.
3436	"	102	Lien on vessel; undertaking to accompany application.
3437	"	103	Lien on vessel; discharge of warrant.
3438	"	104	Lien on vessel; action on undertaking.
3439	"	105	Lien on vessel; costs of proceedings.
3440	"	106	Lien on vessel; sheriff must return warrant.
3441	"	107	Lien on vessel; discharge of lien before issue of warrant.

TABLE II

Table showing where former sections of the Surrogate's Court Act (Chapter XVIII of this Code) may be found in the Revision of 1914. The revised sections are contained in this edition of the Code (see pp. 682-820, post).

Original Code Section	Embodied in Revised Code Sections
2472	2510
2472a Substantially in	2510
2473	2513
2474	2512
2475	2514
2476	2515
2477	2516
2478	2517
2479, 2480 Repealed.	
2481	2490, 2763
2482	2769
2483	2472
2484	2478
2485	2479
2486	2480
2487	2481
2488	2482
2489	2483
2490	2507
2491	2508
2492	2484
2493	2485
2494	2509
2495	2474
2496	2476
2497	2477
2498	2486
2499	2486, 2487
2500	2488
2501 Repealed; a part retained in	2499
2502	2486, 2499, 2552, 2719
2503	2489
2504	2504, 2506
2505 Repealed; a part (modified) in	2504
2506	2505
2507	2473
2508	2491
2509	2486, 2491, 2502, 2503
2509a	2492
2510	2502
2511	2475
2512	2493, 2495
2513	2496, 2500
2513a	2494
2514	2768
2515	2522
2516	2518
2517	2518
2518	2511, 2521, 2524
2519	2523
2520	2525, 2529
2521	2525
2522	2526
2523	2526
2524	2527, 2528, 2529
2525	2529, 2531
2526	2525
2527	2530
2528	2511, 2533
2529 (See Table I).	
2530	2534
2531 Repealed.	

Original Code Section	Embodied in Revised Code Sections
2532	2531
2533	2519
2534	2520
2535	2532
2536 (Repealed in 1900).	
2537	2699
2538	2770
2539	2543
2540	2544
2541	2497
2542	2498
2543	2498
2544	2545
2545	2541, 2542, 2757
2546	2536
2547	2538
2548, 2549 (Repealed in 1910).	
2550	2548
2551	2742
2552	2549
2553	2551
2554	2553
2555	2554
2556	2548, 2745
2557	2744
2558 Repealed; subd. 3 in	2746
2559	2743
2560	2751
2561	2746
2562	2747
2563	2749
2564 Repealed.	
2565	2752
2566	2752
2567	2499, 2501
2568	2754
2569 Repealed.	
2570	2754
2571 Repealed.	
2572	2756
2573	2755
2574	2756
2575	2758
2576	2757
2577	2759
2578	2760
2579	2557, 2761, 2762
2580	2762
2581	2762
2582	2557, 2560
2583	2557
2584	2557
2585	2764
2586	2763
2587	2763
2588 Repealed.	
2589	2751
2590	2558
2591	2560
2592	2561
2593	2562
2594	2563

Original Code Section	Embodied in Revised Code Sections
2555	2576
2556	2582
2557	2577
2558	2578
2559	2574
2560	2579
2561	2580
2562	2598
2563	2555
2564	2556
2565	2563, 2726, 2734
2566	2535, 2549, 2584, 2725, 2734
2567	2583
2568	2584
2569	2585
2570	2587
2611 (See Table I).	
2612	2564, 2565, 2603
2613	2626, 2693, 2695
2614	2609
2615	2610
2616	2524, 2610
2617	2511, 2618
2618	2611
2619	2612
2620	2547, 2612, 2620
2621	2613
2621a	2607
2622	2614
2623	2614
2624	2615
2625 Repealed.	
2626, 2627 (Repealed in 1910).	
2628 (See Table I).	
2629	2621
2630	2622
2631	2623
2632	2623
2633 (See Table I).	
2634 Repealed; in substance in	2753
2635 Repealed.	
2636	2566, 2625
2637 Repealed.	
2638	2567
2639	2628
2640 In part in	2625
2641 In substance in	2566
2642	2627, 2694, 2696
2643	2603
2644	2604
2645	2605
2646 Repealed.	
2647–2653 (Repealed in 1910).	
2653a Repealed.	
2654	2765
2655 Repealed.	
2656	2766
2657	2767
2658, 2659 Repealed.	
2660	2588, 2603
2661	2564
2662	2490, 2521, 2589
2663	2590
2664	2591, 2592
2665 Repealed.	
2666 Repealed; in part in	2489
2667, 2668 Repealed.	
2669	2594
2670	2596

Original Code Section	Embodied in Revised Code Sections
2671 Repealed.	
2672	2597
2673	2598
2674	2599
2675	2600
2676	2601
2677	2601
2678–2680 Repealed.	
2681	2602
2682, 2683 Repealed.	
2684	2624
2685	2569
2686	2570
2687	2571
2688	2571
2689	2572
2690	2573
2691	2574
2692	2563
2693	2606
2694 (See Table I).	
2695	2629
2696	2630
2697	2631
2698	2632
2699	2633
2700	2634
2701	2635
2702	2636
2703, 2704 (See Table I).	
2705	2608
2706 Repealed.	
2707	2675
2708 Repealed.	
2709 In substance in	2676
2710	2676
2711	2665, 2666
2712	2672
2713	2670
2714	2666, 2667, 2673
2715	2668
2716	2669
2717	2684, 2733
2718	2677, 2678
2718a Repealed.	
2719	2682, 2683
2720	2674
2721	2668
2722 Repealed; in substance in	2637
2723	2691
2724	2671, 2635
2725	2721
2726	2726
2727	2535, 2722, 2727, 2728
2728	2729, 2730, 2781
2729	2721, 2731, 2732, 2733
(Subd. 3)	2686
2730	2753
2731	2679
2732 (See Table I).	
2733	2738
2734 (See Table I).	
2735–2741 (Repealed in 1893).	
2742	2742
2743	2735
2744	2736
2745	2737
2746	2699, 2739
2747	2740

Original Code Section	Embodied in Revised Code Sections
2748	2741
2749	2702, 2703
2750–2754	Repealed.
2755	Repealed; in part in 2706
2756	2703
2757	2707
2758	2708
2759	Repealed.
2760	2710
2761	Repealed.
2762	(Repealed in 1904).
2763	Repealed.
2764	2712
2765	2704
2766–2770	(Repealed in 1904).
2771	Repealed.
2772, 2773	(Repealed in 1904).
2774	Repealed.
2775, 2776	(Repealed in 1904).
2777	2714
2778–2781	(Repealed in 1904).
2782	2715
2783	2715
2784	(Repealed in 1904).
2785	2716
2786–2797	(Repealed in 1904).
2798, 2799	Repealed.
2800	2717
2801	2718
2801a	Repealed; in part in 2697
2803	Repealed; in substance in 2721, 2723
2806	Repealed; in substance in 2721, 2724
2804	2689
2805	2690
2806	Repealed; in substance in 2689
2807	Repealed; in substance in 2726
2808	Repealed; in substance in 2727
2809	Repealed.
2810	Repealed; in substance in 2729
2811	Repealed.
2812	Repealed; in substance in 2737
2812	Repealed; in substance in 2742
2814	Repealed; in substance in 2572
2815	Repealed; in substance in 2639
2816	Repealed; in substance in 2639
2817	Repealed; in substance in 2569
2818	2638
2819	2640
2820	2641
2821	2643, 2649
2822	Repealed; in substance in 2644, 2645, 2646
2823	Repealed; in substance in 2646, 2647
2824	Repealed; in substance in 2647
2825	Repealed; in substance in 2648, 2649
2826	Repealed; in substance in 2645
2827	Repealed; in substance in 2645, 2646
2828	Repealed.
2829	Repealed; in substance in 2648
2830	2650, 2651
2831	2652
2832	Repealed; in substance in 2569
2833	Repealed; in substance in 2570, 2571
2834	2570
2835	Repealed; in substance in 2572
2836	Repealed; in substance in 2573
2837	Repealed; in substance in 2726
2838	2654
2839	2655
2840	2656
2841	Repealed.
2842	2660
2843	2558, 2661
2844	2662, 2663
2845	2663
2846	2664
2847	Repealed; in substance in 2727
2848	Repealed; in substance in 2727
2849	Repealed; in substance in 2729
2850	Repealed; in substance in 2730
2851	2657
2852	2566, 2658
2853	Repealed.
2854	Repealed.
2855	Repealed; in substance in 2660
2856	Repealed; in substance in 2726, 2727, 2729
2857	Repealed.
2858	Repealed; in substance in 2569
2859	Repealed; in substance in 2572
2860	2659
1823	2681

TABLE III

Table showing where sections of the Revised Surrogate's Court Act (§§ 2472–2771 in this Code) may be found in the Code of 1913 before the Revision was made.

Revised Code Section	Original Code Section
2472	2483
2473	2507
2474	2495
2475	2511
2476	2496
2477	2497
2478	2484
2479	2485
2480	2486
2481	2487
2482	2488
2483	2489
2484	2492
2485	2493
2486	2498, 2499, 2502, 2509
2487	2499
2488	2500
2489	2503 2666
2490	2481, 2662
2491	2508, 2509
2492	2509a
2493	2512
2494	2513a
2495	2512
2496	2513
2497	2541
2498	2542, 2543
2499	2501, 2502 2567
2500	2513
2501	2567
2502	2509, 2510
2503	2509
2504	2504, 2505
2505	2506
2506	2504
2507	2490
2508	2491
2509	2494
2510	2472, 2472a
2511	2518, 2528, 2617
2512	2474
2513	2473
2514	2475
2515	2476
2516	2477
2517	2478
2518	2516, 2517
2519	2533
2520	2534
2521 New; see	2518, 2662
2522	2515
2523	2519
2524	2518, 2616
2525	2520, 2521, 2526
2526	2522, 2523
2527	2524
2528	2524
2529	2520, 2524, 2525
2530	2527
2531	2525, 2532
2532	2535
2533	2528
2534	2530
2535 New, see	2606, 2727

Revised Code Section	Original Code Section
2536	2546
2537	new
2538	2547
2539	new
2540	new
2541	2545
2542	2545
2543	2539
2544	2540
2545	2544
2546	new
2547	2620
2548	2550, 2556
2549	2552, 2606
2550	new
2551	2553
2552	2502
2553	2554
2554	2555
2555	2603
2556	2604
2557	2579, 2582, 2583, 2584
2558	2590, 2843
2559	new
2560	2582, 2591
2561	2592
2562	2593
2563	2605, 2692
2564	2612, 2661
2565	2612
2566	2636, 2641, 2852
2567	2638
2568	2594
2569	2685, 2817, 2832, 2858
2570	2686, 2833, 2834
2571	2687, 2688, 2833
2572	2689, 2814, 2835, 2859
2573	2690, 2836
2574	2599, 2691
2575	new
2576	2595
2577	2597
2578	2598
2579	2600
2580	2601
2581	new
2582	2596
2583	2607
2584	2606, 2608
2585	2609
2586	new
2587	2610
2588	2660
2589	2662
2590	2663
2591	2664
2592	2664
2593	new
2594	2669
2595	new
2596	2670
2597	2672
2598	2673
2599	2674

Revised Code Section	Original Code Section
2000	2675
2001	2676, 2677
2002	2681
2003	2612, 2643, 2660
2004	2644
2005	2645
2006	2693
2007	2621a
2008	2705
2009	2614
2010	2615, 2616
2011	2618
2012	2619, 2620
2013	2621
2014	2622, 2623
2015	2624
2016	new
2017	new
2018	New; see 2617
2019	new
2020	2620
2021	2629
2022	2630
2023	2631, 2632
2024	2684
2025	2636, 2640
2026	2613
2027	2642
2028	2639
2029	2695
2030	2696
2031	2697
2032	2698
2033	2699
2034	2700
2035	2701
2036	2702
2037	new
2038	2818
2039	2815, 2816
2040	2819
2041	2820
2042	new
2043	2821
2044	2822
2045	2822, 2826, 2827
2046	2822, 2823, 2827
2047	2823, 2824
2048	2825, 2829
2049	2821, 2825
2050	2830
2051	2830
2052	2831
2053	new
2054	2838
2055	2839
2056	2840
2057	2851
2058	2852
2059	2860
2060	2842, 2855
2061	2843
2062	2844
2063	2844, 2845
2064	2846
2065	2711
2066	2711, 2714
2067	2714
2068	2715
2069	2716
2070	2713

Revised Code Section	Original Code Section
2071	2724
2072	2712
2073	2714
2074	2720
2075	2707
2076	2709, 2710
2077	2718
2078	2718
2079	2731
2080	new
2081	1822
2082	2719
2083	2719
2084	2717
2085	new
2086	2729 (subd. 3)
2087	2722
2088	2721
2089	2804, 2806
2090	2805
2091	2723
2092	new
2093	2613
2094	2642
2095	2613
2096	2642
2097	2801a
2098	2602
2099	2537, 2746
2700	new
2701	new
2702	2749
2703	2749, 2756
2704	2765
2705	new
2706	2755
2707	2757
2708	2758
2709	new
2710	2760
2711	new
2712	2764
2713	new
2714	2777
2715	2782, 2783
2716	2785
2717	2800
2718	2801
2719	2502
2720	new
2721	2725, 2729, 2802, 2803
2722	2727
2723	New; see 2802
2724	New; see 2803
2725	2606
2726	2605, 2726, 2807, 2837, 2856
2727	2727, 2808, 2847, 2848, 2856
2728	2727
2729	2728, 2810, 2849, 2856
2730	2728, 2850
2731	2728, 2729
2732	2729
2733	2717, 2729
2734	2605, 2606
2735	2724, 2743
2736	2744
2737	2745, 2812
2738	2733
2739	2746
2740	2747
2741	2748

Revised Code Section	Original Code Section
2742	2551, 2742, 2813
2743	2559
2744	2557
2745	2556
2746	2558 (subd. 3), 2561
2747	2562
2748	new
2749	2563
2750	new
2751	2560, 2589
2752	2565, 2566
2753	2634, 2730
2754	2568, 2570
2755	2573
2756	2572, 2574
2757	2545, 2576
2758	2575
2759	2577
2760	2578
2761	2579
2762	2579, 2580, 2581
2763	2481, 2586, 2587
2764	2585
2765	2654
2766	2655
2767	2657
2768	2514
2769	2482
2770	2538
2771	new

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The Code of Civil Procedure

OF THE

STATE OF NEW YORK.

AN ACT

Relating to Courts, Officers of Justice, and Civil Proceedings.

Passed June 2, 1876; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

CHAPTER I.

General Provisions relating to Courts, and the Members and Officers thereof.

TITLE I.— The Courts of the State; their General Powers and Attributes, and General Regulations pertaining to the Exercise thereof.

TITLE II.— Provisions of General Application, relating to the Judges, and certain other Officers of the Courts.

TITLE I.

The courts of the State; their general powers and attributes, and general regulations pertaining to the exercise thereof.

Article 1. Enumeration and classification.
2. General powers and attributes of the courts.
3. Miscellaneous provisions relating to the sittings of the courts.

ARTICLE FIRST.

Enumeration and classification.

Sec. 1. Courts.
2. Courts of record enumerated.
3. Courts not of record.
4. General provision as to jurisdiction, etc.

§ 2. [Am'd, 1909.] Courts.

The courts referred to in this act, are enumerated in sections 2 and 3 of the Judiciary Law.

Am'd by L. 1909, c. 65.

§ 2. [Omitted; see Table, p. iii.] Courts of record enumerated.

Each of the following courts of the State is a court of record:

1. The court for the trial of impeachments.
2. The court of appeals.
3. The appellate division of the supreme court in each department.
4. The supreme court.
5. The court of claims.
6. A county court in each county, except New York.
7. A surrogate's court in each county.
8. The court of general sessions of the peace in and for the city and county of New York.
9. The city court of the city of New York.[1]
10. The city court of Yonkers.
11. Such other local courts as are now constituted courts of record.

From Co. Proc., part of § 9; 2 R. L. of 1813, § 8; 2 R. S. 218 (Part 3, c. 3, tit. 6), §§ 4 and 9; L. 1841, c. 319, § 1; L. 1843, c. 374, § 1, am'd L. 1849, c. 134; 2 R. S. 224 (Part 3, c. 2, tit. 3), §§ 1–5; L. 1821, c. 47; L. 1854, c. 96; L. 1849, c. 125; L. 1822, c. 218; L. 1871, c. 461, § 4; L. 1872, c. 627, and c. 866, tit. 4, § 1; L. 1873, c. 61; L. 1874, c. 171; L. 1875, c. 68. Am'd by L. 1877, c. 416; L. 1895, c. 946; L. 1897, c. 36 (in effect March 9, 1897).

§ 3. [Omitted; see Table, p. iii.] Courts not of record.

Each of the following courts of the State is a court not of record:

1. Courts of justices of the peace in each town, and in certain cities and villages.
2. Courts of special sessions of the peace in each town, and in certain cities and villages.
3. The police courts in certain cities and villages.[2]
4. The municipal court of the city of New York.[3]
5. The municipal court of the city of Rochester.[4]
6. The municipal court of the city of Syracuse.[4]
7. The municipal court of the city of Buffalo.[4]
8. Such other local courts as are now constituted courts not of record.

From Co. Proc., § 9; L. 1834, c. 271, and amendatory acts; L. 1872, c. 129, § 11; L. 1876, c. 196. Am'd by L. 1877, c. 479; L. 1895, c. 946.

§ 4. [Am'd, 1877.] General provision as to jurisdiction, etc.

Each of those courts shall continue to exercise the jurisdiction and powers now vested in it by law, according to the course and practice of the court, except as otherwise prescribed in this act.

From Co. Proc., § 10, and part of § 469. Am'd by L. 1877, c. 416.

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[1] Called the "Marine Court of the City of New York" until 1883. Name "City Court" adopted by L. 1883, c. 26.

[2] The police justices of New York city have been superseded by judges called "city magistrates." (L. 1893, c. 601, §§ 1–11, 18, 19; L. 1897, c. 378, §§ 1392–1400, 1412–1418; L. 1910, c. 659.)

[3] By the present charter of New York city (L. 1897, c. 378, §§ 1350, 1351; L. 1901, c. 466, §§ 1350, 1351), the former district courts of that city have been consolidated with the former justices' courts of Brooklyn and Long Island City, etc., into a new court, called the "Municipal Court of New York City." This court has, however, a number of districts, and a session is held in each district. As to the districts, number of judges, etc., see L. 1907, c. 603.

[4] See L. 1898, c. 530; L. 1900, c. 237; L. 1903, c. 163.

ARTICLE SECOND.

General powers and attributes of the courts.

Sec. 5. The sittings of courts to be public.
6. Courts not to sit on Sunday, except in special cases.
7. General powers of courts of record.
8. Criminal contempts defined.
9. Punishment for criminal contempts.
10. Such contempts in view of court; how punished, etc.
11. Requisites of commitment.
12. Preceding sections limited.
13. Indictment, if offence is indictable.
14. Contempts punishable civilly.
15. No imprisonment for non-payment of interlocutory costs.
16. Id.; money due upon a contract.
17. Rules of courts of record, how made and revised.
18. Rules to be published.
19. Courts to order calendar printed.
20. Expense to be a county charge.
21. Certain papers may be destroyed.
22. Writs, etc., in name of the people, and in English; abbreviations.
23. Id.; teste and return.
24. Id.; to be subscribed or indorsed; when error, etc., not to vitiate.
25. No discontinuance by reason of vacancy, etc.
26. When one judge may continue proceedings commenced before another.
27. Provisions respecting the seals of courts.
28. Seals of counties.
29. [Repealed.]
30. New seals.

§ 5. [Omitted; see Table, p. iii.] The sittings of courts to be public.

The sittings of every court within this State shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, on account of adultery, seduction, abortion, rape, assault with intent to commit rape, criminal conversation, and bastardy, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

From 2 R. S. 274 (Part 3, c. 3, tit. 1), § 1. Am'd by L. 1879, c. 210.

§ 6. [Omitted; see Table, p. iii.] Courts not to sit on Sunday, except in special cases.

A court shall not be opened, or transact any business on Sunday, except to receive a verdict or discharge a jury. An adjournment of a court on Saturday, unless made after a cause has been committed to a jury, must be to some other day than Sunday. But this section does not prevent the exercise of the jurisdiction of a magistrate, where it is necessary to preserve the peace, or, in a criminal case, to arrest, commit or discharge a person charged with an offense, or the granting of an injunction order by a justice of the supreme court when in his judgment it is necessary to prevent irremediable injury or the service of a summons with or without a complaint if accompanied by an injunction order and an order of such justice permitting service on that day.

From 2 R. S. 275, § 7. Am'd by L. 1900, c. 135 (in effect Sept. 1, 1900).

§ 7. General powers of courts of record.

A court of record has power:

1. To issue a subpœna, requiring the attendance of a person found in the State, to testify in a cause pending in that court; subject, however, to the limitations prescribed by law, with re-

spect to the portion of the State in which the process of a local court of record may be served.

2. To administer an oath to a witness, in the exercise of the powers and duties of the court.

3. To devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.

From 2 R. S. 276 (Part 3, c. 3, tit. 2), § 1.

§ 8. [Omitted; see Table, p. iii.] Criminal contempts defined.

A court of record has power to punish for a criminal contempt, a person guilty of either of the following acts, and no others:

1. Disorderly, contemptuous, or insolvent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

From 2 R. S. 278, § 10.

§ 9. [Omitted; see Table, p. iii.] Punishment for criminal contempts.

Punishment for a contempt, specified in the last section, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail, for the non-payment of such a fine, he must be discharged at the expiration of thirty days; but where he is also committed for a definite time, the thirty days must be computed from the expiration of the definite time.

From Id., § 11.

§ 10. [Omitted; see Table, p. iii.] Such contempts in view of court; how punished, etc.

Such a contempt, committed in the immediate view and presence of the court, may be punished summarily; when not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defence.

From Id., § 12.

§ 11. [Omitted; see Table, p. iii.] Requisites of commitment.

Where a person is committed for such contempt, the particular circumstances of his offence must be set forth in the mandate of commitment.

From Id., § 13.

§ 12. [Omitted; see Table, p. iii.] Preceding sections limited.

The last four sections do not extend to a special proceeding to punish a person, in a case specified in section 14 of this act.

From Id., § 14.

§ 13. [Omitted; see Table, p. iii.] Indictment, if offence is indictable.

Punishment for a contempt, as prescribed in this article, does not bar an indictment for the same offence; but where a person who has been so punished is convicted on such an indictment, the court, in sentencing him, must take into consideration the previous punishment.

From Id., § 15.

§ 14. [Omitted; see Table, p. iii.] Contempts punishable civilly.

A court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action or special proceeding, pending in the court may be defeated, impaired, impeded, or prejudiced, in either of the following cases:

1. An attorney, counsellor, clerk, sheriff, coroner, or other person, in any manner duly selected or appointed to perform a judicial or ministerial service, for a misbehavior in his office or trust, or for a wilful neglect or violation of duty therein; or for disobedience to a lawful mandate of the court, or of a judge thereof, or of an officer authorized to perform the duties of such a judge.

2. A party to the action or special proceeding, for putting in fictitious bail or a fictitious surety, or for any deceit or abuse of a mandate or proceeding of the court.

3. A party to the action or special proceeding, an attorney, counsellor, or other person, for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum; or for any other disobedience to a lawful mandate of the court.

4. A person, for assuming to be an attorney or counsellor, or other officer of the court, and acting as such without authority; for rescuing any property or person in the custody of an officer, by virtue of a mandate of the court; for unlawfully detaining, or fraudulently and wilfully preventing, or disabling from attending or testifying, a witness, or a party to the action or special proceeding, while going to, remaining at, or returning from, the sitting where it is noticed for trial or hearing; and for any other unlawful interference with the proceedings therein.

5. A person subpoenaed as a witness, for refusing or neglecting to obey the subpoena, or to attend, or to be sworn, or to answer as a witness.

6. A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding; or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court.

7. An inferior magistrate, or a judge or other officer of an inferior court, for proceeding, contrary to law, in a cause or matter, which has been removed from his jurisdiction to the court inflicting the punishment; or for disobedience to a lawful order or other mandate of the latter court.

8. In any other case, where an attachment or any other proceeding to punish for a contempt, has been usually adopted and practiced in a court of record, to enforce a civil remedy of a party to an action or special proceeding in that court, or to protect the right of a party.

From 2 R. S. 534 (Part 3, c. 8, tit. 13), § 1.

§ 15. [Omitted; see Table, p. iii.] No imprisonment for non-payment of interlocutory costs.

But a person shall not be arrested or imprisoned, for the non-payment of costs, awarded otherwise than by a final judgment, or a final order, made in a special proceeding instituted by State writ, except where an attorney, counsellor, or other officer of the court, is ordered to pay costs for misconduct as such, or a witness is ordered to pay costs on an attachment for non-attendance.

From L. 1847, c. 390, § 2. Am'd by L. 1877, c. 416.

§ 16. [Omitted; see Table, p. iii.] Id.; money due upon a contract,

Except in a case where it is otherwise specially prescribed by law, a person shall not be arrested or imprisoned for disobedience to a judgment or order, requiring the payment of money due upon a contract, express or implied, or as damages for non-performance of a contract.[1]

From L. 1831, c. 300, § 1.

§ 17. [Omitted; see Table, p. iii.] Rules of courts of record, how made and revised.

The justices assigned to the appellate division of the supreme court shall meet in convention at the capitol in the city of Albany, on the fourth Tuesday in October, 1895, and at least every second year thereafter. They must also meet from time to time at the same place whenever called together by at least five of said justices at a time to be fixed in the said call, a copy of which shall be delivered at least one week before the time fixed to the presiding justice of each department. The convention must establish rules of practice not inconsistent with this act which shall be binding upon all the courts in this State and all the judges and justices thereof, except the court for the trial of impeachments and the court of appeals. A majority of the members of such convention shall constitute a quorum. The rules thus established are styled in this act "the general rules of practice." The convention shall have power to appoint and remove a reporter; and must also adopt a seal for each department of the appellate division of the supreme court. A description of each of the seals specified in this section must be deposited and recorded in the office of the secretary of State and must remain of record. The expense of such seals must be paid from the State treasury.

From L. 1870, c. 408, § 13. Am'd by L. 1877, c. 416; L. 1895, c. 344.

§ 18. [Omitted; see Table, p. iii.] Rules to be published.

A rule thus established, or a general rule or order of the court of appeals, does not take effect, until it has been published in the newspaper published at Albany, in which legal notices are required by law to be published, once in each week for three successive weeks.

From L. 1847, c. 470, § 4.

§ 19. [Omitted; see Table, p. iii.] Courts to order calendar printed.

The supreme court or a county court may, from time to time, by order, require the clerk to cause to be printed for the use of the members and officers thereof, the necessary copies of the

[1] By the Tax Law, § 300, neglect or refusal to pay any tax shall not be punishable as a contempt or as misconduct; and fine and imprisonment for any such non-payment is abolished. But this rule does "not apply to proceedings supplementary to execution upon judgments recovered for taxes."

calendar of causes, prepared for a term of the court. But this section does not apply to the city and county of New York.

From L. 1862, c. 86, § 1. Am'd by L. 1895, c. 946.

§ 20. [Omitted; see Table, p. iii.] Expense to be a county charge.

The expense of printing the copies of the calendar for a term, shall be a charge upon the county in which the term is held; and must be audited, allowed, and paid, by the board of supervisors thereof. In like manner as other contingent county charges, except that the expense of printing the copies of the calendars for the terms of the appellate division of the supreme court which[1] shall be a charge upon the State and shall be audited by the comptroller and paid out of the treasury of the State.

From L. 1862, c. 86, § 1. Am'd by L. 1899, c. 523 (in effect Sept. 1, 1899).

§ 21. [Omitted; see Table, p. iii.] Certain papers may be destroyed.

The appellate division of the supreme court, in any department, may, upon petition, by order made at any term thereof direct a county clerk or a commissioner of jurors to destroy any papers or books or surplus copies of any papers or books now deposited, filed, or of record, or hereafter to be deposited, filed, or of record, in his office, which the court deems to have become useless. Provided, however, that in those counties where commissioners of records have been appointed, a copy of said petition, if for the destruction of any papers or books, or surplus copies of any papers, books or records in the office of a county clerk, shall be served upon the commissioner of records at least five days before application is made to said court. But this provision does not authorize the destruction of a judgment-roll, or a paper incorporated or necessary to be incorporated in a judgment-roll.

From 2 R. S. 198 (Part 3, c. 1, tit. 3), § 17. Am'd by L. 1895, c. 946; L. 1911, c. 275; L. 1912, c. 252; L. 1913, c. 402 (in effect April 29, 1913).

§ 22. Writs, etc., in name of the people, and in English; abbreviations.

Except where it is otherwise specially prescribed by law, a writ or other process must be in the name of the people of the State, and each writ, process, record, pleading or other proceeding in a court, or before an officer, must be in the English language, and, unless it is oral, made out on paper or parchment, in a fair legible character, in words at length, and not abbreviated. But the proper and known names of process, and technical words, may be expressed in appropriate language, as now is, and heretofore has been customary; such abbreviations as are now commonly employed in the English language may be used; and numbers may be expressed by Arabic figures, or Roman numerals, in the customary manner.

From 2 R. S. 275 (Part 3, c. 3, tit. 1), §§ 8, 9.

§ 23. Id.; teste and return.

A writ or other process issued out of a court of record, must be tested, except where it is otherwise specially prescribed by law, in the name of a judge of the court, on any day; must be returnable within the time prescribed by law; or, if no time is prescribed by law, within the time fixed by the court, and therein specified for that purpose; and when returnable, must, together with the return thereto, be filed with the clerk, unless otherwise specially prescribed by law.

From 2 R. S. 278 (Part 3, c. 3, tit. 2), § 9; L. 1847, c. 280, § 57; Id., c. 470, § 43.

[1] So in the original. This " which " is superfluous.

§ 24. Id.; to be subscribed or indorsed; when error, etc., not to vitiate.

A writ or other process, issued out of a court of record, must, before the delivery thereof to an officer to be executed, be subscribed or indorsed with the name of the officer by whom, or by whose direction it was granted, or the attorney for the party, or the person at whose instance it was issued. A writ or other process thus subscribed or indorsed, is not void or voidable, by reason of having no seal or a wrong seal thereon, or of any mistake or omission in the teste thereof, or in the name of the clerk, unless it was issued by special order of the court.

Id.

§ 25. [Am'd, 1877.] No discontinuance by reason of vacancy, etc.

An action or special proceeding, civil or criminal, in a court of record, is not discontinued by a vacancy or change in the judges of the court, or by the re-election or re-appointment of a judge; but it must be continued, heard and determined, by the court, as constituted at the time of the hearing or determination. After a judge is out of office, he may settle a case or exceptions, or make any return of proceedings, had before him while he was in office, and may be compelled so to do, by the court in which the action or special proceeding is pending.

From 2 R. S. 277 (Part 3, c. 3, tit. 2), § 2.

§ 26. [Am'd, 1890, 1910.] When one judge may continue proceedings commenced before another.

In the counties within the first and second judicial districts, a special proceeding instituted before a judge of a court of record, or a proceeding commenced before a judge of the court, out of court, in an action or special proceeding pending in a court of record may be continued from time to time, before one or more other judges of the same court, with like effect, as if it had been instituted or commenced before the judge, who last hears the same.

From Co. Proc., § 27. Am'd by L. 1890, c. 451; L. 1910, c. 562 (in effect Sept. 1, 1910).

§ 27. [Omitted; see Table, p. iii.] Provision respecting the seals of courts.

The seal of the court of appeals, and of each other court of record in the State, now in use, shall continue to be the seal of the court in which it is in use; and the seal kept by the county clerk of each county, shall continue to be the seal of the supreme court, in that county, and, except in the city and county of New York, of the county court in that county. The seal of the surrogate of each county shall continue to be the seal of the surrogate's court of that county, and must be used as such by an officer, who discharges the duties of the surrogate. A description of each of the seals, specified in this section, must be deposited and recorded in the office of the secretary of State, unless it has already been done; and must remain of record.

From L. 1847, c. 470, § 36. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 28. [Omitted; see Table, p. iii.] Seals of counties.

The seal kept by a county clerk, as prescribed in the last section, shall continue to be the seal of the county, and must be used by him where he is required to use an official seal.

From L. 1847, c. 470, § 36.

§ 29. [Repealed by Statutory Construction Law, L. 1892, c. 677.]

This section provided how the seal of a court might be affixed. Section 43 of the General Construction Law (in Appendix I, post) contains the same provision.

§ 30. [Omitted; see Table, p. iii.] New seals.

When the seal of a court is so injured, that it cannot be conveniently used, the court must cause it to be destroyed; and when the seal of a court is lost or destroyed, the court must cause a new seal to be made, similar in all respects to the former seal, which shall become the seal of the court. The expense of a new seal for a county clerk, a surrogate's court, or a local court in a city, must be paid as part of the contingent expenses of the county or of the court, as the case requires. The expense of a new seal for any other court must be paid from the State treasury.

From 2 R. S. 277 (Part 3, c. 3, tit. 2), § 7.

ARTICLE THIRD.

Miscellaneous provisions relating to the sittings of the courts.

Sec. 31. Rooms, fuel, etc., how furnished.
32. No liquors, etc., to be sold in court-house.
33. Penalty.
34. Trial of causes at adjourned term.
35. Adjournment of term, judge not appearing.
36. When court to be adjourned to a day certain.
37. Causes tried elsewhere than at court-house.
38. Governor may change place for holding courts of record.
39. Such appointment, etc., to be recorded and published.
40. Judge may change place for holding court of record.
41. Actual session may be adjourned to another place.
42. Place for holding courts in city of New York, how changed.
43. When court-house is unfit to hold court, another place to be appointed.
44. No action or special proceeding abated, etc., by failure or adjournment of court.
45. Trial once commenced may be continued beyond term.

§ 31. [Omitted; see Table, p. iii.] Rooms, fuel, etc., how furnished.

Except where other provision is made therefor by law, the board of supervisors of each county must provide each court of record, appointed to be held therein, with proper and convenient rooms and furniture, together with attendants, fuel, lights, telephone, postage and stationery suitable and sufficient for the transaction of its business. If the supervisors shall neglect so to do, the court may order the sheriff to make the requisite provision; and the expense incurred by him in carrying the order into effect, when certified by the court, is a county charge.

From Co. Proc., §§ 15, 24, 28, 51. Am'd by L. 1899, c. 67; L. 1913, c. 394; L. 1915, c. 443 (in effect April 28, 1915).

§ 32. [Omitted; see Table, p. iii.] No liquors, etc., to be sold in court-house.

Strong, spirituous, or fermented liquor, or wine, shall not, on any pretense whatever, be sold within a building established as a court-house for holding courts of record, while such a court is sitting therein.

From 2 R. S. 291 (Part 3, c. 3, tit. 2), § 95. Am'd by L. 1877, c. 416.

§ 33. [Omitted; see Table, p. iii.] Penalty.

A person violating the last section is guilty of a misdemeanor.

From 2 R. S. 291 (Part 3, c. 3, tit. 2), § 96.

§ 34. [Am'd, 1895, 1909.] Trial of causes at adjourned term.

Causes may be noticed for trial for any term of a court of record adjourned, as provided in section 7 of the Judiciary Law, as if it was held by original appointment.

From Co. Proc., § 24. Am'd by L. 1895, c. 946; L. 1909, c. 65. (See Table, p. iii, ante).

§ 35. [Omitted; see Table, p. iii.] Adjournment of term, judge not appearing.

If a judge, authorized to hold a term of a court, does not come to the place where the term is appointed to be held, before four o'clock in the afternoon of the day so appointed, the sheriff or clerk must then open the term, and forthwith adjourn it to nine o'clock in the morning of the next day. If such a judge attends by four o'clock in the afternoon of the second day, he must open the term; otherwise the sheriff or the clerk must adjourn it without day.

From 2 R. S. 197 (Part 3, c. 1, tit. 3), § 6; Id., tit. 4, §§ 19, 20, 21. Am'd by L. 1877, c. 416.

§ 36. [Omitted; see Table, p. iii.] When court to be adjourned to a day certain.

If, before four o'clock of the second day, the sheriff or the clerk receives from a judge, authorized to hold the term, a written direction to adjourn the term to a future day certain, he must adjourn it accordingly, instead of adjourning it as prescribed in the last section. The direction must be entered in the minutes as an order.

New. Am'd by L. 1877, c. 416.

§ 37. Causes tried elsewhere than at court-house.

The parties to an action or special proceeding, pending in a court of record, may, with the consent of the judge who is to try or hear it, without a jury, stipulate in writing, that it shall be tried or heard and determined, elsewhere than at the court-house. The stipulation must specify the place of trial or hearing, and must be filed in the office of the clerk; and the trial or hearing must be brought on upon the usual notice, unless otherwise provided in the stipulation.

From L. 1847, c. 470, § 41.

§ 38. [Omitted; see Table, p. iii.] Governor may change place for holding courts of record.

If the governor deems it requisite, by reason of war, pestilence, or other public calamity, or the danger thereof, that the next ensuing term, or the next ensuing adjourned sitting, of the court of appeals, or that the next ensuing term of any other court of record, appointed to be held elsewhere than in the city of New-York, should be held at a place, other than that where it is appointed to be held, he may, by proclamation, appoint a different place within its district for the holding thereof; and at any time thereafter he may revoke the appointment, and appoint another place, or leave the term to be held at the place where it would have been held, but for his appointment.

From 2 R. S. 290 (Part 3, c. 3, tit. 2), § 87.

§ 39. [Omitted; see Table, p. iii.] Such appointment, etc., to be recorded and published.

Such an appointment or revocation must be under the hand of the governor, and filed in the office of the secretary of State; it must be published in such newspapers and for such time, as the governor directs; and the expense of the publication must be paid out of the State treasury.

From Id., § 88.

§ 40. [Omitted; see Table, p. iii.] Judge may change place for holding court of record.

If a malignant, contagious, or epidemic disease exists at the place, where a term of a court of record is appointed to be held, and the governor has not appointed, under the last two sections, another place to hold the same, the judge, or, if there are two or more, the chief or presiding judge, designated to hold the term, may, by order, direct the term to be held in another place, designated by him, within the district for which it is to be held. The order must be forthwith filed in the office of the clerk of the county where the term was to be held, and published in such newspapers, and for such a time, as the judge directs therein; and thereafter the governor shall not appoint another place, for holding that term.

From L. 1866, c. 174, § 1.

§ 41. [Am'd, 1891. Bracketed part omitted, 1909; see Table, p. iii.] Actual session may be adjourned to another place.

[If, during the actual session of a term of a court of record, the judge, or a majority of the judges, holding the same, deem it inexpedient, by reason of war, pestilence or other public calamity, or the danger thereof, or for want of suitable accommodation, that the term should be continued at the place where it is then being held, the court may, by order, adjourn the term, to be held at any other time and place within its district.] A court of record may, in its discretion, where the parties to an action file a stipulation that the same be tried at a place within the county where said action is triable, other than the court-house, adjourn the term to such place for the trial of said action. Notice of such an adjournment must be given, as the court directs by the order.

From L. 1883, c. 159, first clause of § 5; L. 1866, c. 174, § 2. Am'd by L. 1891, c. 159; L. 1909, c. 65.

§ 42. [Omitted; see Table, p. iii.] Place for holding courts in city of New-York, how changed.

The mayor, or, in case of his absence, or other disability, the recorder of the city of New-York, may, by proclamation, direct that the next ensuing term of any court, other than the court of appeals, appointed to be held in that city, shall be held in any building, within the city of New-York, other than the building where the same is regularly to be held, if, in his opinion, war, pestilence, or other public calamity, or the danger thereof, or the destruction or injury of the building, or the want of suitable accommodation, renders it necessary that some other place should be selected. The proclamation must be published in two or more daily newspapers, published in the city of New-York.

From 2 R. S. 290 (Part 3, c. 3, tit. 2), §§ 89, 90.

§ 43. [Omitted; see Table, p. iii.] When court-house is unfit to hold court, another place to be appointed.

If the building established as a court-house in any other county is destroyed, or is, for any cause, unsafe, inconvenient, or unfit for holding court therein, the county judge of the county may, by an order filed in the office of the clerk of the county, appoint another building in the vicinity for temporarily holding courts. The building so appointed becomes the court-house of the county, for the time being; and business transacted therein has the same effect, as if it was transacted at the usual place.

From Id., §§ 93, 94.

§ 44. No action or special proceeding abated, etc., by failure or adjournment of court.

When a term of * court fails or is adjourned, or the time or place of holding the same is changed, as prescribed in this chapter, an action, special proceeding, writ, process, recognizance, or other proceeding, civil or criminal, returnable, or to be heard or tried, at that term, is not abated, discontinued, or rendered void thereby; but all persons are bound to appear, and all proceedings must be had, at the time and place to which the term is adjourned or changed, or, if it fails, at the next term, with like effect as if the term was held, as originally appointed.

From 2 R. S. 204 (Part 3, c. 1, tit. 4), § 22; Id., 277 (Part 3, c. 3, tit. 2), §§ 3, 5, 6; Id., 291, § 91; L. 1833, c. 159, § 3; L. 1847, c. 280, § 28; L. 1886, c. 174, § 2.

§ 45. Trial once commenced may be continued beyond term.

Where the trial or hearing of an issue of fact, joined in an action or special proceeding, civil or criminal, has been commenced at a term of a court of record, it may, notwithstanding the expiration of the time appointed for the term to continue, be continued to the completion thereof; including, if the cause is tried by a jury, all proceedings taken therein until the actual discharge of the jury; or, if it is tried by the court without a jury, until it is finally submitted for a decision upon the merits.

From L. 1875, c. 3, § 1. This section supersedes L. 1846, c. 2, and L. 1850, c. 206, § 1.

* The word "a" omitted by error in engrossing.

TITLE II.

Provisions of general application, relating to the judges, and certain other officers of the courts.

Article 1. General powers, duties, liabilities and disabilities of judges, and officers acting judicially.
2. Attorneys and counsellors at law.
3. General provisions concerning certain ministerial officers, connected with the administration of justice; and special provisions concerning officers of that description, attached to two or more courts.

ARTICLE FIRST.

General powers, duties, liabilities and disabilities of judges and officers acting judicially.

Sec. 46. Judge not to sit when he is a party, etc., or has not heard argument.
47. Judge not to be interested in costs.
48. Disability of judge in certain appeals.
49. Judge or judge's partner not to practice in his court.
50. Judge's partner or clerk not to practice before him; judge not to practice in a cause which has been before him.
51. Judge not to take fees for advice in certain cases.
52. Substitution of one officer for another in special proceeding.
53. Proceedings before substituted officer.
54. Judge to file certificate of age, etc.

§ 46. [Omitted; see Table, p. iii.] Judge not to sit when he is a party, etc., or has not heard argument.

A judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity, or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But a judge of the court of appeals, or a justice of the appellate division of the supreme court, shall not be disqualified from taking part in the decision of an action or special proceeding in which an insurance company is a party or is interested, by reason of his being a policyholder therein. A judge other than a judge of the court of appeals, or of the appellate division of the supreme court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge.

From 2 R. S. 275 (Part 3, c. 3, tit. 1), § 2; L. 1847, c. 280, § 81; L. 1850, c. 41, § 2. Am'd by L. 1883, c. 234; L. 1895, c. 267; L. 1897, c. 268; L. 1903, c. 216 (in effect Sept. 1, 1903). See additional provision in Const. of 1894, art. VI, § 3 (Appendix I, post).

§ 47. [Omitted; see Table, p. iii.] Judge not to be interested in costs.

A judge shall not, directly or indirectly, be interested in the costs of an action or special proceeding, brought before him, or in a court of which he is, or is entitled to act as a member, except an action or a special proceeding to which he is a party, or in which he is interested.

From 2 R. S. 275 (Part 3, c. 3, tit. 1), § 5.

§ 48. [Omitted; see Table, p. iii.] Disability of judge in certain appeals.

A judge of a court of record is not disqualified from hearing or

deciding an action or special proceeding, matter or question, by reason of his being a resident or tax-payer of a town, village, city, or county, interested therein.

From 2 R. S. 210 (Part 3, c. 1, tit. 5), § 10. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 49. [Omitted; see Table, p. iii.] Judge or judge's partner not to practice in his court.

A judge shall not practice or act as an attorney or counsellor, in a court of which he is, or is entitled to act as a member, or in a case originating in that court. A law partner of, or person connected in law business with a judge, shall not practice or act as an attorney or counsellor, in a court, of which the judge is, or is entitled to act as a member, or in a cause originating in that court; except where the latter is a member of a court, ex-officio, and does not officiate or take part, as a member of that court, in any of the proceedings therein. An ex-officio judge shall not, directly or indirectly, be interested in the costs, or the compensation of an attorney or counsellor, in the court of which he is ex-officio a judge.

From 2 R. S. 275 (Part 3, c. 3, tit. 1), §§ 4, 5; L. 1839, c. 308, as am'd by L. 1841, c. 272; Id., c. 346; L. 1847, c. 280, § 82; Id., c. 470, §§ 48, 50, 51.

§ 50. [Omitted; see Table, p. iii.] Judge's partner or clerk not to practice before him; judge not to practice in a cause which has been before him.

The law partner or clerk of a judge shall not practice before him, as attorney or counsellor in any cause, or be employed in any cause which originated before him. A judge shall not act as attorney or counsellor in any action or special proceeding, which has been before him in his official character.

From L. 1847, c. 470, §§ 51, 52. Am'd by L. 1877, c. 416. As to the right of judges to practice as attorneys and counsellors, see also Const. of 1894, art. VI, § 20 (page 1386, post).

§ 51. [Omitted; see Table, p. iii.] Judge not to take fees for advice in certain cases.

A judge or other judicial officer, shall not demand or receive a fee or other compensation, for giving his advice in a matter or thing pending before him, or which he has reason to believe will be brought before him for decision; or for preparing a paper or other proceeding, relating to such a matter or thing; except a justice of the peace, in a case where a fee is expressly allowed to him by law.

From 2 R. S. 275 (Part 3, c. 3, tit. 1), § 6.

§ 52. [Am'd, 1899.] Substitution of one officer for another in special proceeding.

In case of the death, sickness, resignation, removal from office, absence from the county, or other disability of an officer before whom or in whose court a special proceeding has been instituted, where no express provision is made by law for the continuance thereof, it may be continued before the officer's successor, or any other officer residing in the same county, before whom it might have been originally instituted; or, if there is no such officer in the same county or in case such officer be disqualified, then before an officer in an adjoining county, who would originally have had jurisdiction of the subject matter, if it had occurred or existed in the latter county; and in case such special proceeding be pending in a county court and the county judge of the county be dis-

qualified to hear and decide the same, then in such case all further proceedings therein may be had in the county court of any adjoining county, which court shall have jurisdiction to hear, try and determine the same and to enforce its order.

From 2 R. S. 284 (Part 3, c. 3, tit. 2), § 51. Am'd by L. 1899, c. 378 (in effect Sept. 1, 1899).

§ 53. Proceedings before substituted officer.

At the time and place specified in a notice or order, for a party to appear, or for any other proceeding to be taken, or at the time and place specified in the notice to be given, as prescribed in this section, the officer substituted as prescribed in the last section, or in any other provision of law, to continue a special proceeding instituted before another, may act, with respect to the special proceeding, as if it had been originally instituted before him. But a proceeding shall not be taken before a substituted officer, at a time or place, other than that specified in the original notice or order, until notice of the substitution, and of the time and place appointed for the proceeding to be taken, has been given, either by personal service or by publication, in such manner and for such time as the substituted officer directs, to each party who may be effected [1] thereby, and who has not appeared before either officer. Where, after a hearing has been commenced, it is adjourned to the next judicial day, each day to which it is so adjourned, is regarded, for the purposes of this section, as the day specified in the original notice or order, or in the notice to appear before the substituted officer, as the case requires.

From 2 R. S. 284 (Part 3, c. 3, tit. 2), §§ 52, 53.

§ 54. [Omitted; see Table, p. iii.] Judge to file certificate of age, etc.

A judge of a court of record must, within ten days after he enters on the duties of his office, make and sign a certificate, stating his age, and the time when his official term will expire, either by completion of a full term, or by reason of the disability of age, prescribed in the constitution. The certificate must be filed in the office of the Secretary of State, who must keep a record of the time of the commencement and termination of the official term, of each judge of a court of record.

From L. 1870, c. 86, § 8.

[1] Error in engrossing for " affected."

ARTICLE SECOND.

Attorneys and counsellors at law.

Sec. 55. Party may appear in person or by attorney.
56. Examination and admission of attorneys.
57. Rules, how changed.
58. Exemptions to graduates of certain law schools.
59. Attorney's oath of office, and certificate of admission.
60. Attorneys residing in adjoining states.
61. Clerks, etc., not to practice.
62. Id.; as to sheriff, etc.
63. None but attorneys to practice in New York city.
64. Penalty for violation, or suffering violation of last section.
65. Death or disability of attorney; proceedings thereupon.
66. Compensation of attorney or counsellor.
67. Suspension from practice.
68. Must be on notice.
69. Removal or suspension, how to operate.
70. Punishment for deceit, etc.
71. Id.; for wilful delay of action.
72. Attorney not to lend his name.
73. Attorney not to buy claim.
74. Certain loans prohibited.
75. Penalty.
76. Limitation of preceding sections.
77. Same rule when party prosecutes in person, or where certain corporations prosecute.
78. Partner of district-attorney, etc., not to defend prosecutions.
79. Attorney not to defend when he has been public prosecutor.
80. Penalty.
81. Limitation of provisions.

§ 55. Party may appear in person or by attorney.

A party to a civil action, who is of full age, may prosecute or defend the same in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs. Each provision of this act, relating to the conduct of an action, wherein the attorney for the party is mentioned, includes a party prosecuting or defending in person, unless otherwise specially prescribed therein, or unless that construction is manifestly repugnant to the context. If a party has an attorney in the action, he cannot appear to act in person, where an attorney may appear or act either by special provision of law, or by the course and practice of the court. (236)

From 2 R. S. 276 (Part 3, c. 3, tit. 1), § 11.

§ 56. [Omitted; see Table, p. iii.] Examination and admission of attorneys.

A citizen of the State, of full age, applying to be admitted to practice as an attorney or counsellor in the courts of record of the State, must be examined and licensed to practice as herein prescribed.[1] A State board of law examiners is hereby created, to consist of three members of the bar, of at least ten years' standing, who shall be appointed from time to time, by the court of appeals, and shall hold office as a member of such board for a term of three years, except under the first appointment which shall be for terms of one, two and three years respectively, until the appointment of his successor. Such court shall prescribe rules providing for a uniform system of examination which shall govern such board of law examiners in the performance of its duties and shall fix the compensation of its members. There

[1] Statutes have been passed requiring the registration of all persons admitted to practice as attorneys and counsellors (L. 1898, c. 165; L. 1899, c. 225; L. 1903, c. 588; L. 1906, c. 154. See Judiciary Law, §§ 468, 469).

shall be examinations of all persons applying for admission to practice as attorneys and counsellors-at-law at least twice in each year in each judicial department and at such other times and places as the court of appeals may direct. Every person applying for such examination shall pay such fee, not to exceed fifteen dollars, as may be fixed by the court of appeals as necessary to cover the cost of such examination. On payment of one examination fee the applicant shall be entitled to the privilege of not exceeding three examinations. Such board shall certify to the appellate division of the supreme court of the department in which each candidate has resided for the past six months every person who shall pass the examination, provided such person shall have in other respects complied with the rules regulating admission to practice as attorneys and counsellors, which fact shall be determined by said board before examination. Upon the state board of law examiners certifying that a person has passed the required examination, the appellate division of the supreme court in the department in which such person shall have resided for at least six months prior to such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state. Race or sex shall constitute no cause for refusing any person examination or admission to practice. Such board shall render during the month of January, an annual account of all their receipts and disbursements to the court of appeals. The court of appeals may make such provisions as it shall deem proper for admission of persons who have been admitted to practice in other States or countries.

From L. 1871, c. 486, § 3. Am'd by L. 1886, c. 425; L. 1894, c. 760; L. 1895, c. 946; L. 1912, c. 253; (in effect April 11, 1912).

§ 57. [Omitted; see Table, p. iii.] Rules, how changed.

The rules established by the court of appeals, touching the admission of attorneys and counsellors to practice in the courts of record of the State, shall not be changed or amended, except by a majority of the judges of that court. A copy of each amendment to such rules must, within five days after it is adopted, be filed in the office of the secretary of State; who must transmit a printed copy thereof to the clerk of each county, and to the presiding justice of the appellate division of the supreme court, in each judicial department, and also cause the same to be published in the next ensuing volume of the session laws.

From L. 1871, c. 486, §§ 1, 2. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 58. [Omitted; see Table, p. iii.] Exemptions to graduates of certain law schools.

Nothing contained in the last two sections prevents the court of appeals from dispensing, in the rules established by it, with the whole or any part of the stated period of clerkship, required from an applicant, or with the examination where the applicant is a graduate of the Albany law school, being the law department of the Union university, or of the law department of the university of the city of New York, or of the law school of Columbia college, or of the law school of the university of Buffalo or the New York law school or of the college of law, Cornell university, or of the school of law, Syracuse university, or the Brooklyn law school of Saint Lawrence university, or Fordham university law school, and produces his diploma upon his application for admission.

From L. 1871, c. 486, § 3; L. 1872, c. 260. Am'd by L. 1877, c. 416; [illegible] c. 168; L. 1905, c. 195; L. 1908, c. 90 (in effect April 6, 1908).

§ 59. [Omitted; see Table, p. iii.] Attorney's oath of office, and certificate of admission.

Each person, admitted as prescribed in the last three sections, must, upon his admission, take the constitutional oath of office in open court, and subscribe the same in a roll or book, to be kept in the office of the clerk of the appellate division of the supreme court for that purpose. The clerk, upon the payment of the fees allowed by law, must deliver to the person admitted, a certificate under his hand and official seal, stating that such person has been so admitted, and that he has taken and subscribed the constitutional oath of office as prescribed in this section.

From 2 R. S. 287 (Part 3, c. 3, tit. 2), § 66. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 60. [Am'd, 1909.] Service of paper upon attorney residing in adjoining state.

Service of a paper, which might be made upon him at his residence, if he was a resident of the State, may be made upon a person regularly admitted to practice as an attorney and counsellor, in the courts of record of this State, whose office for the transaction of law business is within the State, but who resides in an adjoining State, by depositing the paper in a post-office in the city or town where his office is located, properly inclosed in a postpaid wrapper, directed to him at his office. A service thus made is equivalent to personal service upon him.

From L. 1866, c. 175, § 1. Am'd by L. 1909, c. 65. (See Table, p. iii, ante.)

§ 61. [Omitted; see Table, p. iii.] Clerks, etc., not to practice.

The clerk, deputy-clerk, or special deputy-clerk of a court shall not, during his continuance in office, practice as attorney or counsellor in that court.

From 1 R. S. 109 (Part 1, c. 5, tit. 4), § 26.

§ 62. [Omitted; see Table, p. iii.] Sheriffs, etc., not to practice.

A sheriff, under sheriff, deputy-sheriff, sheriff's clerk, constable, coroner, crier, or attendant of a court, shall not, during his continuance in office, practice as an attorney or counsellor in any court.

From Id., § 27.

§ 63. [Omitted; see Table, p. iii.] None but attorneys to practice in cities of the first or second class.

A person shall not ask or receive, directly or indirectly, compensation for appearing as attorney in a court or before any magistrate in any city of the first or second class, or make it a business to practice as an attorney in a court or before a magistrate in any city of the first or second class, unless he has been regularly admitted to practice, as an attorney or counsellor, in the courts of record of the State, but nothing in this act shall be held to apply to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under article six of the Membership Corporations Law.

From L. 1862, c. 484, § 1; Id., c. 53, § 1. Am'd by L. 1879, c. 542; L. 1898, c. 316; L. 1910, c. 327 (in effect Sept. 1, 1910).

§ 64. [Omitted; see Table, p. iii.] Penalty for violation, or suffering violation of last section.

A person who violates the last section is guilty of a misdemeanor, and shall be punished by imprisonment in the county jail, not exceeding one month, or by a fine of not less than one hundred dollars or more than two hundred and fifty dollars, or by both such fine and imprisonment. A judge, justice or magistrate within the city of New York who knowingly permits to practice in his court, a person who has not been regularly admitted to practice in the courts of record of this state, is guilty of a misdemeanor, and shall be punished as prescribed in this section. But

this and the last section do not apply to a case where a person appears in a cause to which he is a party.

From L. 1862, c. 484, §§ 1, 2; Id., c. 53, § 1. Am'd by L. 1898, c. 316 (in effect June 1, 1898).

§ 65. [Am'd, 1913.] Death or disability of an attorney; proceedings thereupon.

If an attorney dies, is removed or suspended, or otherwise becomes disabled to act, at any time before judgment in an action, no further proceeding shall be taken in the action, against the party for whom he appeared, until thirty days after notice to appoint another attorney, has been given to that party, either personally, or in such manner as the court directs. If after such notice, given as herein provided, no attorney appears for the party notified within the time specified in this section, the party serving the notice may proceed with the cause, and take a dismissal of the complaint, or a verdict, decision or judgment, as the case requires, and it is not necessary to give any further notice.

From 2 R. S. 287 (Part 3, c. 3, tit. 2), § 67. Am'd by L. 1913, c. 741 (in effect May 26, 1913).

§ 66. [Omitted; see Table, p. iii.] Compensation of attorney or counsellor.

The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law.[1] From the commencement of an action or special proceeding,

[1] The first sentence of this section is now § 474 of the Judiciary Law; the remainder of it is § 475 of that Law; said § 474 has been amended by L. 1912, c. 229 (in effect Sept. 1, 1912) so as to read as follows:

The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law, except that no agreement made hereafter between an attorney and a guardian of an infant for the compensation of such attorney, dependent upon the success of the prosecution by said attorney of a claim belonging to said infant, or by which such attorney is to receive a percentage of any recovery or award in behalf of such infant or a sum equal to a percentage of any such recovery or award, shall be valid or enforceable unless made as hereinafter provided. An attorney may contract with the guardian of an infant to prosecute, by suit or otherwise, any claim for the benefit of an infant for a compensation to said attorney dependent upon the success in the prosecution of such claim, subject to the power of the court, as hereinafter provided, to fix the amount of such compensation. Whenever such a contract shall have been entered into between an attorney and a guardian of an infant, upon the recovery of a judgment, or the obtaining of an award in behalf of the said infant, or upon any compromise or settlement of such claim, the attorney may apply, upon notice to the guardian, to the judge or justice before whom the said action or proceeding was tried, in case the said action or proceeding was tried at a court held within this state; or to a special term of said court, in case the said action or proceeding was tried before some person other than a justice thereof, or said claim was compromised or settled after said suit was begun, or in case of the death or disability of the judge or justice before whom the action was tried; or to a special term of the supreme court in case the recovery, award, compromise or settlement was not had in any court of this state; such application shall set forth briefly the contract, the services performed by the attorney and pray that there be awarded to him a suitable amount out of the recovery, award, compromise or settlement obtained through his efforts as attorney on behalf of the infant; the court to which such application is made, upon being satisfied that due notice of the said application has been given to the said guardian, shall proceed summarily to determine the value of the services of said attorney, taking such proof from either the attorney or the guardian by affidavit, reference or the examination of witnesses before the said court, as to the said court may seem to be necessary and proper, and shall thereupon make an order determining the suitable compensation for the attorney for his services therein, which sum shall thereafter be received by the said attorney for his services in behalf of the said infant; and no other compensation shall be paid or allowed by the guardian for such services out of the estate of said infant. If a copy of such order awarding the compensation with notice of entry be thereafter served by the said attorney upon the adverse party to the said litigation or the person making such compromise or settlement and upon the custodian of the funds recovered, in case there be such custodian, such award shall become and constitute a lien to the amount thereof on behalf of the said attorney upon such recovery, award, settlement or fund.

or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, decision, judgment or final order in his client's favor, and the proceeds thereof in whosesoever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment or final order. The court upon the petition of the client or attorney may determine and enforce the lien.

From Co. Proc., § 303. Am'd by L. 1879, c. 542; L. 1899, c. 61 (in effect Sept. 1, 1899).

§ 67. [Omitted; see Table, p. iii.] Suspension from practice.

The supreme court shall have power and control over attorneys and counsellors-at-law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice as such who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.[1] Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such. Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be stricken from the roll of attorneys. Upon a reversal of such conviction, or pardon by the president of the United States or governor of this State, the appellate division shall have power to vacate or modify such order or debarment.

From 1 R. S. 109 (Part 1, c. 5, tit. 4), § 24. Am'd by L. 1890, c. 528; L. 1891, c. 99; L. 1895, c. 946; L. 1912, c. 253 (in effect April 11, 1912).

§ 68. [Omitted; see Table, p. iii.] Must be on notice.

Before an attorney or counsellor at law is suspended or removed as prescribed in the last section, a copy of the charges against him must be delivered to him personally or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot be served within the state, the same may be served upon him without the

[1] By L. 1913, c. 720 (in effect May 24, 1913), the following amendment has been added at this point:

It shall be the duty of the appellate division to insert in each judgment, decree or final order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts for compensation or reward, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the judgment, decree or order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the judgment, decree or order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in judgments, decrees or orders hereafter made.

If a certified copy of such judgment, decree or order or of such amended judgment, decree or order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

state by mail or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any district attorney within a department, when so designated by the presiding justice of the appellate division of the supreme court, to prosecute all proceedings for the removal or suspension of attorneys and counsellors at law or the said presiding justice may, in a county wholly included within a city, appoint an attorney and counsellor at law, designated by a duly incorporated bar association approved by him, to prosecute any such proceedings and, upon the termination of the proceedings, may fix the compensation to be paid to such attorney and counsellor at law for the services rendered under such designation, which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

The presiding justice of the appellate division to which charges of professional misconduct against an attorney and counsellor at law have been presented, may make an order directing the expenses of such proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including also in a county wholly within a city the expense of a preliminary investigation in relation to such charges, to be paid by the county treasurer of a county within the judicial department, which expenses shall be a charge upon such county.

From 1 R. S. 109 (Part 1, c. 5, tit. 4), § 24. Am'd by L. 1890, c. 528; L. 1895, c. 946; L. 1896, c. 557; L. 1903, c. 327; L. 1915, c. 475 (in effect May 3, 1915).

§ 69. [Omitted; see Table, p. lii.] Removal or suspension, how to operate.

The suspension or removal of an attorney or counsellor, by the supreme court, operates as a suspension or removal in every court of the state.

From 1 R. S. 109 (Part 1, c. 5, tit. 4), § 25.

§ 70. [Omitted; see Table, p. lii.] Punishment for deceit, etc.

An attorney or counsellor, who is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court, or a party, forfeits, to the party injured by his deceit or collusion, treble damages. He is also guilty of a misdemeanor.

From 2 R. S. 287 (Part 3, c. 3, tit. 2), § 68.

§ 71. [Omitted; see Table, p. lii.] Id., for willful delay of action.

An attorney or counsellor, who willfully delays his client's cause, with a view to his own gain, or willfully receives money, or an allowance for or on account of money, which he has not laid out or become answerable for, forfeits to the party injured, treble damages.

From Id., § 69.

§ 72. [Omitted; see Table, p. lii.] Attorney not to lend his name.

If an attorney knowingly permits a person not being his general law partner, or a clerk in his office, to sue out a mandate, or to prosecute or defend an action in his name, he, and the person who so uses his name, each forfeits to the party, against whom the mandate has been sued out, or the action prosecuted or defended, the sum of fifty dollars, to be recovered in an action.

From Id., § 70.

§ 73. [Omitted; see Table, p. iii.] Attorney not to buy claim.

An attorney or counsellor shall not, directly or indirectly, buy, or be in any manner interested in buying a bond, promissory note, bill of exchange, book-debt, or other thing in action, with the intent and for the purpose of bringing an action thereon.

From Id., § 71.

§ 74. [Omitted; see Table, p. iii.] Certain loans prohibited.

An attorney or counsellor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors, or either, to divide between themselves the compensation to be received.

From Id., § 72. Am'd by L. 1879, c. 542; L. 1907, c. 700 (in effect Sept. 1, 1907).

§ 75. [Omitted; see Table, p. iii.] Penalty.

An attorney or counsellor, who violates either of the last two sections, is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court.

From 2 R. S. 287 (Part 3. c. 3, tit. 2), § 73.

§ 76. [Omitted; see Table, p. iii.] Limitation of preceding sections.

The last three sections do not prohibit the receipt, by an attorney or counsellor, of a bond, promissory note, bill of exchange, book-debt, or other thing in action, in payment for property sold, or for services actually rendered, or for a debt antecedently contracted; or from buying, or receiving a bill of exchange, draft, or other thing in action for the purposes of remittance, and without intent to violate either of those sections.

From Id., § 74.

§ 77. [Omitted; see Table, p. iii.] Same rule when party prosecutes in person, or when certain corporations prosecute.

The last four sections apply to a person prosecuting an action in person and to a corporation engaged in the business of conducting litigation and providing counsel therefor, who or which does an act which an attorney or counsellor is therein forbidden to do.

From L. 1847, c. 470, § 47. Am'd by L. 1907, c. 700 (in effect Sept. 1, 1907).

§ 78. [Omitted; see Table, p. iii.] Partner of district-attorney, etc., not to defend prosecutions.

An attorney or counsellor shall not, directly or indirectly, advise concerning, aid, or take any part in, the defence of an action or special proceeding, civil or criminal, brought, carried on, aided, advocated, or prosecuted, as attorney-general, district attorney, or other public prosecutor, by a person with whom he is interested or connected, either directly or indirectly, as a law partner; or take or receive, directly or indirectly, from a defendant therein, or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretence, understanding, or agreement whatever, either express or implied, having relation thereto, or the prosecution or defence thereof.

From L. 1846, c. 120, § 1.

§ 79. [Omitted; see Table, p. iii.] Attorney not to defend when he has been public prosecutor.

An attorney or counsellor, who has brought, carried on, aided, advocated, or prosecuted, or has been in any wise connected with, an action or special proceeding, civil or criminal, as attorney-general, district-attorney, or other public prosecutor, shall not, at any time thereafter, directly or indirectly, advise concerning, aid, or take any part in, the defence thereof; or take or receive, either directly or indirectly, from a defendant therein, or other person, a fee, gratuity, or reward, for or upon any cause, consideration, pretence, understanding, or agreement, either express or implied, having relation thereto, or to the prosecution or defence thereof.

From Id., § 2.

§ 80. [Omitted; see Table, p. iii.] Penalty.

An attorney or counsellor, who violates either of the last two sections, is guilty of a misdemeanor; and, on conviction thereof, shall be punished accordingly, and must be removed from office by the supreme court.

From Id., § 3.

§ 81. [Omitted; see Table, p. iii.] Limitation of provisions.

This article does not prohibit an attorney or counsellor from defending himself in person, if prosecuted either civilly or criminally.

From Id., § 4.

ARTICLE THIRD.

General provisions concerning certain ministerial officers connected with the administration of justice; and special provisions concerning officers of that description, attached to two or more courts.

[N. B. — The whole of this article (comprising §§ 82–99) has been transferred by L. 1909, c. 65, to the **Judiciary Law** and the **County Law** of the "**Consolidated Laws,**" or to other parts of this Code. The Table on page iii, ante, shows where these sections are now to be found.]

§§ 82–99. [Omitted; see Table, p. iii.]

CHAPTER II.

Powers, Duties, and Liabilities of a Sheriff, or other Ministerial Officer, in the Execution of the Process or Other Mandate of a Court or Judge, in a Civil Case.

TITLE I.— Provisions relating to the Execution of Civil Mandates generally.

TITLE II.— Provisions relating to the Execution, by a Sheriff, of a Mandate against the Person.

TITLE III.— Application of the foregoing Provisions to the Proceedings of a Coroner.

TITLE IV.— Powers, Duties and Liabilities of an Incoming and Outgoing Sheriff respectively, touching the Matters included in this Chapter.

TITLE I.

Provisions relating to the execution of civil mandates generally.

Sec. 100. Sheriff to furnish certain minute.
101. Copy of process, etc., to be delivered when served.
102. Sheriff to execute process, etc.; may return by mail.
103. Liability for neglect in special proceedings.
104. Sheriff may command the power of the county, to overcome resistance.
105. Names of resisters to be certified.
106. Punishment for refusing to assist.
107. Use of troops in civil disorders.
108. Trial of claim of title by third person, to property seized by sheriff.
109. Expenses, how paid.

§ 100. Sheriff to furnish certain minute.

A sheriff, to whom a mandate of any description, is delivered to be executed, must, without compensation, give to the person delivering the same, if required, a minute in writing, signed by the sheriff, specifying the names of the parties, the general nature of the mandate, and the day and hour of receiving the same.

From 2 R. S. 440 (Part 3, c. 7, tit. 6), § 75.

§ 101. [Am'd, 1877.] Copy of process, etc., to be delivered when served.

A sheriff or other officer, serving a mandate, must, upon the request of the person served, deliver to him a copy thereof, without compensation.

From Id., § 76. Am'd by L. 1877, c. 416.

§ 102. [Am'd, 1877.] Sheriff to execute process, etc.; may return by mail.

A sheriff, or other officer, to whom a mandate is directed and delivered, must execute the same according to the command thereof, and make return thereon of his proceedings, under his hand. For a violation of this provision, he is liable to the party aggrieved, for the damages sustained by him; in addition to any fine, or other punishment or proceeding, authorized by law. A

mandate directed and delivered to a sheriff may be returned, by depositing the same in the post-office, properly inclosed in a post-paid wrapper, addressed to the clerk, at the place where his office is situated; unless the officer, making the return in the name of the sheriff, resides in the place where the clerk's office is situated.

From 2 R. S. 440 (Part 3, c. 7, tit. 6), § 77; L. 1850, c. 226, § 3. Am'd by L. 1877, c. 416.

§ 103. [Am'd, 1877.] Liability for neglect in special proceedings.

A sheriff, or other officer, to whom is delivered for service or execution, a mandate, authorized by law to be issued, by a judge or other officer, in a special proceeding, who wilfully neglects to execute the same, may be fined by the judge, in a sum not exceeding twenty-five dollars, and is liable to the party aggrieved for his damages sustained thereby.

From 2 R. S. 551 (Part 3, c. 8, tit. 17), § 3. Am'd by L. 1877, c. 416.

§ 104. [Omitted; see Table, p. iii.] Sheriff may command the power of the county, to overcome resistance.

If a sheriff, to whom a mandate is directed and delivered, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may command all the male persons in his county, or as many as he thinks proper, and with such arms as he directs, including any military organization armed and equipped, to assist him in overcoming the resistance and, if necessary, in arresting and confining the resisters, their aiders and abettors, to be dealt with according to law.

From 2 R. S. 441 (Part 3, c. 7, tit. 6), § 80, as am'd by L. 1845, c. 69, § 18.

§ 105. [Omitted; see Table, p. iii.] Names of resisters to be certified.

The sheriff must certify to the court, from which or by whose authority the mandate was issued, the names of the resisters, their aiders and abettors, as far as he can ascertain the same, to the end that they may be punished for their contempt of the court.

From 2 R. S. 441 (Part 3, c. 7, tit. 6), § 81.

§ 106. [Omitted; see Table, p. iii.] Punishment for refusing to assist.

A person, commanded by a sheriff to assist him, as prescribed in the last section but one, who, without lawful cause, refuses, or neglects to obey the command, is guilty of a misdemeanor.

From Id., § 82.

§ 107. [Omitted; see Table, p. iii.] Use of troops in civil disorders.

Whenever it shall be made to appear to the governor that there is a breach of the peace, tumult, riot or resistance to process of this state, or imminent danger thereof, the governor may, upon the request of either the sheriff of a county or the mayor of a city, order out any part or all of the military or naval forces of the state in aid of the civil authorities, in the suppression of such disorder.

From Id., § 83. Transferred to Military Law, § 115. Am'd by L. 1916, c. 355 (in effect May 1, 1916).

§ 108. [Am'd, 1879, 1895.] Trial of claim of title by third person, to property seized by sheriff.

Where it is specially prescribed by law that a sheriff must or may, in his discretion, impanel a jury to try the validity of a claim of title to or of the right of possession of goods or effects seized by him by virtue of a mandate in an action, interposed by

a person not a party to the action, the trial must be conducted in the following manner, except as otherwise specially prescribed by law:

1. The sheriff must from time to time notify as many persons to attend as it is necessary in order to form a jury of twelve persons qualified to serve as trial jurors in the county court of the county, or in the city and county of New York, in the supreme court, to try the validity of the claim.

2. Upon the trial, witnesses may be examined in behalf of the claimant and of the party at whose instance the property claimed was taken by the sheriff. For the purpose of compelling a witness to attend and testify, the sheriff, upon the application of either party to the inquisition, must issue a subpoena as prescribed in section 854 of this act, and with like effect, except that a warrant to apprehend or commit a witness in a case specified in section 855 or section 856 of this act may be issued by a judge of the court in which the action is brought, or by the county judge.

3. The sheriff or under sheriff must preside upon the trial. A witness, produced by either party, must be sworn by the presiding officer and examined orally in the presence of the jury. A witness who testifies falsely upon such an examination is guilty of perjury in a like case and is punishable in like manner as upon the trial of a civil action.

From 2 R. S. 4 (Part 2, c. 5, tit. 1, art. 1), §§ 10-12; Co. Proc., § 216, Am'd by L. 1879, c. 542; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 100. [Am'd, 1895.] Expenses, how paid.

Upon such a trial there are no costs; but the fees of the sheriff, jurors and witnesses must be taxed by a judge of the court or the county judge of the county, and must be paid as follows:

1. If the jury by their verdict find the title or the right of possession to the property claimed to be in the claimant, by the party at whose instance the property was taken by the sheriff.

2. If they find adversely to the claimant with respect to all the property claimed, by the claimant.

3. If they find the title or right of possession to only a part of the property claimed, to be in the claimant; each party must pay his own witnesses' fees. And the sheriff's and jurors' fees must be paid, one-half by each party to the inquisition.

Before notifying the jurors, the sheriff may, in his discretion, require each of the parties to the controversy to deposit with him such reasonable sum as may be necessary to cover his legal fees and the jurors' fees. The sheriff must return to each party the balance of the sum so deposited by him, after deducting his fees, lawfully chargeable to that party, as prescribed in this section.

From 2 R. S. 4 (Part 2, c. 5, tit. 1, art. 1), § 12. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

TITLE II.

Provisions relating to the execution, by a sheriff, of a mandate against the person.

Article 1. Arresting, conveying to jail, and committing a prisoner.
2. Jails; jail discipline; and regulations concerning the confinement and care of prisoners.
3. Temporary jails, and temporary removal of prisoners from jail
4. Jail liberties; escapes.
5. Action upon and assignment of a bond for jail liberties.

ARTICLE FIRST.

Arresting, conveying to jail, and committing a prisoner.

Sec. 110. Prisoner, how kept; support of.
111. Imprisonment on execution.
112. Support of poor prisoner.
113. Charges for food, etc., when prohibited.
114. Also for waiting for prisoner.
115. Rates of charges for lodging, etc.
116. Prisoner may send for necessaries.
117. Charges for rent, etc., prohibited.
118. Prisoner, how conveyed to jail through another county.
119. Officer or prisoner not liable to arrest.

§ 110. [Am'd, 1909.] Prisoner, how kept; support of.

A person arrested, by virtue of an order of arrest, in an action or special proceeding brought in a court of record; or of an execution issued upon a judgment rendered in a court of record; or surrendered in exoneration of his bail; must be safely kept in custody, in the manner prescribed by law, and, except as otherwise prescribed in the next section, and in subdivision 19 of section 240 of the County Law, at his own expense, until he satisfies the judgment rendered against him, or is discharged according to law.

From 2 R. S. 376 (Part 3, c. 6, tit. 5), §§ 76, 77. Am'd by L. 1909, c. 65.

§ 111. [Added, 1886.] Imprisonment on execution.

No person shall be imprisoned within the prison walls of any jail for a longer period than three months under an execution or any other mandate against the person to enforce the recovery of a sum of money less than five hundred dollars in amount or under a commitment upon a fine for contempt of court in the nonpayment of alimony or counsel fees in a divorce case where the amount so to be paid is less than the sum of five hundred dollars; and where the amount in either of said cases is five hundred dollars or over, such imprisonment shall not continue for a longer period than six months. It shall be the duty of the sheriff in whose custody any such person is held to discharge such person at the expiration of said respective periods without any formal application being made therefor. No person shall be imprisoned within the jail liberties of any jail for a longer period than six months upon any execution or other mandate against the person, and no action shall be commenced against the sheriff upon a bond given for the jail liberties by such person to secure the benefit of such liberties, as provided in articles fourth and fifth of this title for an escape made after the expiration of six months' imprisonment as aforesaid. Notwithstanding such a discharge in either of the above cases, the judgment creditor in the execution, or the person at whose instance the said mandate was issued, has

the same remedy against the property of the person imprisoned which he had before such execution or mandate was issued; but the prisoner shall not be again imprisoned upon a like process issued in the same action or arrested in any action upon any judgment under which the same may have been granted. Except in a case hereinbefore specified nothing in this section shall effect[1] a commitment for contempt of court.

Added by L. 1886, c. 672 (which superseded the original § 111).

§ 112. [Omitted; see Table, p. iii.] Support of poor prisoner.

In any county, if a prisoner, actually confined in jail, makes oath before the sheriff, jailer, or deputy-jailer, that he is unable to support himself during his imprisonment, his support is a county charge.

From L. 1875, c. 251, §§ 1, 4. Am'd by L. 1883, c. 405.

§ 113. [Omitted; see Table, p. iii.] Charges for food, etc., when prohibited.

A sheriff or other officer shall not charge a person, whom he has arrested, with any sum of money, or demand, or receive from him money, or any valuable thing, for any drink, victuals or other thing, furnished or provided for the officer, or for the prisoner, at any tavern, ale-house, or public victualing or drinking house.

From 2 R. S. 426 (Part 3, c. 7, tit. 6), § 1.

§ 114. [Omitted; see Table, p. iii.] Also for waiting for prisoner.

A sheriff or other officer shall not demand or receive from a person, arrested by him, while in his custody, a gratuity or reward, upon any pretence, for keeping the prisoner out of jail; for going with him or waiting for him to find bail, or to agree with his adversary; or for any other purpose.

From Id., § 2.

§ 115. [Omitted; see Table, p. iii.] Rates of charges for lodging, etc.

If a person arrested is kept in a house, other than the jail of the county, the officer arresting him, or the person in whose custody he is, shall not demand or receive from him any greater sum, for lodging, drink, victuals, or any other thing, than has been theretofore prescribed by the court of sessions of the county; or, if no rate has been prescribed by the court of sessions, than is allowed by a justice of the peace of the same town or city, upon proof that the lodging or other thing was actually furnished, at the request of the prisoner. And such an officer or person shall not, in any case or upon any pretext, demand or receive compensation for strong, spirituous, or fermented liquor, or wine, sold or delivered to the prisoner.

From Id., § 3.

§ 116. [Omitted; see Table, p. iii.] Prisoner may send for necessaries.

A prisoner so kept in a house, may send for and have beer, ale, cider, tea, coffee, milk, and necessary food, and such bedding, linen and other necessary things, as he thinks fit, from whom he pleases without detention of the same or any part thereof by, or paying for the same, or any part thereof to, the officer arresting him, or the person in whose custody he is.

From Id., § 4.

[1] So in original. Should be "affect."

§ 117. [Omitted; see Table, p. iii.] Charges for rent, etc., prohibited.

A sheriff, jailer, or other officer, shall not demand or receive money, or any valuable thing, for chamber rent in a jail; or any fee, compensation, or reward, for the commitment, detaining in custody, release, or discharge of a prisoner, other than the fees expressly allowed therefor by law.

From Id., § 5.

§ 118. Prisoner, how conveyed to jail through another county.

A sheriff or other officer, who has lawfully arrested a prisoner, may convey his prisoner through one or more other counties, in the ordinary route of travel, from the place where the prisoner was arrested, to the place where he is to be delivered or confined.

From Id., § 6.

§ 119. [Omitted; see Table, p. iii.] Officer or prisoner not liable to arrest.

A prisoner so conveyed, or the officer having him in custody, is not liable to arrest in any civil action or special proceeding, while passing through another county.

From Id., § 7.

ARTICLE SECOND.

Jails; jail discipline; and regulations concerning the confinement and care of prisoners.

Sec. 120. Jail in New York city.
121. Jails in other counties.
122. Either of several jails may be used.
123. Civil and criminal prisoners to be kept separate.
124. Males and females to be kept separate.
125. Penalties.
126. Jail physician.
127. Issue of new execution when sick prisoner escapes.
128. Sale of liquor in jails.
129. Permit, when granted.
130. Penalties for violation.
131. Service of papers on prisoner.
132. Sheriff to permit access for that purpose.
133. Prisoners under United States process.
134. Sheriff answerable for their custody.

§ 120. [Omitted; see Table, p. iii.] Jail in New York city.

The building now used as a jail in the city of New-York, for the confinement of prisoners in civil causes, shall continue to be the jail of the city and county of New-York, for the confinement of such persons; and the sheriff of the city and county of New-York shall have the custody thereof and of the prisoners in the same.

From 2 R. S. 428 (Part 3, c. 7, tit. 6), § 12; 1 R. S. 380 (Part 1, c. 12, tit. 2), § 75.

§ 121. [Omitted; see Table, p. iii.] Jails in other counties.

The buildings, now used as the jails of the other counties of the State, shall continue to be the jails of those counties respectively, until other buildings have been designated or erected for that purpose, according to law; and the sheriff of each county shall have the custody of the jail or jails of his county, and of the prisoners in the same.

From 2 R. S. 428 (Part 3, c. 7, tit. 6), § 13; 1 R. S. 380 (Part 1, c. 12, tit. 2), § 75.

§ 122. [Omitted; see Table, p. iii.] Either of several jails may be used.

The sheriff of a county, in which there is more than one jail, may confine a prisoner in either; and may remove him from one jail to another, within the county, whenever he deems it necessary for his safe keeping, or for his appearance at court.

From 2 R. S. 430 (Part 3, c. 7, tit. 6), § 24.

§ 123. [Omitted; see Table, p. iii.] Civil and criminal prisoners to be kept separate.

A prisoner, arrested in a civil cause, must not be kept in a room, in which any prisoner, detained on a criminal charge or conviction, is confined.

From 2 R. S. 428 (Part 3, c. 7, tit. 6), § 8.

§ 124. [Omitted; see Table, p. iii.] Males and females to be kept separate.

Male and female prisoners must not be put in the same room; except that a husband and his wife may be put or kept together, in a room wherein there are no other prisoners.

From id., § 10.

§ 125. [Omitted; see Table, p. iii.] Penalties.

A sheriff, or other officer, who wilfully violates any of the foregoing provisions of this title, forfeits to the person aggrieved, treble damages. He is also guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office.

From Id., § 11.

§ 126. [Omitted; see Table, p. iii.] Jail physician.

The board of supervisors of each county, except New-York, must appoint some reputable physician, duly authorized to practice medicine, as the physician to the jail of the county. If there is more than one jail they must appoint a physician to each. The common council of the city of New-York must appoint a similar physician, to the jail of that city and county. The physician to a jail holds his office at the pleasure of the board which appointed him, except in the county of Kings. In that county, the term of his office is three years.

From 2 R. S. 430 (Part 3, c. 7, tit. 6), § 28, as am'd by L. 1869, c. 418.

§ 127. [Am'd, 1895. Bracketed part omitted, 1909; see Table, p. iii.] Issue of new execution when sick prisoner escapes.

[If the physician to a jail, or, in case of vacancy, a physician acting as such, and the warden or jailer, certify in writing, that a prisoner, confined in the jail in a civil cause, is in such a state of bodly health that his life will be endangered unless he is removed to a hospital for treatment, the county judge, or, in the city and county of New York, one of the justices of the supreme court, must, upon application, make an order, directing the removal of the prisoner to a hospital within the county designated by the judge; or, if there is none, to such nearest hospital as the judge directs; that the prisoner be kept in the custody of the chief officer of the hospital until he has sufficiently recovered from his illness, to be safely returned to the jail; that the chief officer of the hospital then notify the warden or jailer, and that the latter thereupon resume custody of the prisoner.] If a prisoner actually escapes, while going to, remaining at, or returning from a hospital, to which he has been ordered removed pursuant to section 355 of the Prison Law, a new execution may be issued against his person, if he was in custody by virtue of an execution; or, if he was in custody by virtue of an order of arrest, a new order of arrest may be granted, upon proof by affidavit of the facts specified in this section, without other proof and without an undertaking.

From L. 1873, c. 299, § 1. Am'd by L. 1895, c. 946; L. 1909, c. 65.

§ 128. [Omitted; see Table, p. iii.] Sale of liquor in jails.

Strong, spirituous, or fermented liquor, or wine, shall not, on any pretence, be sold within a building used and established as a jail. Spirituous, fermented or other liquor, except cider, and that quality of beer called table-beer, shall not be brought into a jail for the use of a person confined therein, without a written permit by the physician to the jail, which must be delivered to and kept by the keeper thereof, specifying the quantity and kind of liquor which may be furnished, the name of the prisoner for whom, and the time during which the same may be furnished.

From 2 R. S. 431 (Part 3, c. 7, tit. 6), § 29.

§ 129. [Omitted; see Table, p. iii.] Permit, when granted.

Such a permit shall not be granted, unless the physician is satisfied, that the liquor allowed to be furnished is necessary for the

health of the prisoner, for whose use it is permitted, and that fact must be stated in the permit.

From Id., § 30.

§ 130. [Omitted; see Table, p. iii.] Penalties for violation.

A person who brings into or sells in a jail, strong, spirituous, fermented, or other liquor, or wine, contrary to the foregoing provisions of this article; or a sheriff, keeper of a jail, assistant-keeper, or an officer, or person employed in or about a jail, who knowingly suffers liquor or wine to be sold or used therein, contrary to this article, is guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office.

From Id., § 31.

§ 131. Service of papers on prisoner.

A sheriff or jailer, upon whom a paper in an action or special proceeding, directed to a prisoner in his custody, is lawfully served, or to whom such a paper is delivered for a prisoner, must, within two days thereafter, deliver the same to the prisoner, with a note thereon of the time of the service thereof upon, or the receipt thereof by him. For a neglect or violation of this section, the sheriff or jailer, guilty thereof, is liable to the prisoner for all damages occasioned thereby.

From Id., § 32.

§ 132. Sheriff to permit access for that purpose.

Subject to reasonable regulations, which the sheriff may establish for that purpose, a sheriff, jailer, or other officer, who has the custody of a prisoner, must permit such access to him as is necessary, for the personal service of a paper in an action or special proceeding, to which the prisoner is a party, and which must be personally served.

New.

§ 133. Prisoners under United States process.

A sheriff must receive into his jail and keep a prisoner, committed to the same, by virtue of civil process issued by a court of record, instituted under the authority of the United States, until he is discharged by the due course of the laws of the United States, in the same manner as if he was committed by virtue of a mandate in a civil action, issued from a court of the State. The sheriff may receive, to his own use, the money payable by the United States for the use of the jail.

From 2 R. S. 443 (Part 3, c. 7, tit. 6), § 96.

§ 134. Sheriff answerable for their custody.

A sheriff or jailer, to whose jail a prisoner is committed, as prescribed in the last section, is answerable for his safe keeping, in the courts of the United States, according to the laws thereof.

From Id., § 97.

ARTICLE THIRD.

Temporary jails, and temporary removal of prisoners from jail.

Sec. 135. When jail becomes unfit, etc., another to be designated.
136. Designation, how annulled.
137. Copy of designation to be served on the sheriff, etc.
138. Prisoners already upon jail liberties.
139. Jail liberties to prisoner, who becomes entitled thereto, before removal.
140. Id.; to prisoners removed.
141. When designation to be revoked, etc.
142. Copy of revocation to be served on sheriff; sheriff's duty thereon
143. Removal of prisoners in case of fire.
144. What officer to act in case of absence, etc.

§ 135. [Omitted; see Table, p. iii.] When jail becomes unfit, etc., another to be designated.

If there is no jail in a county; or the jail becomes unfit or unsafe for the confinement of some or all of the prisoners, or is destroyed by fire or otherwise; or if a pestilential disease breaks out in the jail, or in the vicinity of the jail, and the physician to the jail certifies that it is likely to endanger the health of any or all of the prisoners in the jail; the county judge, or, in the city and county of New-York, the presiding justice of the appellate division of the supreme court of the first department must, by an instrument in writing, filed with the clerk of the county, designate another suitable place within the county, or the jail of a contiguous county, for the confinement of some or all of the prisoners, as the case requires. The place so designated thereupon becomes, to all intents and purposes, except as otherwise prescribed in this article, the jail of the county for which it has been so designated, and the purposes expressed in the instrument designating the same.

From 2 R. S. 428, 430 (Part 3, c. 7, tit. 6), §§ 14, 26, 27. Am'd by L. 1877, c. 416; L. 1895, c. 946.

§ 136. [Omitted; see Table, p. iii.] Designation, how annulled.

The designation may be modified or revoked, by the judge making the same, by a like instrument in writing, filed with the clerk of the county.

From 2 R. S. 428, 430 (Part 3, c. 7, tit. 6), § 15.

§ 137. [Omitted; see Table, p. iii.] Copy of designation to be served on the sheriff, etc.

The county clerk must serve a copy of the designation, duly certified by him, under his official seal, on the sheriff and keeper of the jail of a contiguous county so designated. The sheriff of that county must, upon the delivery of the sheriff of the county for which the designation is made, receive into his jail, and there safely keep, all persons who may be lawfully confined therein, pursuant to this article; and he is responsible for their safe keeping, as if he was the sheriff of the county for which the designation is made.

From Id., §§ 16, 17.

§ 138. [Am'd, 1909.] Prisoners already upon jail liberties.

If a prisoner has been admitted to the liberties of the jail of the county, for which a designation is made, pursuant to section 851 of the Prison Law, he must, notwithstanding, remain within those liberties; but he may be removed by the sheriff, to whom he has

given bond for the liberties, to the jail or other place so designated, and confined therein, in a case where the sheriff might confine him in the jail of his own county.

From Id., § 18. Am'd by L. 1909, c. 65.

§ 139. Jail liberties to prisoner, who becomes entitled thereto, before removal.

If a person, who is arrested, before or after the designation, by the sheriff of the county for which the designation is made, becomes entitled, after the designation, and before his removal, to the liberties of the jail, he must be admitted to the liberties of the jail of that county, as if the designation had not been made; but he may be removed by the sheriff to the jail, or other place, so designated, and confined therein, in a case where the sheriff might confine him in the jail of his own county.

From Id., § 19.

§ 140. [Am'd, 1909.] Id.; to prisoners removed.

If a person confined in or removed to the jail of a contiguous county, designated as prescribed in article 13 of the Prison Law, becomes entitled to the liberties of the jail, the sheriff of that county must admit him to the jail liberties, as if he had been originally arrested by that sheriff, on a mandate directed to him.

From Id., § 20. Am'd by L. 1909, chs. 65 and 240 (in effect April 22, 1909).

§ 141. [Am'd, 1909.] When designation to be revoked.

When a jail is erected for the county, for whose use the designation, pursuant to section 351 of the Prison Law, was made, or its jail is rendered fit and safe for the confinement of prisoners, or the reason for the designation of another jail or place has otherwise ceased to be operative, the designation must be revoked, as prescribed in this article and section 352 of the Prison Law.

From Id., § 21. Am'd by L. 1909, chs. 65 and 240 (in effect April 22, 1909).

§ 142. Copy of revocation to be served on sheriff; sheriff's duty thereon.

The county clerk must immediately serve a copy of the revocation, duly certified by him under his official seal, upon the sheriff of the same county; who must remove the prisoners belonging to his custody, and confined without his county, to his proper jail. If a prisoner has been admitted to the jail liberties in the other county, he must also be removed; and he is entitled to the liberties of the jail of the county, to which he is removed, without a new bond, as if he had been originally admitted to the jail liberties in that county; and the bond given by him applies accordingly to those liberties.

From Id., § 22.

§ 143. [Omitted; see Table, p. iii.] Removal of prisoners in case of fire.

If, by reason of a jail, or a building near a jail, being on fire, there is reason to apprehend that some or all of the prisoners confined in the jail, may be injured, or may escape, the sheriff or keeper of the jail may, in his discretion, remove them to some safe and convenient place, and there confine them, until they can be safely returned to the jail; or, if the jail is destroyed, or so injured, that it is unfit or unsafe for the confinement of the prisoners, until a designation is made, as prescribed in section 135 of this act.

From Id., § 25.

§ 144. [Omitted; see Table, p. iii.] What officer to act in case of absence, etc.

If the county judge, or the presiding justice of the appellate division of the supreme court of the first department, is absent or unable to act, or if his office is vacant, a designation, or the revocation or modification thereof, as prescribed in this article, may be made, in any county, except New York, by the special county judge or the district-attorney, or, in the city and county of New York, by any justice of the appellate division.

New. Am'd by L. 1895, c. 940 (in effect Jan. 1, 1896).

ARTICLE FOURTH.

Jail liberties; escapes.

Sec. 145. Jail liberties in certain counties.
146. Jail liberties in other counties.
147. Jail liberties, how laid out.
148. Copy to be kept posted in jail.
149. Who admitted to liberties.
150. Undertaking to be executed by prisoner; its contents.
151. For whom undertaking to be held.
152. Prisoner to be committed when surety is insufficient.
153. Surrender of prisoner by his sureties.
154. How surrender made.
155. What deemed and what not deemed an escape.
156. When court may order indicted prisoner to be produced.
157. Prisoner committed for contempt.
158. Sheriff's liability for escape.
159. Penalty for connivance at escape by a sheriff, etc.

§ 145. [Omitted; see Table, p. iii.] Jail liberties in certain counties.

The following are the liberties of the jail for each of the counties specified, to wit: For the county of New York, the whole of said county; for the county of the Bronx, the whole of said county; for the county of Onondaga, the whole of the city of Syracuse; for the county of Monroe, the whole of the city of Rochester; for the county of Erie, the whole of the city of Buffalo; for the county of Dutchess, the whole of the city of Poughkeepsie; for the county of Kings, the whole of that county; for the county of Albany, the whole of the city of Albany; for the county of Jefferson, the whole of the city of Watertown; for the county of Herkimer, the whole of the village of Herkimer; for the county of Rensselaer, the whole of the city of Troy; for the county of Niagara, the whole of the city of Lockport; for the county of Steuben, the whole of the village of Bath; for the county of Nassau, the whole of the town of Hempstead; for the county of Broome, the whole of the city of Binghamton; for the county of Genesee, the whole of the village of Batavia.

From L. 1846, c. 32; L. 1851, c. 202; L. 1859, c. 198; L. 1861, c. 61 and c. 73; L. 1863, c. 186; L. 1872, c. 16 and c. 538; L. 1873, c. 196 and c. 603. Am'd by L. 1895, c. 42; L. 1900, c. 113; L. 1902, c. 311; L. 1904, c. 384; L. 1905, c. 439; L. 1911, c. 174; L. 1915, c. 62 (in effect March 11, 1915).

§ 146. [Omitted; see Table, p. iii.] Jail liberties in other counties.

The liberties of the jail, in each of the other counties of the State, as heretofore established, shall continue to be the liberties thereof, until they are altered, or new liberties are established, as prescribed by law.

From 2 R. S. 432 (part 3, c. 7, tit. 6), § 33.

§ 147. [Omitted; see Table, p. iii.] Jail liberties, how laid out.

Where the liberties of a jail are altered or established, by resolution of the board of supervisors, as prescribed by law, a space of ground, adjacent to the jail, and not exceeding five hundred acres in quantity, must be laid out as the jail liberties, in a square or rectangle as nearly as may be; but a stream of water, canal, street, or highway, may be adopted as an exterior line, notwithstanding it is not in a straight line, or is not at right angles with the other exterior line of the liberties. A resolution establishing or altering jail liberties, must contain a particular description of their boundaries; and as soon as may be after its

adoption, the boundaries must be designated by monuments, inclosures, posts, or other visible and permanent marks, at the expense of the county.

From Id., § 34; L. 1875, c. 482, § 1.

§ 148. [Omitted; see Table, p. iii.] Copy to be kept posted in jail.

The county clerk must, within one week after a resolution of the board of supervisors, establishing or altering jail liberties, has been filed in his office, deliver an exemplified copy thereof to the keeper of the jail; who must keep the same exposed to public view, in an open and public part of the jail, and exhibit it to each person admitted to the liberties of the jail, at the time of his executing a bond for that purpose.

From 2 R. S. 423 (Part 3, c. 7, tit. 6), §§ 38, 39.

§ 149. [Am'd, 1886, 1904.] Who admitted to liberties.

A person in the custody of a sheriff, by virtue of an order of arrest; or of an execution in a civil action; or in consequence of a surrender in exoneration of his bail: is entitled to be admitted to the liberties of the jail, upon delivering to the sheriff an approved undertaking as prescribed in the next section.

From Id., § 40. Am'd by L. 1886, c. 648; L. 1904, c. 384 (in effect April 26, 1904).

§ 150. [Am'd, 1886, 1904.] Undertaking to be executed by prisoner; its contents.

The undertaking must be executed by the prisoner, and one or more sufficient sureties, residents, and householders or freeholders of the county, in a penalty at least twice the sum, in which the sheriff was required to hold the defendant to bail, if he is in custody under an order of arrest, or has been surrendered in exoneration of his bail, before judgment; or directed to be collected by the execution, if he is in custody under an execution; or remaining uncollected upon a judgment against him, if he has been surrendered after judgment; conditioned, that the person so in custody shall remain a prisoner, and shall not, at any time, or in any manner, escape or go without the liberties of the jail, until discharged by due course of law. Upon the giving and the approval by the court or a judge thereof, or a county judge, of such an undertaking, the prisoner shall be released from the custody of the sheriff and the sheriff shall thereupon be exonerated from liability. But after the allowance of the undertaking as hereinafter prescribed, the same must be delivered by the clerk, on request, to the party at whose instance the prisoner was in custody. Within two days after the approval by the court, judge, or county judge, the undertaking must be filed by the sheriff with the clerk, and a copy delivered to the party at whose instance the prisoner was in custody, or to his attorney, who shall within three days thereafter serve upon the surety or sureties, or the attorney for the prisoner, a notice that he does not accept him, or them, as bail; otherwise he is deemed to have accepted them. Within three days after the receipt of such notice, the surety or sureties, or the attorney for the prisoner, may serve upon the party, or attorney for the party, at whose instance the prisoner was in custody, notice of justification of the same or other bail before the court or a judge thereof, or a county judge, at a specified time and place; the time to be not less than five days nor more than ten days thereafter, and the place to be within the county where one of the bail resides or where the defendant was arrested. Except as otherwise

expressly prescribed in this article, the provisions regulating the substitution of new sureties or a new undertaking, and the examination and qualification of the new sureties, and the allowance of the undertaking after justification, contained in article third of title first of chapter seventh of this act, shall govern. If the bail shall not be allowed, the court, judge or county judge shall remand the prisoner to the custody of the sheriff.

From 2 R. S. 433 (Part 3, c. 7, tit. 6), §§ 41, 42. Am'd by L. 1886, c. 648; L. 1904, c. 384 (in effect April 26, 1904).

§ 151. [Am'd, 1886, 1904.] For whom undertaking to be held.

An undertaking so taken is held for the indemnity of the party at whose instance the prisoner executing it is confined.

From 2 R. S. 434 (Part 3, c. 7, tit. 6), § 43. Am'd by L. 1886, c. 648; L. 1904, c. 384 (in effect April 26, 1904).

§ 152. [Am'd, 1886.] Prisoner to be committed when surety is insufficient.

If the party at whose instance the prisoner is in custody discovers that a surety therein is insufficient, he may, upon proof of the fact, by affidavit or otherwise, apply to the court or to a judge thereof, on whose process or mandate such prisoner is in custody, or to the county judge of the county where such prisoner is confined, and the court, or a judge thereof, or such county judge, may make an order committing such prisoner to close confinement in the jail until another undertaking with good and sufficient sureties is offered.

From id., § 44. Am'd by L. 1886, c. 648.

§ 153. [Am'd, 1886.] Surrender of prisoner by his sureties.

One or more of the sureties, in an undertaking given for the liberties of a jail, may surrender the principal, at any time before judgment is rendered against them in an action on the undertaking; but they are not exonerated thereby, from a liability incurred before making the surrender.

From 2 R. S. 434 (Part 3, c. 7, tit. 6), § 45. Am'd by L. 1886, c. 648.

§ 154. [Am'd, 1886.] How surrender made.

The surrender must be made as follows: The surety or sureties making it must take the principal to the keeper of the jail, who must, upon his or their written requisition to that effect, take the principal into his custody, and indorse upon the undertaking given for the liberties, an acknowledgment of the surrender; and also, if required, give the surety or sureties a certificate, acknowledging the surrender.

From 2 R. S. 434 (Part 3, c. 7, tit. 6), § 46. Am'd by L. 1886, c. 648.

§ 155. [Am'd, 1886.] What deemed and what not deemed an escape.

The going at large, within the liberties of the jail in which he is in custody, of a prisoner who has executed such an undertaking, or of a prisoner who would be entitled to the liberties upon executing such an undertaking, is not an escape. But the going at large, beyond the liberties, by a prisoner, without the assent of the party at whose instance he is in custody, is an escape; and the sheriff in whose custody he was, or his sureties, has the same authority to pursue and retake him, as if he had escaped from the

jail. Such an escape forfeits the undertaking for the liberties, if any; subject to the provisions of the next article of this title.

From 2 R. S. 434 (Part 3, c. 7, tit. 6), § 47. Am'd by L. 1886, c. 648.

§ 156. [Am'd, 1877.] When court may order indicted prisoner to be produced.

Where a person, who has been indicted for a criminal offence, is held by a sheriff, by virtue of a mandate in a civil action or special proceeding, the court, in which the indictment is pending, may make an order, requiring the sheriff to bring him before the court; whereupon the court may make such disposition of the prisoner, as to it seems proper. The sheriff's fees and expenses, in so doing, are a county charge of the county wherein the court is sitting.

From L. 1871, c. 308, § 1. Am'd by L. 1877, c. 416.

§ 157. Prisoner committed for contempt.

A prisoner, committed to jail upon process for contempt, or committed for misconduct in a case prescribed by law, must be actually confined and detained within the jail, until he is discharged by due course of law, or is removed to another jail or place of confinement, in a case prescribed by law. A sheriff or keeper of a jail, who suffers such a prisoner to go or be at large out of his jail; except by virtue of a writ of habeas corpus, or by the special direction of the court committing him, or in a case specially prescribed by law; is liable to the party aggrieved, for his damages sustained thereby, and is guilty of a misdemeanor. If the commitment was for the non-payment of a sum of money, the amount thereof, with interest, is the measure of damages.

From 2 R. S. 437 (Part 3, c. 7, tit. 6), § 61.

§ 158. [Am'd, 1886, 1904.] Sheriff's liability for escape.

Where a prisoner, in a sheriff's custody, goes or is at large beyond the liberties of the jail, without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor until an undertaking provided for in section 150 of this article has been given and approved, as follows:

1. If the prisoner was in custody by virtue of an order of arrest, or in consequence of a surrender in exoneration of his bail, before judgment, the sheriff is answerable to the extent of the damages sustained by the plaintiff.

2. If the prisoner was in custody by virtue of any other mandate, or in consequence of a surrender in exoneration of his bail, after judgment, the sheriff is answerable for the debt, damages, or sum of money, for which the prisoner was committed.

3. Upon the giving and approval of the undertaking in this article mentioned, no action for an escape shall be maintained against the sheriff.

From 2 R. S. 437 (Part 3, c. 7, tit. 6), §§ 62, 63. Am'd by L. 1886, c. 648; L. 1904, c. 384 (in effect April 26, 1904).

§ 159. [Omitted; see Table, p. iii.] Penalty for connivance at escape, by a sheriff, etc.

A sheriff or other officer, who demands or receives a reward, gratuity, or other valuable thing, to procure, assist, connive at, or permit an escape of a prisoner in his custody, is guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office, and disqualifies him forever thereafter from holding the same.

From 2 R. S. 438 (Part 3, c. 7, tit. 6), §§ 65, 66.

ARTICLE FIFTH.

Action upon and assignment of a bond for jail liberties.

Sec. 160. Defence in action by sheriff on undertaking.
161. Judgment against sheriff to be evidence against sureties, etc.
162. Summary judgment for sheriff.
163. Requisites of application therefor.
164. Such judgment when stayed; when vacated.
165. Judgment against sheriff is evidence of damages.
166. Assignment of undertaking.
167. Action on undertaking by assignee; damages recoverable.
168. Such assignment bars action against sheriff.
169. Defence in action by assignee.
170. Stay of proceedings where assignment is not taken.
171. Defence of sheriff in action for escape.

§ 160. [Am'd, 1886.] Defence in action by sheriff on undertaking.

In an action brought on an undertaking for the jail liberties, it is a defence, that the prisoner voluntarily returned to the liberties of the jail from which he escaped, or was recaptured by, or surrendered to the sheriff, from whose custody he escaped, before the commencement of the action. The defendants may make that or any other defence to the action, which might be made by the sheriff, to an action against him for the escape.

From 2 R. S. 435 (Part 3, c. 7, tit. 6), § 48. Am'd by L. 1886, c. 648.

§ 161. Judgment against sheriff to be evidence against sureties, etc.

But if judgment has been rendered against the sheriff, in an action brought for the escape, and due notice of the pendency of the action was given to the prisoner and his sureties, to enable them to defend the same, the judgment against the sheriff is conclusive evidence of his right to recover against the prisoner and his sureties, to whom the notice was given, as to any matter which was or might have been controverted, in the action against the sheriff.

From 2 R. S. 435 (Part 3, c. 7, tit. 6), § 49.

§ 162. [Am'd, 1886.] Summary judgment for sheriff.

In an action brought by a sheriff on an undertaking for the jail liberties, if it appears to the court, upon a motion made in behalf of the sheriff, that judgment has been rendered against him, for the escape of the prisoner, and that due notice of the pendency of the action against him, was given to the prisoner and his sureties, to enable them to defend the same, the court must order a summary judgment for the plaintiff; and judgment must be entered accordingly, with costs.

From Id., § 50. Am'd by L. 1886, c. 648.

§ 163. Requisites of application therefor.

But to entitle a sheriff to move for such a judgment, he must have served a copy of his complaint, and given twenty days' notice of the motion.

From 2 R. S. 435 (Part 3, c. 7, tit. 6), § 51.

§ 164. Such judgment when stayed; when vacated.

If it appears, on the hearing of the motion, that the defendants have a meritorious defence, which was not controverted in the

action against the sheriff and which by law could not have been so controverted, the court may stay proceedings on the judgment, with such limitations and upon such terms, as it deems just, until a trial in the action; but the judgment must stand as a security for the sheriff. If the defence is established, the court must vacate the judgment, and render judgment for the defendant.

From Id., §§ 52, 53.

§ 165. [Am'd, 1886.] Judgment against sheriff is evidence of damages.

In an action brought by a sheriff on an undertaking for the jail liberties, a judgment against him for the escape of the prisoner, is evidence of the damages sustained by him, as if it had been collected; and he may recover his reasonable attorney's and counsel fees, and other expenses in defending the action against him, as part of his damages.

From 2 R. S. 435, § 54. Am'd by L. 1886, c. 648.

§ 166. [Am'd, 1886.] Assignment of undertaking.

If an undertaking for the jail liberties is forfeited before the same is duly allowed, the party at whose instance the prisoner was confined, or, in case of his death, his executor or administrator, may elect to bring an action on the undertaking.

From 2 R. S. 436, § 55. Am'd by L. 1886, c. 648.

§ 167. [Am'd, 1886, 1904.] Recovery of damages for breach of condition.

The person so electing may maintain an action on the undertaking, where an action might have been heretofore maintained by the sheriff, and he may recover the same damages for the breach of the condition, which he might heretofore have recovered in an action against the sheriff for the escape.

From 2 R. S. 436, § 56. Am'd by L. 1886, c. 648; L. 1904, c. 384 (in effect April 26, 1904).

§ 168. [Am'd, 1886.] Such assignment bars action against sheriff.

The commencement of such an action shall be deemed an election and is a bar to an action, by or on behalf of such person, against the sheriff or other officer accepting such an undertaking, for an escape by the prisoner executing the undertaking, amounting to a breach of the condition thereof, unless the escape was with the assent of the sheriff or other officer.

From 2 R. S. 436, § 57. Am'd by L. 1886, c. 648.

§ 169. [Am'd, 1886, 1904.] Defence to action.

In an action brought as provided for in the last three sections, the defendant may make any defence, which he might heretofore have made, if the action was brought by the sheriff.

From 2 R. S. 436, § 58. Am'd by L. 1886, c. 648; L. 1904, c. 384 (in effect April 26, 1904).

§ 170. [Am'd, 1886] Stay of proceedings where assignment is not taken.

If the person so entitled to bring an action on the undertaking for the jail liberties, in lieu of making such election, brings an action against the sheriff for the escape, the court may, except where the escape was made with the sheriff's assent, stay proceedings upon a judgment recovered against the sheriff, with such

limitations and upon such terms as it deems just, until he has had a reasonable time to prosecute the undertaking, and collect a judgment recovered thereon.

From 2 R. S. 436, 437, §§ 59, 60. Am'd by L. 1886, c. 668.

§ 171. [Am'd, 1904.] Defence of sheriff in action for escape. In an action against a sheriff or other officer, for the escape of a prisoner, it is a defense, that the escape was without the assent of the defendant, and that at the commencement of the action, he had the prisoner within the liberties, either by his voluntary return or by recapture, or that an undertaking required to be given by sections 149 and 150 of this act, was given and approved.

From 2 R. S. 437, § 64. Am'd by L. 1904, c. 384 (in effect April 26, 1904).

TITLE III.

Application of the foregoing provisions to the proceedings of a coroner.

Sec. 172. Duties of coroner when sheriff is a party.
173. Any one of the coroners may act.
174. Arrest of sheriff by coroner.
175. Sheriff; how confined.
176. Place of confinement to be deemed a jail.
177. Sheriff to be admitted to jail liberties; liability of coroner for sheriff's escape.
178. Coroner may prosecute, etc., bond for liberties.
179. Duties of coroner where sheriff is plaintiff.
180. Such prisoner entitled to jail liberties, etc.
181. Escape of such prisoner.

§ 172. Duties of coroner when sheriff is a party.

In an action or special proceeding, to which the sheriff of a county is a party, a coroner of the same county has all the power, and is subject to all the duties of a sheriff, in a cause to which the sheriff is not a party; except as otherwise specially prescribed by law.

From 2 R. S. 441 (Part 3, c. 7, tit. 6), § 84.

§ 173. Any one of the coroners may act.

A mandate in a civil action or special proceeding which must or may be executed by the coroners, or by a coroner of a county, must be directed either to a particular coroner, or generally to the coroners of that county. Where such a mandate is directed generally to the coroners of a county, or requires them to do any act, it may be executed, and a return thereto may be made and signed, by one of them; but such an act or return does not affect the others.

From Id., §§ 84, 85.

§ 174. [Am'd, 1886.] Arrest of sheriff by coroner.

Where a mandate, requiring the arrest of the sheriff of the county, is directed to a coroner, he must execute the same in the manner prescribed by law, with respect to the execution of a similar mandate by a sheriff; and he is authorized to take an undertaking on the arrest, or an undertaking for the jail liberties, in a like case, and in like manner, and with like effect, as where such an undertaking may be taken by a sheriff.

From Id., § 86. Am'd by L. 1886, c. 648.

§ 175. Sheriff; how confined.

Where the actual confinement of a sheriff by a coroner, on a mandate, is required or authorized by law, he must be confined by the coroner, in a house situated within the liberties of the jail of the county, other than the sheriff's house, or the jail, in the same manner as a sheriff is required by law to confine a prisoner in the jail.

From 2 R. S. 442 (Part 3, c. 7, tit. 6), § 87.

§ 176. Place of confinement to be deemed a jail.

That house thereupon becomes the jail of the county, for the use of the coroner; and each provision of law relating to the jail, or to an escape from the jail, applies thereto, while the sheriff is confined therein.

From Id., §§ 88, 89.

§ 177. [Am'd, 1886.] Sheriff to be admitted to jail liberties; liability of coroner for sheriff's escape.

A sheriff so arrested must be admitted to the liberties of the jail of the county, in a like case, and upon executing a like undertaking to the coroner, as prescribed by law for a prisoner in the sheriff's custody. For an escape of the sheriff from the liberties, the coroner is liable, in the same manner, and to the same extent, as a sheriff for a similar escape; and he may make the same defence as a sheriff.

From Id., 442, § 90. Am'd by L. 1886, c. 648.

§ 178. [Am'd, 1886.] Coroner may prosecute, etc., undertaking for liberties.

The coroner may prosecute an undertaking for the liberties taken by him, and is entitled to all the rights, and subject to all the liabilities, prescribed by law with respect to a similar undertaking taken by a sheriff. The undertaking may be assigned by him, to the party at whose instance the sheriff was arrested; and the same proceedings may be had thereupon, as upon an undertaking taken and assigned by a sheriff in a similar case.

From 2 R. S. 442, § 91. Am'd by L. 1886, c. 648.

§ 179. Duties of coroner where sheriff is plaintiff.

A person arrested by a coroner, in an action or special proceeding, in which the sheriff of the county is plaintiff, must be confined in the jail of the county, in a case where such a confinement is required or authorized by law; but the coroner is not liable for an escape of the prisoner from the jail, after he has been confined therein. A person so confined must be kept and treated, in all respects, like a prisoner confined by the sheriff.

From 2 R. S. 443, §§ 92, 93.

§ 180. [Am'd, 1886.] Such prisoner entitled to jail liberties, etc.

A person so arrested by a coroner is entitled to be discharged, or to the liberties of the jail, as the case requires, upon giving an undertaking to the coroner, in the like manner, and in a like case, in which a person arrested by a sheriff would be entitled to be so discharged, or to the liberties. The undertaking so given must be in all respects similar to that required to be given to a sheriff; and it has the like effect, and may be assigned and proceeded upon in like manner.

From 2 R. S. 443, §§ 93, 94. Am'd by L. 1886, c. 648.

§ 181. Escape of such prisoner.

A coroner is answerable for an escape of a prisoner, admitted by him to the liberties of the jail, in the same manner and to the same extent, as a sheriff, and may interpose a like defence.

From 2 R. S. 443, § 95.

§ 181a. [Added, 1902.] Duties of county treasurer in Erie county.

In the county of Erie the powers imposed and the duties conferred upon coroners by the provisions of this title shall be exercised and performed by the county treasurer of such county, and such county treasurer shall, in the exercise and performance thereof, be subject to the same liabilities and responsibilities as are prescribed in this title in the case of coroners.

New. Added by L. 1902, c. 575 (in effect April 14, 1902).

§§ 182–189. [Omitted; see Table, p. iii.]

CHAPTER III.

Civil Jurisdiction of the Principal Courts of Record; Organization, Members, and Officers thereof; Distribution and Dispatch of Business therein.

TITLE I.— The Court of Appeals.
TITLE II.— The Supreme Court.
TITLE III.— The Court of Claims.
TITLE IV.— The City Court of the City of New-York.
TITLE V.— The County Courts.

TITLE I.

The Court of Appeals.

Article 1. Jurisdiction, and mode of exercising the same; general powers; terms and sittings.
2. The clerk of the court.
3. The State reporter; publication and distribution of the reports.

ARTICLE FIRST.

Jurisdiction, and mode of exercising the same; general powers; terms and sittings.

Sec. 190. The jurisdiction of the Court of Appeals in civil actions.
191. Limitations, exceptions and conditions.
192. [Repealed.]
193. Court may make rules.
194. Remittitur; when judgment absolute to be rendered, and proceedings thereupon.
195. Second and subsequent appeals.
196. Times and places for holding terms.
197. Court may be held in any building; adjournments.
198. Officers to be appointed by court.

§ 190. [Am'd, 1895.] The jurisdiction of the Court of Appeals in civil actions.

The court of appeals has exclusive jurisdiction to review upon appeal every actual determination made prior to the last day of December, 1895, at a general term of the supreme court, or by either of the superior city courts, as then constituted, in all cases in which, under the provisions of law existing on said day, appeals might be taken to the court of appeals. From and after the last day of December, 1895, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases, and no others:

1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against them.

2. Appeals may also be taken from determinations of the appellate division of the supreme court in any department where the appellate division allows the same, and certifies that one or more questions of law have arisen which, in its opinion, ought to be re-

viewed by the court of appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the court of appeals shall certify to the appellate division its determination upon such questions.

From Co. Proc., § 11. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 191. [Am'd, 1895, 1896, 1898, 1900.] Limitations, exceptions and conditions.

The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said court, in any civil action or proceeding commenced in any court other than the supreme court, court of claims, county court, or a surrogate's court, unless the appellate division of the supreme court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

2. No appeal shall be taken to said court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, or in an action to set aside a judgment, sale, transfer, conveyance, assignment or written instrument, as in fraud of the rights of creditors, or in an action to recover wages, salary or compensation for services, including expenses incidental thereto, or damages for breach of any contract therefor, or in an action upon an individual bond or individual undertaking on appeal, when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals.

3. The jurisdiction of the court is limited to a review of questions of law.

4. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals.

From Co. Proc., § 11. Am'd by L. 1895, c. 946; L. 1896, c. 559; L. 1898, c. 574; L. 1900, c. 592 (in effect Sept. 1, 1900).

§ 192. [Repealed by L. 1895, c. 946 (in effect Jan. 1, 1896).]

§ 193. [Omitted; see Table, p. iii.] Court may make rules.

The court may from time to time make, alter, and amend, rules, not inconsistent with the constitution or statutes of the State, regulating the practice and proceedings in the court, and the admission of attorneys and counsellors at law, to practice in all the courts of record of the State.

From L. 1870, c. 203, § 2; L. 1871, c. 486, § 1.

§ 194. Remittitur; when judgment absolute to be rendered, and proceedings thereupon.

The judgment or order of the court of appeals must be remitted to the court below, to be enforced according to law. Upon an appeal from an order granting a new trial, on a case or exceptions, if the court of appeals determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and after its judgment has been re-

mitted to the court below, an assessment of damages, or any other proceeding, requisite to render the judgment effectual, may be had in the latter court.

From Co. Proc., §§ 11, 12.

§ 195. Second and subsequent appeals.

Upon a second and each subsequent appeal, including a case where a former appeal has been dismissed for a defect or irregularity, the time of filing the return, upon the first appeal, determines the place of the cause upon the calendar.

From Id., § 13.

§§ 196–216. [Omitted; see Table, p. iii.]
54–58

TITLE II.

The supreme court, including special and trial terms.

Article 1. Jurisdiction and powers; designation of terms; distribution of business among the terms and judges; attendants upon the sittings; miscellaneous provisions.
2. The supreme court reporter.
3. Stenographers.

ARTICLE FIRST.

Jurisdiction and powers; designation of terms; distribution of business among the terms and judges; attendants upon the sittings; miscellaneous provisions.

Sec. 217. General jurisdiction of supreme court.
218. Supreme court may change place of trial of actions pending in other courts.
219. Judicial departments.
220. Appellate division.
221. Clerks, attendants and stenographers.
222. Governor may revoke designation.
223. Designation, etc., to be filed with secretary of State.
224. [Repealed.]
225. Times and places of holding terms of the appellate division of the supreme court; how appointed.
226. Appointment to be published.
227. [Repealed.]
228. When associate justice to preside.
229. Hearing of appeals when title to public office is involved.
230. Number of justices necessary for a decision.
231. Reargument, etc., when cause to be heard in another department.
232. Appointments of terms of the supreme court.
233. Publication of appointments.
234. Governor may appoint extraordinary terms; justices to hold them.
235. General powers and duties of justices.
236. [Repealed.]
237. Designation of trial justices in certain cases.
238. Place of holding the terms.
239. Special terms adjourned to chambers; trials thereat.
240. [Repealed.]
241. What judges may perform duties of justices at chambers.
242. Officers required to attend a term of the appellate division; sheriff's duty.
243. Fees of such officers; how paid.

§ 217. General jurisdiction of supreme court.

The general jurisdiction in law and equity, which the supreme court of the State possesses, under the provisions of the constitution, includes all the jurisdiction, which was possessed and exercised by the supreme court of the colony of New York, at any time, and by the court of chancery in England, on the 4th day of July, 1776; with the exceptions, additions, and limitations, created and imposed by the constitution and laws of the State. Subject to those exceptions and limitations, the supreme court of the State has all the powers and authority of each of those courts, and exercises the same in like manner.

From 2 R. S. 178 (Part 3, c. 1, tit. 2), § 36; 2 R. S. 196 (Part 3, c. 1, tit. 3), § 1; L. 1847, c. 280, § 16.

§ 218. [Am'd, 1895.] Supreme court may change place of trial of actions pending in other courts.

The supreme court, upon the application of either party, may, and, in a proper case, must make an order, directing that an issue

of fact, joined in an action or special proceeding, pending in any other court of record, except the city court of the city of New York, or a county court, be tried at a term of the supreme court in another county, on such terms, and under such regulations as it deems just; and thereupon the issue must be tried accordingly. After the trial, the clerk of the county, in which it has taken place, must certify the minutes thereof; which must be filed with the clerk of the court, in which the action or special proceeding is pending. The subsequent proceedings in the last mentioned court must be the same, as if the issue had been tried therein.

From L. 1847, c. 280, § 49. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 219. [Omitted; see Table, p. iii.] Judicial departments.

The state is hereby divided into four judicial departments. The first department shall consist of the counties embraced within the first judicial district; the second department shall consist of the counties embraced within the present second and ninth judicial districts; the third department shall consist of the counties embraced within the present third, fourth and sixth judicial districts; the fourth department shall consist of the counties embraced within the present fifth, seventh and eighth judicial districts.

From L. 1870, c. 408, as am'd by L. 1875, c. 616. Am'd by L. 1895, c. 376; L. 1915, c. 475 (in effect May 3, 1915).

§ 220. [Am'd, 1895. Bracketed parts omitted, 1909; see Table, p. iii.] Appellate division.

[On and after the first day of January, 1896, there shall be an appellate division of the supreme court in each judicial department hereby created, consisting of seven justices in the first department and of five justices in each of the other departments. In each department four shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case. From all the justices elected to the supreme court the governor shall designate those who shall constitute the appellate division in each department, and he shall designate the presiding justice thereof, who shall act as such during his term of office, and shall be a resident of the department. The other justices shall be designated for terms of five years, or the unexpired portions of their respective terms of office, if less than five years. From time to time, as the terms of such designations expire, or vacancies occur, he shall make new designations. He may also make temporary designations in case of the absence or inability to act of any justice in the appellate division. A majority of the justices designated to sit in the appellate division in each department shall be residents of the departments. Whenever the appellate division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments at a meeting called by the presiding justice of the department in arrears may transfer any pending appeals from such department to any other department for hearing and determination.] No justice of the appellate division shall exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division or to the hearing and decision of motions submitted by consent of counsel. From and after the last day of December, 1895, the appellate division shall have the jurisdiction now exercised by the supreme court at its general terms, and by the general terms of the court of common pleas for the city and county of New York, the superior court of the city of New York, the superior

court of Buffalo and the city court of Brooklyn, and such additional jurisdiction as may be conferred by the legislature. [It shall have power to appoint and remove a reporter, to whom the original opinions of the court shall be delivered by the judges immediately after the decisions of the cases in which they are written are made, and to make rules and regulations governing the practice therein. The appellate court shall be located, respectively, in the first department, in the city of New York; in the second department, in the city of Brooklyn; in the third department, in the city of Albany; and in the fourth department, in the city of Rochester; but terms thereof may be held elsewhere in such departments, whenever in the discretion of the justices thereof, respectively, public interests may require.]

From L. 1870, c. 408, § 3; L. 1875, c. 616. Am'd by L. 1895, c. 376.

§§ 221-228. [Omitted; see Table, p. iii.]

§ 229. [Added, 1896; am'd, 1909.] Hearing of appeals when title to public office is involved.

An appeal from a judgment or decree in any case in which the question of the title to a public office is directly or collaterally at issue or in any manner involved, may be placed on the calendar and noticed for hearing on any day in the appellate division of the supreme court, in the first department, or in the court of appeals, and shall be heard on said day.

Added by L. 1896, c. 560. Am'd by L. 1909, c. 65.

§ 230. [Omitted; see Table, p. iii.] Number of justices necessary for a decision.

In each department four of the justices of the appellate division of the supreme court shall constitute a quorum, and the concurrence of three justices is necessary to pronounce a decision. No more than five justices shall sit in any case. If three do not concur in a decision, a reargument must be ordered.

Added by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 231. [Am'd, 1895, 1900, 1915.] Reargument, etc., when cause to be heard in another department.

Where in any case four justices of the appellate division in any department are not qualified to sit therein, or where the justices qualified to hear the appeal are equally divided, the court must direct the same to be sent to another department to be specified in the order to be there heard and determined. Where in any case when an appeal to the appellate division of any department comes on for argument, and the justice before whom the action was tried or who granted the order appealed from, is a member of such appellate division, the appellant may make an application to such appellate division for, and the court may grant, an order directing that such appeal be sent to an adjoining department to be specified in the order, to be there heard and determined. The appellate division may in any other appeal make an order in the furtherance of justice, directing that such appeal be sent to the appellate division of any department to be there heard and determined.

From L. 1870, c. 408, §§ 6, 10. Am'd by L. 1895, c. 946; L. 1900, c. 209; L. 1915, c. 553 (in effect May 8, 1915).

§ 232. [Omitted; see Table, p. iii.] Appointments of terms of the supreme court.

The justices of the appellate division in each department may fix the times and places for holding special and trial terms therein, and assign the justices of the departments to hold such terms, or make rules therefor;

and may from time to time make additional appointments and designations, or change or alter those already made. If said justices of the said appellate division in any department shall not have fixed the times and places for holding said special and trial terms, or shall not have assigned the justices to hold such terms, or shall not have made rules therefor, before the first day of December, in the year 1895, and in every second year thereafter, the justices of the supreme court for each judicial district, or a majority of them not designated as justices of the appellate division, must, between the first and fifteenth days of December in each of said years, appoint the times and places for holding the trial and special terms of the supreme court within their judicial district, for two years from the first day of January of the year next following; if for any reason such an appointment is not made before the expiration of the time so specified, it must be made at the earliest convenient time thereafter. A special term or a trial term of the supreme court must be held by one judge. At least one special term and two trial terms must be appointed to be held in each year in each county separately organized. Two or more trial terms may be appointed to be held and may be held at the same time in any county. Fulton and Hamilton counties shall be deemed one county for the purposes of this section. A trial term in any county may be held in two or more parts, and a jury panel may be summoned to serve in each part, or jurors may be drawn from one panel; and in such county such part or parts, exceeding one, as may be requisite shall be reserved for the trial of actions on sales of personal property, including agreements incident to such sales, for work, labor and services, and material furnished, upon policies of insurance and upon negotiable paper and other instruments transferable by endorsement or order. The rules made by the justices of an appellate division for fixing the times and places for holding special and trial terms, and for assigning the justices for holding special and trial terms, must be signed by the justices making them, and immediately filed in the office of the secretary of state; and a duplicate thereof must also be filed in the office of the clerk of such appellate division, who must immediately transmit a copy thereof, certified by him, to each of the justices of the supreme court in such department not designated as justices of an appellate division. The justices of the appellate division of each department are hereby authorized to adopt and procure an official seal, with suitable devices and inscription. A description of such seal, with an impression thereof, shall be filed in the office of the secretary of state. The expense of procuring such seal shall be a charge against the state, and shall be paid by the state treasurer upon the audit and warrant of the comptroller.

From L. 1870, c. 408, § 7; 2 R. S. 201, § 4; Co. Proc., § 20; L. 1852, c. 374, § 5. Am'd by L. 1886, c. 303; L. 1893, c. 69; L. 1895, c. 376 and c. 946; L. 1896, c. 140 and c. 561; L. 1900, c. 73; L. 1901, c. 500; L. 1913, c. 561 (in effect May 16, 1913).

§ 233. [Omitted; see Table, p. lii.] Publication of appointments.

An appointment so made must be signed by the justices making it, and immediately filed in the office of the Secretary of State, who must publish a copy thereof in the newspaper, printed at Albany, in which legal notices are required to be published, at least once in each week, for three successive weeks before the holding of a term in pursuance thereof. The expense of the publication is payable out of the treasury of the State.

From Co. Proc., § 25.

§ 234. [Omitted; see Table, p. iii.] Governor may appoint extraordinary terms; justices to hold them.

The governor may, when, in his opinion, the public interest so requires, appoint one or more extraordinary terms of the appellate division of the supreme court in any department, or of the special or trial terms of the supreme court. He must designate the time and place of holding the same, and name the justice who shall hold or preside at such term, except of the appellate division; and he must give notice of the appointment, in such manner as, in his judgment, the public interest requires.

From L. 1870, c. 408, § 14. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 235. [Am'd, 1895, 1900, 1909.] General powers and duties of justices.

Any justice of the supreme court has power to hold a special or trial term of the supreme court for the whole or any portion of the term; and to act upon any business, which regularly comes before the term in which he is sitting, except where he is personally disqualified from sitting, in a particular action or special proceeding. Each justice must, at all reasonable times, when not engaged in holding court, transact such judicial business as may be done out of court.

From 2 R. S. 203 (Part 2, c. 1, tit. 4), § 14; Co. Proc., §§ 26, 27. Am'd by L. 1895, c. 946; L. 1900, c. 384; L. 1909, c. 65.

§ 236. [Repealed by L. 1895, c. 946 (in effect Jan. 1, 1896.)]

§ 237. [Omitted; see Table, p. iii.] Designation of trial justices in certain cases.

If it appear to the satisfaction of the presiding justice of the appellate division in any department that a special or trial term of the supreme court duly appointed therein is in danger of failing, he may designate a justice who resides in that department to hold such term in the absence of the justice assigned thereto. If in the opinion of such presiding justice it is not practicable to make a designation from his department, he shall so inform the governor who may thereupon designate for such term a justice from any department.

From L. 1850, c. 1, § 1. Am'd by L. 1895, c. 946; L. 1900, c. 414 (in effect April 12, 1900).

§ 238. [Omitted; see Table, p. iii.] Place of holding the terms.

The place appointed within each county, for holding a special term of the supreme court, at which issues of fact are triable, or

a trial term, must be that designated by the statute, for holding the county court.

From Co. Proc., § 24. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 239. [Enacted; parts omitted, 1909; see Table, p. iii.] Special terms adjourned to chambers; trials thereat.

[A special term of the supreme court may be adjourned to a future day, and to the chambers of any justice of the court, residing within the judicial district, by an entry in the minutes; and then adjourned from time to time, as the justice holding the same directs. Special terms may be held at the chambers of the justice, in the town, city or village of his residence, whether at the county seat or elsewhere in the county.] An action triable by the supreme court, without a jury, which was upon the calendar of the term before it was adjourned, as provided in section 148 of the Judiciary Law,[1] may be tried at a term so adjourned, and held at chambers, by consent of both parties, but not otherwise. [In that case, the attendance of the clerk, the sheriff, the crier, or a constable, is not required, unless the justice directs one or more of those officers to attend.]

From Co. Proc., part of § 24. Am'd by L. 1913, c. 561 (in effect May 16, 1913).

§ 240. [Repealed by L. 1895, c. 946 (in effect Jan. 1, 1896.]

§ 241. [Am'd, 1895; re-enacted, 1910.] What judges may perform duties of justices at chambers.

A county judge within his county possesses, and upon proper application must exercise, the power conferred by law in general language upon an officer authorized to perform the duties of a justice of the supreme court at chambers or out of court.

From Co. Proc., § 403; 2 R. S. 280 (Part 3, c. 3, tit. 2), §§ 18, 19. Am'd by L. 1895, c. 946; re-enacted by L. 1910, c. 575 (in effect June 22, 1910).

§§ 242–250. [Omitted; see Table, p. iii.]

ARTICLE THIRD.

Stenographers.

Sec. 251. Stenographers.
252, 253. [Repealed.]

§ 251. [Am'd, 1880, 1883, 1892, 1895.] Stenographers.

If the justice presiding requires a copy of any proceedings written out at length from stenographic notes, he may make an order, directing one-half of the stenographer's fees therefor, to be paid by each of the parties to the action or special proceeding, at the rate of ten cents for each folio as written out, and may enforce payment thereof. Any such copy shall be accessible to, and may be examined by, any of the counsel in the cause. If there are two or more parties on the same side, the order may direct either of them to pay the sum payable by their side, for the stenographer's fees; or it may apportion the payment thereof among them, as the justice deems just.

From Co. Proc., § 256. Am'd by L. 1880, c. 54; L. 1883, c. 4; L. 1892, c. 231; L. 1895, c. 946 (in effect Jan. 1, 1896).

§§ 252, 253. [Repealed by L. 1895, c. 946 (In effect Jan. 1, 1896.)]

§§ 254–262. [Omitted; see Table, p. iii.]

[1] The first sentence of this section (now enclosed in brackets) now forms part of § 148 of the Judiciary Law, and is the matter to which this cross-reference relates.

TITLE III.

ARTICLE ONE.[1]

The Court of Claims.

Sec. 263. Court of claims.
264. Jurisdiction.
265. Rules and procedure.
266. Officers.
267. Seal of court.
268. Sessions; duty of sheriff.
269. Judgments.
270. Duty of attorney-general and superintendent of public works.
271. Record of proceedings; report.
272. Expense of procuring testimony on commission.
273. Annual report to comptroller.
274. Costs not to be taxed.
275. Appeals.
276. Time and manner of taking appeal.
277. Case on appeal.
278. Preference on appeals.
279. Salaries and expenses of judges.
280. Salaries of officers of court of claims.
281. Interpleader, consolidation, and new parties.
282. Additional judges.
283. Determination of appropriation cases; assignment of judges.
284. Calendar practice.

§ 263. [Added, 1897; am'd, 1904, 1906, 1911, 1915.] Court of Claims.

The board of claims is hereby abolished and the court of claims re-established. Such court shall consist of three judges, to be known as judges of the court of claims, who shall be appointed by the governor, by and with the advice and consent of the senate. The judges first appointed shall be appointed for terms of three, six and nine years, respectively, from the first day of January of the calendar year in which such appointments shall be made. Thereafter the full term of office of each judge shall be nine years. Whenever the term of office of a judge shall expire, or his office become vacant from any cause, his successor shall be appointed for the unexpired term. Notwithstanding the provisions of section five of the public officers law, a judge of the court of claims shall hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified, but after the expiration of such term the office shall be deemed vacant for the purpose of choosing his successor. By an order to be filed in the office of the secretary of state, the governor shall designate one of the judges as presiding judge, who shall act as such during his term, and thereafter upon the appointment of his successor, the governor shall designate such successor or any other judge of the court as presiding judge, who shall act as such during his term. The office of commissioner of claims is hereby abolished, but the commissioners now in office shall continue to have the powers and duties of commissioners of claims until the appointment and qualification of judges of the

[1] From 1877 to 1896, this Article, comprising §§ 263 to 312, related to four courts, which were styled the Superior City Courts, viz., the Superior Court of the City of New York, the Court of Common Pleas for the City and County of New York, the Superior Court of Buffalo and the City Court of Brooklyn. The Constitution of 1894, § 5, provided that these courts should be abolished from and after January 1, 1896, and transferred their jurisdiction to the Supreme Court. Then, by L. 1895, c. 946, § 2, §§ 263 to 312 of the Code were repealed. Sections 263 to 280, relating to the Court of Claims, were afterwards introduced into the Code by L. 1897, c. 36. By the amendments of 1911 (L. 1911, c. 856) the jurisdiction of this court was transferred to the Board of Claims, but by a later amendment (L. 1915, c. 1) the Court of Claims was re-established.

court of claims, except that after this section as amended takes effect and until the appointment and qualification of judges of the court of claims they shall not hear, try or determine any claim, or entertain a motion or make an order affecting the substantial rights of a party. During the period of three months after the first appointment and qualification of judges hereunder, such commissioners shall have power to determine and dispose of questions, claims and matters which shall have been finally submitted to and heard by such board on or before January 23, 1915, in the same manner and with the same effect as if such board had not been abolished. Such commissioners shall for their services rendered during such period of three months receive compensation at the rate of five hundred dollars per month. A judge of the court of claims, appointed under the provisions of this section, as amended, must be an attorney and counselor-at-law admitted to practice in the courts of this state, of at least ten years' experience in practice. A judge shall not during his term of office practice the profession of law, or act as referee in any action or proceeding in any court of this state. A judge shall not hold any other office or public trust to which any salary or compensation is attached,[1] nor serve as a member of any political committee. Except as herein otherwise provided, the judges appointed under this section shall have jurisdiction to hear and determine all matters pending in the court of claims at the time they shall take office, and all matters pending in the board of claims at the time when this section, as amended takes effect, shall be heard and determined by the court of claims. But if any matter or claim be left undisposed of by the commissioners of claims, the court of claims shall have jurisdiction thereon. Whenever in this act or in any other statute, heretofore enacted or enacted at the legislative session of the year 1915, reference is made to the board of claims or any officer thereof, the same shall be deemed to refer to and mean the court of claims or an officer thereof. A determination of the board of claims, heretofore rendered shall have the same force and effect and be subjected to the same procedure as provided in this article for a judgment.

Added by L. 1897, c. 36. Am'd by L. 1904, c. 16; L. 1906, c. 692; L. 1911, c. 856; L. 1915, c. 1 (in effect January 28, 1915).

§ 264. [Added, 1897; am'd, 1905, 1906, 1908, 1912, 1915.] Jurisdiction.

The court of claims possesses all of the powers and jurisdiction of the former board of claims. It also has jurisdiction to hear and determine a private claim against the state, including a claim of an executor or administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the part of the state by which the decedent's death was caused, which shall have accrued within two years before the filing of such claim and the state hereby consents, in all such claims, to have its liability determined. It may also hear and determine any claim on the part of the state against the claimant, or against his assignor at the time of the assignment, and must render judgment for such sum as should be paid by or to the state. But the court has

[1] By L. 1915, c. 100, § 2, it is provided that a judge of the court of claims shall not be prevented by the provisions of § 263 of the Code from serving as a member of a constitutional convention and receiving the salary or compensation attached to that office.

no jurisdiction of a claim submitted by law to any other tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim, or some part thereof, has been rejected by such tribunal or officer. In no case shall any liability be implied against the state, and no award shall be made on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity. No claim other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the court of claims and with the attorney-general a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths. The attorney-general may require any person filing such a notice of claim for any cause whatever against the state to be sworn before him or one of his deputies designated by him for that purpose within the county of the claimant's residence, relating to such claim, and when so sworn, to answer orally as to any facts relative to the justness of such claim. Willful false swearing before the attorney-general or deputy attorney-general is perjury and punishable as such. Provided further, that nothing herein contained shall be construed to allow the court to hear any claim which as between citizens of the state would be barred by lapse of time or of any claim heretofore accrued and of which the said court or board has had jurisdiction and which was barred by lapse of time at the date when this section, as amended, takes effect. Provided further, that the court shall have jurisdiction, and may hear and determine all claims accrued and actually filed at any time prior to September 1, 1912, and filed within two years from the time they accrued, though no notice of intention to file was given, as required by this section, if such claims when filed were not barred by lapse of time and the court or board had jurisdiction and authority to hear and determine the same except for the lack of such notice; and such jurisdiction shall attach without refiling or previous notice.

Added by L. 1897, c. 36. Am'd by L. 1905, c. 370; L. 1906, c. 692; L. 1908, c. 519; L. 1912, c. 545; L. 1915, c. 1 (in effect January 28, 1915).

§ 265. [Added, 1897; am'd, 1906, 1915.] Rules and procedure.

The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and method of procedure before it, vacate or modify judgments and grant new trials, and except as otherwise provided in said rules and regulations, or the code of civil procedure, the practice shall be the same as in the supreme court. Rules of the board of claims or former court of claims, now in force, shall continue to be the rules of the court of claims until changed by such court.

Added by L. 1897, c. 36. Am'd by L. 1906, c. 692; L. 1915, c. 1 (in effect January 28, 1915).

§ 266. [Added, 1897; am'd, 1906, 1909, 1911, 1915.] Officers.

The court of claims shall appoint and may at pleasure remove, a clerk, a stenographer and an attendant, who shall also act as messenger; and they shall perform such duties as the court may prescribe. Before entering upon the duties of his

office, the clerk shall make and file in the office of the comptroller, a bond for the faithful performance of his duties in an amount and with sufficient sureties to be approved by at least two of the judges, which approval shall be indorsed on said bond. The court may also appoint such other employees as may be needed. The clerk and stenographer appointed by the board of claims are continued as such officers and employees of the court of claims until the appointment and qualification of their successors.

Added by L. 1897, c. 36. Am'd by L. 1906, c. 692; L. 1909, c. 586; L. 1911, c. 856; L. 1915, c. 1 (in effect January 28, 1915).

§ 267. [Added, 1897.] Seal of court.

The court shall adopt and procure an official seal, with suitable device and inscription. A description of such seal, with an impression thereof, shall be filed in the office of the secretary of state. The expense of procuring such seal shall be paid out of the contingent fund of the court.

Id.

§ 268. [Added, 1897; am'd, 1906, 1911, 1915.] Sessions; duty of sheriff.

The court shall hold at least eight sessions each year, and unless otherwise ordered by the court shall be held as follows: On the fourth Monday of January at the city of Albany; on the third Monday of February at the city of Syracuse; on the fourth Monday of March at the city of Utica; on the fourth Monday of April at the city of Albany; on the fourth Monday of May at the city of Rochester; on the third Monday of June at the city of Buffalo; on the fourth Monday of September at the city of Albany; on the fourth Monday of November at the city of Albany, and it may also hold adjourned or special sessions at such other times and places in the state as it may determine. It may also hold a session and take testimony where the claimant resides or where the claim is alleged to have arisen, or in the vicinity, and may view any premises affected by the proceedings, and in case of any appropriation of land by the state, the value of which shall exceed five hundred dollars, it shall be the duty of the court, or the judge or judges hearing the claim, to view the premises affected by the appropriation. The sheriff of any county, except Albany, shall furnish for the use of the court suitable rooms in the courthouse of his county for any session ordered to be held thereat and shall if required attend said session. His fees for attendance shall be paid out of the contingent fund of the court at the same rate as for attending a term of the supreme court in that county.

A session of the court may be conducted and testimony and proof taken and arguments heard thereat, by one or more judges to be designated by the presiding judge; but no determination or judgment of the court shall be rendered except upon the concurrence of at least two of the judges of the court. Not more than three judges shall sit in any case.

Adjourned or special sessions of the board of claims heretofore designated to be hereafter held, shall be held as sessions of the court of claims unless such court shall cancel such designations.

Id. Am'd by L. 1906, c. 692; L. 1911, c. 856; L. 1915, c. 1 (in effect January 28, 1915), and c. 100 (in effect March 19, 1915).

§ 269. [Added, 1897; am'd, 1901, 1909.] Judgments.

The determination of the court upon a claim shall be by a judgment

to be entered in a book to be kept by the clerk for that purpose, and signed and certified by him. Within ten days after the entry of the judgment, the clerk shall serve a certified copy thereof on the claimant or his attorney and also upon the attorney-general. If the claim arises in a case where the state seeks to appropriate or has appropriated land for a public use, the judgment shall contain a description of such land. A transcript of a judgment in favor of the state, certified by the clerk of the court, may be filed and docketed in the clerk's office of any county; and upon being so docketed shall become and be a lien upon the property of the claimant in that county, to the same extent and enforceable by execution in the same manner, as a judgment of the supreme court. A final judgment against the claimant on any claim prosecuted as provided in this article shall forever bar any further claim or demand against the state arising out of the matters involved in the controversy. Interest shall be allowed on each judgment of the court of claims from the date thereof until the twentieth day after the comptroller is authorized to issue his warrant for the payment thereof or until payment, if payment be made sooner. But no such judgment shall be paid until there shall be filed with the comptroller a copy thereof duly certified by the clerk of the court of claims together with a certificate of the attorney-general that no appeal from such judgment has been or will be taken by the state, and a release and waiver by the attorney for the claimant of any lien for services upon said claimant's cause of action, claim, award, verdict, report, decision or judgment in favor of said claimant, which said attorney may have thereon under and by virtue of section 475 of the Judiciary Law; and where damages are awarded for the permanent appropriation of land for a public use, there shall also be filed with the comptroller a satisfactory abstract of title and certificate of search as to incumbrances, showing the person demanding such damages to be legally entitled thereto. The provisions of this section as to limitation of interest shall not apply, however, to judgments paid from the various trust funds or sinking funds of the state, which funds shall be entitled to interest until the twentieth day after an appropriation is available for the reimbursement thereof or until payment, if payment be sooner made.

Id. Am'd by L. 1901, c. 440; L. 1909, c. 65.

§ 270. [Added, 1897; am'd, 1905.] Duty of attorney-general and superintendent of public works.

The attorney-general shall represent the state in all proceedings relating to claims. In all cases of canal claims a copy of each such claim and of notice of claim which is or may hereafter be required to be filed with the court of claims shall be filed with the superintendent of public works who on request from the attorney-general, shall furnish such assistance as he may require in subpœnaing witnesses and preparing the cases for trial. The attorney-general may designate a clerk in his office to assist in the preparation of cases for trial and to attend a term of the court. And no claim brought against the state on account of the canal shall be settled or compromised for any amount without the written consent thereto by the superintendent of public works or his duly authorized representative.

Added by L. 1897, c. 36. Am'd by L. 1905, c. 370 (in effect May 4, 1905).

§ 271. [Added, 1897.] Record of proceedings; report.

The court shall keep a record of its proceedings, and, at the commencement of each session of the legislature, and at such other times during the session as it may deem proper, or as the senate or assembly may request, report to the legislature the claims upon which it has finally acted, with a statement of the judgment rendered in each case.

Id.

§ 272. [Added, 1897.] Expense of procuring testimony on commission.

When testimony is taken on commission, at the instance of the claimant, the expense thereof including the fees of the commissioner, shall be paid by the claimant; and when taken at the instance of the state, such fees and all expense incurred by the attorney-general shall be paid out of the contingent fund of the court.

Id.

§ 273. [Added, 1897.] Annual report to comptroller.

On the first day of January in each year, the clerk shall report to the comptroller, under oath, a detailed statement of his disbursements made under the direction of the court from its contingent fund during the preceding year.

Id.

§ 274. [Added, 1897; am'd, 1909.] Costs not to be taxed.

Costs, witnesses' fees and disbursements shall not be taxed, nor shall counsel or attorney fees be allowed by the court to any party. The said court of claims, whenever the appraised value of the premises appropriated shall be less than $200, shall in their award make a reasonable allowance for the expense of procuring the abstract of title and certificate of search as to incumbrances, which the statutes require shall be furnished the comptroller before payment of any damages which may be awarded for the permanent appropriation of land or water.

Id.; L. 1884, c. 336, § 3. Am'd by L. 1909, c. 65.

§ 275. [Added, 1897.] Appeals.

Either party may appeal from an order or judgment of the court of claims to the appellate division of the supreme court of the third department. The appeal from a judgment may be taken upon questions of law or of fact, or both, or for an alleged excess or insufficiency of the judgment. Upon such appeal, the court may affirm, reverse, or modify the judgment, or dismiss the appeal, or grant a new trial. The provisions of this code relating to appeals in the supreme court apply, so far as practicable, to appeals from orders or judgments of the court of claims, except as modified in this article.

Id.

§ 276. [Added, 1897.] Time and manner of taking appeal.

An appeal must be taken within thirty days after the entry and service of the order, or the service by the clerk of a certified copy of the judgment, by serving upon the claimant or his attorney, or upon

the attorney-general, and upon the clerk, in like manner as in the supreme court, a written notice to the effect that the appellant appeals from the order or from the judgment or from a specified part thereof, and briefly stating the grounds of the appeal.

Id.

§ 277. [Added, 1897.] Case on appeal.

With the notice of appeal from a judgment, the appellant shall serve upon the adverse party a case containing so much of the evidence as the appellant may deem necessary to present the questions raised by the appeal. Within ten days after the service of the case, the respondent may propose and serve amendments thereto, and the case may be settled upon five days' notice by any judge of the court. Notice of the settlement may be served by either party, within ten days after service of the proposed amendments. The court or a judge thereof may extend the time for serving a case or amendments.

Id.

§ 278. [Added, 1897.] Preference on appeals.

An appeal taken after the calendar for a term of the appellate court is prepared may be placed thereon upon the application of the attorney-general at any time during the then current term, and brought on for hearing as a preferred cause upon a notice of fourteen days.

Id.

§ 279. [Added, 1897; am'd, 1906, 1910, 1911, 1915.] Salaries and expenses of judges.

Each judge of the court of claims shall receive an annual compensation of eight thousand dollars, payable monthly, and all actual and necessary traveling and other expenses and disbursements incurred or made by them in the discharge of their official duties elsewhere than in Albany, payable monthly, by the state treasurer on the audit and warrant of the comptroller.

Id. Am'd by L. 1906, c. 692; L. 1910, c. 684; L. 1911, c. 856; L. 1915, c. 1 (in effect January 28, 1915).

§ 280. [Added, 1897; am'd, 1907, 1911, 1915.] Salaries of officers of court of claims.

Each officer of the court of claims shall receive an annual salary, payable monthly, and other compensation as follows:

1. The clerk, three thousand dollars.

2. The court stenographers, who shall also be deputy clerks, two thousand five hundred dollars and five cents a folio for copies of minutes and testimony furnished at the request of the claimant.

3. The attendant, including his services as messenger, twelve hundred dollars.

4. The clerk, court stenographers and attendant shall be paid their actual expenses while in the discharge of their respective duties, elsewhere than in the city of Albany, to be audited by the court and paid from the contingent fund. No charge shall be made against the

state by the clerk or the stenographers for copies of minutes, testimony or papers, furnished to the attorney-general or to the court or filed in the office of the clerk.

Id. Am'd by L. 1907, c. 590; L. 1911, c. 856; L. 1915, c. 1 (in effect January 28, 1915), and c. 100 (in effect March 19, 1915).

§ 281. [Added, 1901.] Interpleader, consolidation and new parties.

Jurisdiction and powers are also conferred upon the court of claims in its discretion, to order other parties, known or unknown, to be brought in and made parties to any action or proceeding pending in said court or substituted whenever it appears or is made to appear to the court, necessary to a complete determination of the controversy, or the determination of a liability; to consolidate claims or actions, to order interpleader, in the same manner and to like extent and with like effect in matters over which said court of claims have or shall have jurisdiction, as is conferred upon other courts by sections 452, 756, 817, 820 and 2518 of this code. Said parties may be brought in by order instead of by citation or summons, which order may be served personally or by publication in like manner as is provided for the service of a citation in surrogate's court; and in the cases provided in this section the said court may render judgment for or against any of the parties in said action or proceeding as may be just and equitable.

Added by L. 1901, c. 286 (in effect April 5, 1901).

§ 282. [Added, 1915.] Additional judges.

The number of judges to constitute the court of claims may be increased to not more than five as provided by this section. If the attorney-general shall at any time certify to the governor in writing that the accumulation of business in the court of claims requires for the disposal thereof an additional judge or judges, specifying the number, not more than two, the governor may appoint, by and with the advice and consent of the senate, such additional judge or judges, each of whom shall be an attorney and counselor-at-law, admitted to practice in the courts of this state of at least ten years' experience in practice. The terms of any such additional judge shall expire January first, 1918. If a vacancy shall occur otherwise than by expiration of term in the office of any such additional judge, his successor shall be appointed by the governor, by and with the advice and consent of the senate, for the unexpired term of his predecessor in office. If at any time prior to January first, 1918, it appears to the satisfaction of the governor that the necessity for having any such additional judge no longer exists, he may file a certificate to such effect in the office of the secretary of state and thereupon the term of such additional judge shall expire. Such an additional judge, shall, during his term of office, receive the same compensation and be allowed his expenses, payable at the same time and in the same manner as a judge of the court of claims. Except as herein provided the provisions of section 263 relating to judges of the court of claims shall apply to any such additional judge.

Added by L. 1915, c. 1 (in effect January 28, 1915).

§ 283. [Added, 1916.] Determination of appropriation cases; assignment of judges.

At least two of the judges of the court of claims shall be designated by the presiding judge thereof to devote their entire time, or so much thereof as shall be necessary, to the hearing and determination of claims filed against the state arising out of the appropriation of lands, structures, waters, franchises or other property in connection with the improvement of the Erie, Champlain and Oswego canals as provided by chapter 147 of the laws of 1903, and acts amendatory thereof and supplemental thereto, the Cayuga and Seneca canals as provided by chapter 391 of the laws of 1909, and acts amendatory thereof and supplemental thereto, and for the purpose of furnishing proper terminals and facilities for barge canal traffic as provided for by chapter 746 of the laws of 1911, and acts amendatory thereof and supplemental thereto. Such designations of judges may be changed in the discretion of the presiding judge, provided at least two of such judges be at all times assigned to the hearing and determination of such claims. Nothing in this section contained, however, shall be construed to limit the power of the judges so designated, or either of them, from hearing and determining claims other than such appropriation cases whenever and to the extent that it appears to the satisfaction of such judges, or either of them, that such appropriation cases do not require their attention or that of either of them.

Added by L. 1916, c. 343 (in effect April 27, 1916).

§ 284. [Added, 1916.] Calendar practice.

A calendar shall be prepared by the clerk of the court of claims for each regular session thereof. Such calendar shall be comprised of all pending claims in the district where such session is to be held and the claims shall appear therein in the order of the date of the filing thereof respectively. The attorney-general may notice any of such claims for trial at any such term by serving upon the attorney for the claimant a notice of trial at least fourteen days before the commencement of such term. When any claim of the character mentioned in the last preceding section is reached for trial by the court, if the claimant fails to appear, or if he appears but is not ready to proceed to the trial thereof, the court, in its discretion, may proceed forthwith to take proofs and testimony therein offered by the state or otherwise, and may make an award in accordance therewith and cause a judgment to be entered thereon. If, in such a case, the court shall decide not to proceed forthwith to take such

proofs and testimony, interest shall not accrue or be allowed upon such claim between such date and the entry of judgment in such case, unless, in the exercise of its discretion, for good cause shown, the court shall otherwise determine.

When any claim other than one of those mentioned in the last preceding section is noticed for trial as herein provided, if the claimant fails to appear, the court, upon the motion of the attorney-general, may dismiss the same, in which event such default shall not be opened nor shall such claim be restored to the calendar except upon the motion of the attorney for the claimant, based upon affidavits showing a reasonable and satisfactory excuse for such default and that such claim is a meritorious one. Such notice of motion and the affidavits upon which the same is based shall be served upon the attorney-general at least eight days before such application, unless a shorter time shall be ordered by the court. Whenever any interest-bearing claim, other than one of those mentioned in the last preceding section, shall have been dismissed and thereafter restored to the calendar as herein provided, no interest shall accrue or be allowed thereon between the date of such dismissal and the entry of judgment in such case.

Added by L. 1916, c. 343 (in effect April 27, 1916).

§§ 285-313. [Repealed by L. 1895, c. 946, § 2.]

§ 314. [Repealed by L. 1877, c. 416.]

TITLE IV.

The city court of the city of New York.

Sec. 315. Jurisdiction.
316. The last section limited.
317. Jurisdiction in special causes.
318. Power to naturalize aliens.
319. Removal of action to supreme court from city court.
319a. Removal of causes in certain cases from city court to supreme court.
319b. Vacation of judgment in certain cases.
320. Justices; their general duties.
321. How suspended from office.
322. Chief-justice; how designated; his general duties, etc.
323. Justices may make rules.
324. Court when open; justices to designate terms; routine of business.
325. Terms, where held; publication of appointments.
326. Justices may take oaths, acknowledgments, etc.
327. Orders, etc., how made.
328. Clerk, deputy-clerks, assistants, stenographer, etc.; their salaries.
329. General duties of deputy-clerk.
330. Special deputy-clerks.
331. Clerk to account monthly for fees, and pay over the same.
332. Stenographers.
333. Official oath; interpreters.
334. Id.; penalty for misconduct.
335. The justices must appoint attendants; their salaries.
336. Clerks, interpreter and attendants not to receive fees.
337. Suspension of an officer of the court.
338. What mandates may be executed without the city.
339. Direction and execution of mandates.
339a. Destruction of records and papers.

§ 315. [Am'd, 1877, 1895, 1911.] Jurisdiction.

The jurisdiction of the city court of the city of New York,[1] extends to the following cases:

1. An action against a natural person, or against a foreign or domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking or detention thereof.

2. An action to foreclose or enforce a lien upon real property in the city of New York, created as prescribed by statute, in favor of a person, who has performed labor upon, or furnished materials to be used in the construction, alteration or repair of a building, vault, wharf, fence, or other structure; or who has graded, filled in, or otherwise improved, a lot of land, or the sidewalk or street in front of or adjoining a lot of land.

3. An action to foreclose or enforce a lien, for a sum not exceeding five thousand dollars, exclusive of interest, upon one or more chattels.

4. The taking and entry of a judgment, upon the confession of one or more defendants, where the sum, for which judgment is confessed, does not exceed five thousand dollars, exclusive of interest from the time of making the statement, upon which the judgment is entered.

From L. 1872, c. 629, § 3; L. 1874, c. 545, § 5; L. 1875, c. 479, § 1; L. 1875, c. 379, §§ 1, 2. Am'd by L. 1877, c. 416; L. 1895, c. 946; L. 1911, c. 569 (in effect Sept. 1, 1911).

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[1] Until 1883 this court was called the Marine Court. The name was changed by L. 1883, c. 26.

Where the sum of $5,000 is found in §§ 315, 316, the amount was, before Sept. 1, 1911, $2,000. This change was made by L. 1911, c. 569. This amendment has been held unconstitutional and void in *Lewkowics* v. *Queen Aeroplane Co.*, 207 N. Y. 290.

§ 316. [Am'd, 1879, 1889, 1911.] The last section limited.

The jurisdiction conferred by the last section is subject to the following limitations and regulations:

1. In an action wherein the complaint demands judgment for a sum of money only, the sum, for which judgment is rendered in favor of the plaintiff, cannot exceed five thousand dollars, exclusive of interest, and costs as taxed; except where it is brought upon a bond or undertaking given in an action or special proceeding in the same court, or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in the next section. Where the action is brought upon a bond or other contract, the judgment must be for the sum actually due, without regard to a penalty therein contained; and where the money is payable in instalments, successive actions may be brought for the instalments, as they become due.

2. In an action to recover one or more chattels, a judgment cannot be rendered in favor of the plaintiff, for a chattel or chattels, the aggregate value of which exceeds five thousand dollars.

From the same sources as the last section. Am'd by L. 1879, c. 542; L. 1889, c. 441; L. 1911, c. 569 (in effect Sept. 1, 1911).

§ 317. [Am'd, 1895.] Jurisdiction in special causes.

The city court of the city of New York possesses the same jurisdiction in the following actions as the supreme court of the state:

1. An action in favor of a person, belonging to a vessel in the merchant service, against the owner, master, or commander thereof, for the reasonable value of services, or for the breach of a contract to pay for services, rendered or to be rendered on board of the vessel, during a voyage, wholly or partly performed, or intended to be performed by it.

2. An action in favor of or against a person, belonging to or on board of a vessel in the merchant service to recover damages for an assault, battery, or false imprisonment, committed on board the vessel, upon the high seas, or in a place without the United States.

But this section does not confer upon the city court authority to proceed as a court of admiralty or maritime jurisdiction.

From L. 1872, c. 629, § 3, subds. 13, 14; 2 R. L., p. 382, § 106. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 318. [Am'd, 1911.] Power to naturalise aliens.

The court shall have power to naturalise an alien.

From L. 1852, c. 389, part of § 10. Am'd by L. 1911, c. 569 (in effect Sept. 1, 1911).

§ 319. [Am'd, 1895.] Removal of action to supreme court from city court.

The supreme court, at a term held in the first judicial district, may, by an order made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action brought in the city court, for the purpose of changing the place of trial thereof. Where an order for removal is made, as prescribed in this section, the place of trial must be changed by the same order to another county, and the subsequent proceedings therein must be the same as if the action had been originally brought in the supreme court. The provisions of sections 344, 345 and 346 of this act apply to an application to remove such an action, and to the proceedings upon and subsequent to the removal, as if the city court

were specified in those sections in place of the county court, and a justice thereof in place of the county judge.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 319a. [Added, 1913.] Removal of cause in certain cases from city court to supreme court.

The supreme court, at a term held in the first judicial district, must, on the motion of any party, by an order made at any time before the entry of judgment, remove to itself an action brought in the city court of the city of New York in the following cases:

1. An action to foreclose or enforce a lien, for a sum exceeding two thousand dollars, exclusive of interest, upon one or more chattels.

2. An action wherein the complaint demands judgment for a sum of money only, exceeding two thousand dollars, exclusive of interest and costs as taxed; except where the action is brought upon a bond or undertaking given in an action or special proceeding in the same court, or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in section 317 of this code.

3. An action to recover one or more chattels the aggregate value of which exceeds two thousand dollars.

Upon the entry of the order of removal in the office of the clerk of the county of New York, the city court shall proceed no further therein, and the clerk of the city court must forthwith deliver to the clerk of the county of New York all papers filed therein, and certified copies of all minutes and entries relating thereto, which must be filed, entered or recorded, as the case requires, in the office of the clerk of the county of New York, and thereupon the supreme court shall proceed in said action as though said action had been commenced in said supreme court, and all proceedings had in the city court prior to the entry of said order of removal shall be of like force and effect as though had in the supreme court.

Added by L. 1913, c. 210 (in effect April 4, 1913).

§ 319b. [Added, 1913.] Vacation of judgment in certain cases.

Whenever judgment has been or shall be entered in the city court of the city of New York in any one or more of the following cases, to wit:

1. An action to foreclose or enforce a lien, for a sum exceeding two thousand dollars, exclusive of interest, upon one or more chattels;

2. An action wherein the complaint demands judgment for a sum of money only, and the judgment is in favor of the plaintiff, and exceeds two thousand dollars, exclusive of interest and costs as taxed; except where the action is brought upon a bond or undertaking given in an action or special proceeding in the same court or before a justice thereof; or to recover damages for a breach of promise of marriage; or where it is a marine cause, as that expression is defined in section 317 of this code.

3. An action to recover one or more chattels, and the judgment is in favor of the plaintiff for a chattel or chattels, the aggregate value of which exceeds two thousand dollars.

Any party to such action, at any time after the entry of such judgment, may apply to the said city court to have such judgment vacated, and thereupon the said city court may in its discretion vacate such judgment. Any case, wherein a judgment has been so vacated, may be re-

moved to the supreme court in the first judicial district, as provided in section 319a.

Added by L. 1913, c. 211 (in effect April 4, 1913).

§ 320. [Am'd, 1877, 1907.] Justices; their general duties.

The court consists of ten justices, one of whom is the chief justice of the court. Each justice must perform his share of the labors and duties appertaining to the office. One of the justices must attend at the chambers of the court, from ten o'clock in the morning until four o'clock in the afternoon of each day, except Sunday, a public holiday, or a day upon which the inhabitants of the city of New York generally refrain from business. Each justice, while in the rooms of the court, and not actually engaged in the performance of other official duties, must act upon any application for his official action, properly made to him. The justice, assigned to a trial term or a special term, must remain in attendance, until the day calendar is disposed of, or for such other time as is reasonable.

From L. 1849, c. 144, §§ 1, 8; L. 1852, c. 389, § 1; L. 1870, c. 582, § 2; L. 1872, c. 629, § 4; see, also, 2 R. L., p. 383, § 108. Am'd by L. 1877, c. 416; L. 1907, c. 707 (in effect July 22, 1907).

§ 321. How suspended from office.

Where it appears presumptively, to the satisfaction of the governor, that a justice of the court has been guilty of corruption, or other gross misconduct in office; or habitually neglects to perform his share of the labors and duties appertaining to the office; or is incapable of properly discharging the same; the governor may, in his discretion, make an order, suspending that justice from the exercise of the duties of his office, and directing that his compensation cease. Such an order must recite the grounds upon which it is made; and it remains in force, unless it is sooner revoked by the governor, until the final adjournment of the next session of the legislature; or, if the legislature is then in session, until the final adjournment of that session.

From L. 1849, c. 144, § 9.

§ 322. [Am'd, 1902.] Chief-justice; how designated; his general duties, etc.

The justices of the court, or a majority of them, must, from time to time, as a vacancy occurs in the office of chief-justice, designate one of their number to be chief-justice. A certificate of the designation, under the hands of the justices making the same, must be filed in the office of the clerk of the court. The person so designated shall be chief-justice during his term of office. The chief-justice has the like authority, within the jurisdiction of the court, as a presiding justice of the supreme court.

From L. 1872, c. 629, § 4. Am'd by L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 323. [Am'd, 1909.] Justices may make rules.

The justices of the court, or a majority of them, may, from time to time, establish rules of practice for the court, not inconsistent with this act, or with the general rules of practice, established as prescribed in section 94 of the Judiciary Law. The latter govern the practice in the court, as far as they are applicable thereto.

From L. 1875, c. 479, § 56. Am'd by L. 1909, c. 65.

§ 324. [Am'd, 1902.] Court when open; justices to designate terms; routine of business, etc.

The court is always open for the transaction of any business, for which notice is not required to be given to an adverse party. The justices of the court, or a majority of them, from time to time must appoint and may alter, the times of holding special and trial terms of the court. They must prescribe the duration of the terms; designate the trial terms at which jurors are required to attend; and assign the justice to preside and attend at each of the terms so appointed. In case of the inability of a justice to preside or attend, another justice may preside or attend in his place. Each trial and special term must be held by one justice. Two or more special or trial terms may be appointed to be held at the same time.

From L. 1872, c. 629, § 4. Am'd by L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 325. Terms where held; publication of appointments.

Each term so appointed must be held at the city-hall in the city of New-York, except that auxiliary or additional parts, for the transaction of any business specified in the appointment, may be held elsewhere within the city of New-York, as designated in the appointment. An appointment must be published in two newspapers, published in the city of New-York, at least once in each week, for three successive weeks, before a term is held in pursuance thereof.

From L. 1875, c. 479, § 28.

§ 326. Justices may take oaths, acknowledgments, etc.

Each of the justices may, within the city of New-York, administer an oath, or take a deposition, or the acknowledgment or proof of the execution of a written instrument, and certify the same, in like manner and with like authority and effect, as a justice of the supreme court.

From L. 1874, c. 545, § 8.

§ 327. [Am'd, 1895.] Orders, etc., how made.

In an action brought in the court, an order cannot be made, or a warrant of attachment granted by an officer, other than a justice of the court; and each provision of this act, which empowers an officer, other than a judge of the court in which an action is brought, to make an order therein, must be construed as being exclusive of an action brought in the city court.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 328. [Am'd, 1877, 1891, 1906, 1907, 1910, 1911, 1912.] Clerk, deputy clerks, assistants, stenographer, etc.; their salaries.

The court has a clerk who is appointed, and may be removed, by the justices thereof, or a majority of them, for cause upon charges and after a hearing after notice, and who shall receive a salary of six thousand dollars per annum. The justices of the court or a majority of them must appoint, and may remove, six deputy clerks and not more than twenty-one assistants and a stenographer and typewriter operator for the purpose of copying their minutes and opinions and doing such other confidential work which may be required by said justices or the clerk of the court. The clerk is responsible for the faithful discharge of his duty by each deputy-clerk, and each assistant and the stenographer and typewriter operator. Each deputy-clerk, each assistant, and the stenographer and

typewriter operator, is entitled to a salary, fixed and to be paid as prescribed by law.

From L. 1872, c. 438, § 1; L. 1857, c. 295, § 6; L. 1873, c. 453, § 2; L. 1876, c. 413, §§ 1, 4. Am'd by L. 1877, c. 416; L. 1891, c. 154; L. 1906, c. 662; L. 1907, c. 708; L. 1910, c. 579; L. 1911, c. 173; L. 1912, c. 466 (in effect Sept. 1, 1912).

§ 329. [Am'd, 1877, 1907.] General duties of deputy-clerk.

The deputy-clerk has all the powers, and may perform all the duties of the clerk, when the office of clerk is vacant, or at the clerk's office, when the clerk is absent therefrom, or at a term or sitting of the court which the deputy-clerk attends.

From L. 1857, c. 295, § 6. Am'd by L. 1877, c. 416; L. 1907, c. 708 (in effect July 23, 1907).

§ 330. [Am'd, 1877.] Special deputy-clerks.

The clerk may designate as many of his assistants, as the justices of the court, or a majority of them deem necessary, as special deputy-clerks. Each special deputy-clerk possesses, in the absence of the clerk and a deputy-clerk, the same powers as the clerk, at any sitting or term of the court which he attends, with respect to the business transacted thereat.

New. Am'd by L. 1877, c. 416.

§ 331. [Am'd, 1877.] Clerk to account monthly for fees, and pay over the same.

The clerk must receive, for the use of the city of New York, the fees allowed by law. He shall not perform any service, for which a fee is allowed by law, until the fee therefor is paid to him. He must, on the first day of each month, or within three days thereafter, render to the comptroller of the city, an account, under oath, of all fees received, directly or indirectly, during the preceding month, by him, or by a deputy-clerk, or either of his assistants, for any official service; and he must, at the same time, pay the same into the treasury of the city of New York. When the return and payment are so made, the clerk is entitled to receive his compensation, for the period included in the return. He is not entitled to compensation for a period, for which he has not made his return and payment.

From L. 1849, c. 144, § 5. Am'd by L. 1877, c. 416.

§ 332. [Am'd, 1877, 1906, 1907.] Stenographers.

The justices of the court or a majority of them must appoint nine stenographers of the court, and may at pleasure remove either of them. The justices of the court, or a majority of them, must, from time to time, assign each of the stenographers to duty at the trial or special term. Each stenographer is entitled to a salary, fixed and to be paid as prescribed by law and must attend the term to which he is assigned.

From L. 1876, c. 413, §§ 1, 4. Am'd by L. 1877, c. 416; L. 1906, c. 61 (this act repeals all acts or parts of acts which provide for the appointment of additional stenographers for this court); L. 1907, c. 708 (in effect July 23, 1907).

§ 333. [Am'd 1877, 1907, 1909.] Official oath; interpreters.

The justices of the court or a majority of them, from time to time, must appoint, and may at pleasure remove, three official interpreters of the court, who are entitled to a salary, fixed and to be paid as prescribed by law. Before entering upon their official duties the clerk, deputy-clerks, assistant clerks, stenographers, interpreters and attendants must subscribe and file in the office of the clerk of the city of New York, the constitutional oath of

office. Each interpreter must attend any trial or special term of the court, where his services are required; and the justice therein presiding shall regulate his attendance thereat.

From L. 1876, c. 413, §§ 1, 4. Am'd by L. 1877, c. 416; L. 1907, c. 708; L. 1909, c. 387 (in effect Sept. 1, 1909).

§ 334. [Omitted; see Table, p. 111.] Id.; penalty for misconduct.

If an official interpreter knowingly and wilfully, falsely interprets any evidence, matter or thing, between a witness and the court, or a justice thereof, in the course of an action or special proceeding, he is guilty of perjury.

From L. 1867, c. 784, § 8. Am'd by L. 1907, c. 707 (in effect July 22, 1907).

§ 335. [Am'd, 1877, 1907, 1913.] The justices must appoint attendants; their salaries.

The justices of the court or a majority of them must appoint, and may at pleasure remove, as many attendants upon the court as they deem necessary, not exceeding twenty-five. The justices of the court, or a majority of them, may regulate their attendance. Each attendant is entitled to a salary fixed, and to be paid as prescribed by law.

From L. 1876, c. 413, §§ 1, 4. Am'd by L. 1877, c. 416; L. 1907, c. 708; L. 1912, c. 465 (in effect Sept. 1, 1912.)

§ 336. Clerks, interpreter and attendants not to receive fees.

The clerk, the deputy-clerk, an assistant to the clerk, the official interpreter, or an attendant, shall not receive any fee or compensation, except his salary, for any official service performed by him.

From L. 1872, c. 438, § 8.

§ 337. [Am'd, 1877.] Suspension of an officer of the court.

A justice of the court may, by an instrument under his hand, suspend a stenographer, or an officer specified in the last section, for a period not exceeding ten days from the filing thereof. Such an instrument must express the cause of the suspension; it must be filed in the office of the clerk of the city and county of New-York; and it may be revoked, at any time before the expiration of the period of suspension, by an instrument filed in like manner, under the hand of the justice who executed the first instrument, or the hands of a majority of the justices of the court. Where such an instrument has been revoked, the officer shall not be again suspended for the same cause.

From L. 1849, c. 144, § 10. Am'd by L. 1877, c. 416.

§ 338. [Am'd, 1910.] What mandates may be executed without the city.

A mandate of the court can be executed only within the city[1] of New-York, except as follows:

1. An execution upon a judgment rendered therein, for a sum exceeding twenty-five dollars, may be issued out of the court, tested in the name of the chief-justice thereof, to the sheriff of any county, wherein the judgment has been duly docketed.

2. A subpoena may be served within either of the counties of Richmond, Kings, Queens, or Westchester.

[1] By L. 1897, c. 378, § 1345, L. 1901, c. 466, § 1345 (the Charter of New York city), the word "city" in this section means the city of New York as it existed prior to January 1, 1898, i. e., the former city before its consolidation with Brooklyn, Long Island City, etc. The same is true as to the word "city" in §§ 3165, 3169, 3170, 3268, post.

3. A warrant to apprehend a witness for a failure to obey a subpoena, may be executed by the sheriff of the city and county of New York, or a marshal of that city, within either of those counties.

4. [Am'd, 1910.] An order duly made, in an action or special proceeding pending in the court, requiring the performance of an act by a party thereto, or by an officer, may be served upon a person bound to obey the order, and his obedience thereto may be required in any part of the State.

5. An order to show cause, why a person should not be punished for a contempt of the court, may be served by any person in any part of the State.

6. A warrant to apprehend, and bring before the court, a person charged with such a contempt, may be executed by the sheriff of the city and county of New York, or a marshal of that city, in any part of the State.

From L. 1875, c. 479, § 40. Am'd by L. 1910, c. 583 (in effect June 22, 1910).

§ 339. [Am'd, 1895.] Direction and execution of mandates.

In an action brought in the court, an order of arrest, a warrant of attachment, an execution, or a requisition to replevy a chattel, must be directed to and executed by the sheriff. Any other mandate, which must have been directed to and executed by the sheriff of the city and county of New York, if it issued out of the supreme court, may, where it issues out of the city court, be directed to and executed either by that sheriff, or a marshal of that city, named therein. A marshal is entitled to the same fees as the sheriff, upon a mandate directed to him, or upon the service of a summons; and each provision of law, relating to the execution of a mandate by the sheriff, and the power and control of the court over the sheriff executing the same, applies to the marshal. The return of a marshal to such a mandate, or his certificate of the execution thereof, or of the service of any paper served by him, has the same force and effect, as the like return and certificate of a sheriff.

From L. 1865, c. 400, §§ 2, 3; L. 1872, c. 629, § 8; L. 1875, c. 626; 2 R. L., p. 384, § 114. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 339a. [Added, 1912.] Destruction of records and papers.

The justices of the city court, or a majority of them, may, upon petition of the clerk of such court, by order made at any term thereof, direct the clerk of the court to destroy any records or papers deposited or filed in his office which the justices of the court or a majority of them conclude to be no longer necessary for any purpose whatsoever.

Added by L. 1912, c. 515 (in effect Sept. 1, 1912).

TITLE V.

The county courts.

Sec. 340. Jurisdiction.
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359. Stenographers for county courts in Kings, Queens and Richmond counties.
360. Interpreters for county court, etc., in Kings county.
361. Stenographers.

§ 340. [Am'd, 1877, 1895, 1909, 1910.] Jurisdiction.

The jurisdiction of each county court extends to the following actions and special proceedings, in addition to the jurisdiction, power, and authority, conferred upon a county court, in a particular case, by special statutory provisions:

1. To an action for the partition of real property; for dower; for the foreclosure, redemption, or satisfaction of a mortgage upon real property; or to procure a judgment requiring a specific performance of a contract, relating to real property; where the real property, to which the action relates, is situated within the county; or to foreclose a lien upon a chattel, in a case specified in section 206 of the Lien Law,[1] where the lien does not exceed one thousand dollars in amount, and the chattel is found within the county.

2. To an action in favor of the executor, administrator or assignee of a judgment creditor, or in a proper case, in favor of the judgment creditor, to recover a judgment for money remaining due upon a judgment rendered in the same court.

3. To an action for any other cause, where the defendant is, or, if there are two or more defendants, where all of them are, at the time of the commencement of the action, residents of the county, and wherein the complaint demands judgment for a sum of money only, not exceeding two thousand dollars; or to recover one or more chattels, the aggregate value of which does not exceed one thousand dollars, with or without damages for the taking or detention thereof.

4. To the custody of the person and the care of the property, concurrently with the supreme court, of a resident of the county, who is incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness; or imbecility arising from old age or loss of memory and understanding or other cause; and to every special proceeding, which the supreme court has jurisdiction to entertain, for the appointment of a committee of the person or of the property of such an incompetent person or for the sale or other disposition of the real property situated within the county of a person, wherever resident, who is so incompetent for either of the reasons aforesaid, or who is an infant; or for the sale or other dis-

[1] Section 206 of the Lien Law is the same as the former § 1737 of this Code, which has been retained in this edition for convenience of reference.

position of the real property, situated within the county, of a domestic religious corporation.

From Co. Proc., § 80, subd. 1; L. 1870, c. 467, § 1; L. 1884, c. 543. Am'd by L. 1877, c. 416; L. 1895, c. 946; L. 1909, c. 65; L. 1910, c. 123 (in effect Sept. 1, 1910).

§ 341. [Am'd, 1880, 1911, 1914.] Domestic corporation, etc., when deemed resident, etc.

For the purpose of determining the jurisdiction of a county court, in either of the cases specified in the last section, a domestic corporation or joint-stock association, whose principal place of business is established, by or pursuant to a statute, or by its articles of association, or whose principal place of business or any part of its plant or plants, shops, factories or offices is actually located within the county, or in case of a railroad corporation where any portion of the road operated by it is within the county, it is deemed a resident of the county; and personal service of a summons, made within the county, as prescribed in this act, or personal service of a mandate, whereby a special proceeding is commenced, made within the county, as prescribed in this act for personal service of a summons, is sufficient service thereof upon a domestic corporation wherever it is located. Provided, however, that a city which shall include within its boundaries more than one county shall not for the purpose of conferring jurisdiction on a county court be deemed a domestic corporation resident of any county so included.

New. Am'd by L. 1899, c. 320; L. 1911, c. 68; L. 1914, c. 350 (in effect April 15, 1914).

§ 342. [Am'd, 1877.] Action, etc., wherein county judge is incapable to act.

If the county judge is, for any cause, incapable to act in an action or special proceeding, pending in the county court, or before him, he must make, and file in the office of the clerk, a certificate of the fact; and thereupon the special county judge, if any, and if not disqualified, must act as county judge in that action or special proceeding. Upon the filing of the certificate, where there is no special county judge, or the special county judge is disqualified, the action or special proceeding is removed to the supreme court, if it is then pending in the county court; if it is pending before the county judge, it may be continued before any justice of the supreme court within the same judicial district. The supreme court, upon the application of either party, made upon notice, and upon proof that the county judge is incapable to act in an action or special proceeding pending in the county court, may, and if the special county judge is also incapable to act, must, make an order removing it to the supreme court. Thereupon the subsequent proceedings in the supreme court must be the same as if it had originally been brought in that court, except that an objection to the jurisdiction may be taken, which might have been taken in the county court.

From Co. Proc., § 30, subd. 13 (last clause), as am'd by L. 1876, c. 431, § 3. Am'd by L. 1877, c. 416.

§ 343. Supreme court may remove action, and change place of trial.

The supreme court may, by an order, made at any time after joinder of an issue of fact, and before the trial thereof, remove to itself an action, brought in a county court, under subdivision second or subdivision third of the last section but two, for the purpose of changing the place of trial thereof. Where an order for removal is made, as prescribed in this section, the place of trial of the action must be changed by the same order to another county; and the subsequent proceedings therein must be the

same, as if the action had been originally brought in the supreme court.

From Co. Proc., § 30, subd. 1 (last clause); see L. 1873, c. 239, § 8.

§ 344. Effect of order of removal; appeal, etc.

An order of removal, made as prescribed in either of the last two sections, takes effect upon the entry thereof in the office of the county clerk. Where the order directs that the action be tried in another county, the clerk with whom it is entered, must forthwith deliver to the clerk of that county, all papers filed therein, and certified copies of all minutes and entries relating thereto; which must be filed, entered, or recorded, as the case requires, in the office of the last mentioned clerk. The provisions of section 271[1] of this act apply to an appeal taken from such an order.

See L. 1873, c. 239, §§ 5, 9.

§ 345. Stay of proceedings.

An order to stay proceedings, for the purpose of affording an opportunity to make the application for removal, may be made by the county judge, or by a judge authorized to make such an order in the supreme court, and with like effect and under like circumstances.

See Id., § 6.

§ 346. Removal of action not to impair process, etc.

The removal of an action or special proceeding, as prescribed in this title, does not invalidate, or in any manner impair, a process, provisional remedy, or other proceeding, or a bond, undertaking, or recognizance in the action or special proceeding so removed; each of which continues to have the same validity and effect, as if the removal had not been made. Where bail was given, the surrender of the defendant in the supreme court has the same effect, as a surrender in the county court would have had, if the action or special proceeding had remained therein.

See Id., § 10.

§ 347. County court may send its process to any county.

A county court has power, in an action or special proceeding of which it has jurisdiction, to send its process and other mandates into any county of the State, for service or execution, and to enforce obedience thereto, with like power and authority as the supreme court.

See Id., § 11.

§ 348. When jurisdiction, etc., co-extensive with supreme court.

Where a county court has jurisdiction of an action or a special proceeding, it possesses the same jurisdiction, power and authority in and over the same, and in the course of the proceedings therein, which the supreme court possesses in a like case; and it may render any judgment, or grant either party any relief, which the supreme court might render or grant in a like case, and may enforce its mandates in like manner as the supreme

[1] This refers to § 271 of the Code as it read before Jan. 1, 1896. It was repealed by L. 1895, c. 946, § 2. The present § 271 was enacted by L. 1897, c. 36. See § 263, ante, foot-note.

court. And the county judge possesses the same power and authority, in the action or special proceeding, which a justice of the supreme court possesses, in a like action or special proceeding, brought in the supreme court.

See Id., § 1.

§ 349. Power of county judge in special proceedings.

The county judge also possesses the same power and authority, in a special proceeding, which can be lawfully instituted before him, out of court, which a justice of the supreme court possesses in a like special proceeding, instituted before him in like manner.

See Id., § 1.

§ 350. Fines and penalties; how remitted.

Upon the application of a person, who has been fined by a court, or of a person whose recognizance has become forfeited, or of his surety, the county court of the county in which the term of the court was held, where the fine was imposed, or the recognizance taken, may, except as otherwise prescribed in the next section, upon good cause shown, and upon such terms as it deems just, make an order, remitting the fine, wholly or partly, or the forfeiture of the recognizance, or part of the penalty thereof; or it may discharge the recognizance. If a fine so remitted has been paid, the county treasurer, or other officer, in whose hands the money remains, must pay the same, or the part remitted, according to the order.

From 2 R. S. 486 (Part 3, c. 8, tit. 6), § 37.

§ 351. [Am'd, 1895.] Restrictions upon power to remit.

The last section does not authorize a county court to remit any part of a fine exceeding two hundred and fifty dollars imposed by the supreme court upon conviction for a criminal offense; or a fine to any amount imposed by a court upon an officer or other person, for an actual contempt of court, or for disobedience to its process, or other mandate; or to remit or discharge a recognizance taken in its county for the appearance of a person in another county. In the latter case, the power of remitting or discharging the recognizance is vested in the county court of the county, in which the person is bound to appear.

From 2 R. S. 486 (Part 3, c. 8, tit. 6), § 38. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 352. Notice of application, etc.; costs to be paid on remission.

An application for an order, as prescribed in the last section but one, cannot be heard, until such notice thereof as the court deems reasonable, has been given to the district-attorney of the county, and until he has had an opportunity to examine the matter, and prepare to resist the application. And upon granting such an order, the court must always impose, as a condition thereof, the payment of the costs and expenses, if any, incurred in an action or special proceeding for the collection of the fine, or the penalty of the recognizance.

From 2 R. S. 486 (Part 3, c. 8, tit. 6), §§ 39, 41.

§ 353. Fines imposed by justices of the peace; how remitted.

Where a person has been fined by a court of special sessions, or by a justice of the peace, upon a conviction for an offence, and has been committed to jail for non-payment of the fine, the county court of the county may make an order, remitting the fine, wholly or partly, and discharging him from his imprisonment. The power conferred by this section must be exercised in the manner prescribed, and subject to the provisions contained in the last three sections.

From Id., § 42.

§ 354. Who may make orders.

In an action or special proceeding in a county court, an order may be made without notice, or an order to stay proceedings may be made upon notice, by a justice of the supreme court, or by the county judge of the county where the attorney for the applicant resides, in a case where the county judge, in whose court the action or special proceeding is brought, may make the same, out of court; and with like effect.

See L. 1847, c. 280, § 34.

§ 355. [Am'd, 1877. Bracketed part omitted, 1909; see Table, p. iii.] County court; sessions and terms.

The county court is always open for the transaction of any business, for which notice is not required to be given to an adverse party, except where it is specially prescribed by law, that the business must be done at a stated term. [The county judge must, from time to time, appoint the times and places for holding terms of his court. At least two terms, for the trial of issues of law or of fact, must be appointed to be held in each year. Each term may continue as long as the county judge deems necessary. The county judge may, by a new appointment, change the day appointed for holding a term, or appoint one or more additional terms, or dispense with the holding of a term, without affecting any other term or terms theretofore appointed to be held. Each term must be held at the place designated by statute for that purpose: except that the county judge may, from time to time, adjourn a term to any place within the county, for the hearing and decision of motions and appeals, and trials and other proceedings without a jury; and may appoint as many terms as he thinks proper to be held, either at the court-house or elsewhere in the county, for the same purpose.]

From Co. Proc., § 31, as am'd by L. 1876, c. 431, § 4; L. 1847, c. 470, § 24. Am'd by L. 1877, c. 416.

§ 356. [Added, 1909.] Power of county judge when holding court in another county.

During the period that any county judge shall be in a county other than his own, for the purpose of holding courts therein, he may exercise all the powers and perform all the duties of the county judge of such other county, which said last-mentioned judge is by law authorized to exercise and perform out of court or in vacation; provided, however, that nothing herein contained shall empower him to perform the duties of surrogate in such other county.

From L. 1877, c. 11, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909). Former § 356 transferred to Judiciary Law and County Law (see Table on p. iii, ante).

§ 357. [Omitted; see Table, p. iii.] Jurors, how drawn and notified.

Jurors for the terms of the county court, at which issues of fact are triable by jury, must be drawn and notified in the same manner as for a trial term of the supreme court.

From Co. Proc., § 32. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§§ 358-361. [Omitted; see Table, p. iii.]

CHAPTER IV.

Limitation of the Time of Enforcing a Civil Remedy.

TITLE I.—Actions for the Recovery of Real Property.
TITLE II.—Actions other than for the Recovery of Real Property.
TITLE III.—General Provisions.

TITLE I.

Actions for the recovery of real property.

Sec. 362. When the people will not sue.
363. Action by grantee from the State.
364. Action after annulling letters patent.
365, 366. Seisin within twenty years, when necessary, etc.
367. Action after entry.
368. Possession, when presumed; occupation presumed to be under legal title.
369. Adverse possession under written instrument or judgment.
370. Id.; what constitutes it.
371. Adverse possession under claim of title not written.
372. Id.; what constitutes it.
373. Relation of landlord and tenant, as affecting adverse possession.
374. Right not affected by descent cast.
375. Certain disabilities excluded from time to commence action.

§ 362. When the people will not sue.

The people of the State will not sue a person for or with respect to real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either,

1. The cause of action accrued within forty years before the action is commenced; or,

2. The people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time.

From Co. Proc., § 75.

§ 363. Action by grantee from the State.

An action shall not be brought for or with respect to real property, by a person claiming by virtue of letters patent or a grant, from the people of the State, unless it might have been maintained by the people, as prescribed in this title, if the patent or grant had not been issued or made.

From Id., § 76.

§ 364. Action after annulling letters patent.

Where letters patent or a grant of real property, issued or made by the people of the State, are declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion or concealment, or of a forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title; an action of ejectment, to recover the premises in question, may be commenced, either by the people, or by a subsequent patentee or grantee of the same premises, his heirs, or assigns, within twenty years after the determination is made; but not after that period.

From Id., § 77.

§ 365. Seisin within twenty years, when necessary, etc.

An action to recover real property, or the possession thereof,

cannot be maintained by a party, other than the people, unless the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the commencement of the action.

From Co. Proc., § 78.

§ 366. The same.

A defence or counterclaim, founded upon the title to real property, or to rents or services out of the same, is not effectual, unless the person making it, or under whose title it is made, or his ancestor, predecessor, or grantor, was seized or possessed of the premises in question, within twenty years before the committing of the act, with respect to which it is made.

From Id., § 79.

§ 367. Action after entry.

An entry upon real property is not sufficient or valid as a claim, unless an action is commenced thereupon, within one year after the making thereof, and within twenty years after the time, when the right to make it descended or accrued.

From Id., § 80.

§ 368. Possession, when presumed; occupation presumed to be under legal title.

In an action to recover real property, or the possession thereof, the person who establishes a legal title to the premises is presumed to have been possessed thereof, within the time required by law; and the occupation of the premises, by another person, is deemed to have been under and in subordination to the legal title, unless the premises have been held and possessed adversely to the legal title, for twenty years before the commencement of the action.

From Id., § 81.

§ 369. Adverse possession under written instrument or judgment.

Where the occupant, or those under whom he claims, entered into the possession of the premises, under claim of title, exclusive of any other right, founding the claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court; and there has been a continued occupation and possession of the premises, included in the instrument, decree, or judgment, or of some part thereof, for twenty years, under the same claim; the premises so included are deemed to have been held adversely: except that where they consist of a tract, divided into lots, the possession of one lot is not deemed a possession of any other lot.

From Id., § 82.

§ 370. Id.; what constitutes it.

For the purpose of constituting an adverse possession, by a person claiming a title, founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases:

1. Where it has been usually cultivated or improved.
2. Where it has been protected by a substantial inclosure.
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, either for the purposes of husbandry, or for the ordinary use of the occupant.

Where a known farm or a single lot has been partly improved, the portion of the farm or lot that has been left not cleared, or not inclosed, according to the usual course and custom of the adjoining country, is deemed to have been occupied for the same length of time, as the part improved and cultivated.

From Id., § 83.

§ 371. Adverse possession under claim of title not written.

Where there has been an actual continued occupation of premises, under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no others, are deemed to have been held adversely.

From Id., § 84.

§ 372. Id.; what constitutes it.

For the purpose of constituting an adverse possession, by a person claiming title, not founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in either of the following cases, and no others:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

From Id., § 85.

§ 373. Relation of landlord and tenant, as affecting adverse possession.

Where the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years after the termination of the tenancy; or, where there has been no written lease, until the expiration of twenty years after the last payment of rent; notwithstanding that the tenant has acquired another title, or has claimed to hold adversely to his landlord. But this presumption shall not be made, after the periods prescribed in this section.

From Id., § 86.

§ 374. Right not affected by descent cast.

The right of a person to the possession of real property is not impaired or affected, by a descent being cast, in consequence of the death of a person in possession of the property.

From Id., § 87.

§ 375. Certain disabilities excluded from time to commence action.

If a person, who might maintain an action to recover real property, or the possession thereof, or make an entry, or interpose a defence or counterclaim, founded on the title to real property, or to rents or services out of the same, is when his title first descends, or his cause of action or right of entry first accrues, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life:

The time of such a disability is not a part of the time, limited in this title, for commencing the action, or making the entry, or interposing the defence or counterclaim; except that the time so limited cannot be extended more than ten years, after the disability ceases, or after the death of the person so disabled.

From Id., § 88.

TITLE II.

Actions other than for the recovery of real property.

Sec. 376. When satisfaction of judgment presumed.
377. Effect of return of execution.
378. How presumption raised.
379. Limitation of action to redeem from a mortgage.
380. Other periods of limitation.
381. Within twenty years.
382. Within six years.
383. Within three years.
384. Within two years.
385. Within one year.
386. When cause of action accrues on a current account.
387. Action for penalty, etc., by any person who will sue.
388. Actions not before provided for.
389. Actions by the people subject to the same limitations.
390. Actions against a non-resident, upon a demand barred by the law of his residence.
391. When person liable, etc., dies without the State.
392. Cause of action accruing between the death of a testator or intestate, and the grant of letters.
393. No limitation of action on bank notes, etc.
394. Action against directors, etc., of banks.
395. Acknowledgment of new promise must be in writing.
396. Exceptions, as to persons under disabilities.
397. Defence or counterclaim.

§ 376. [Am'd, 1877, 1894.] When satisfaction of judgment presumed.

A final judgment or decree for a sum of money, or directing the payment of a sum of money, heretofore rendered in a surrogate's court of the state, or heretofore or hereafter rendered, in a court of record within the United States, or elsewhere, or hereafter docketed pursuant to the provisions of section 3017 of this act, is presumed to be paid and satisfied, after the expiration of twenty years from the time, when the party recovering it was first entitled to a mandate to enforce it. This presumption is conclusive, except as against a person who, within twenty years from that time, makes a payment or acknowledges an indebtedness of some part of the amount recovered by the judgment or decree, or his heir or personal representative, or a person whom he otherwise represents. Such an acknowledgment must be in writing, and signed by the person to be charged thereby.

From Co. Proc., § 90, subd. 1. Am'd by L. 1877, c. 416; L. 1894, c. 307.

§ 377. Effect of return of execution.

If the proof of payment, under the last section, consists of the return of an execution partly satisfied, the adverse party may show, in full avoidance of the effect thereof, that the alleged partial satisfaction did not proceed from a payment made, or a sale of property claimed, by him or by a person whom he represents.

New. Suggested by Henderson v. Cairns, 14 Barb. 15.

§ 378. How presumption raised.

A person may avail himself of the presumption created by the last section but one, under an allegation that the action was not commenced, or that the proceeding was not taken, within the time therein limited.

See § 413, post.

§ 379. Limitation of action to redeem from a mortgage.

An action to redeem real property from a mortgage, with or without an account of rents and profits, may be maintained by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises, for twenty years after the breach of a condition of the mortgage, or the non-fulfilment of a covenant therein contained.

New.

§ 380. Other periods of limitation.

The following actions must be commenced within the following periods, after the cause of action has accrued.

From Co. Proc., §§ 74, 89.

§ 381. [Am'd, 1877.] Within twenty years.

Within twenty years:

An action upon a sealed instrument.

But where the action is brought for breach of a covenant of seizin, or against incumbrances, the cause of action is, for the purposes of this section only, deemed to have accrued upon an eviction, and not before.

From Id., part of § 90. Am'd by L. 1877, c. 416.

§ 382. [Am'd, 1877, 1894.] Within six years.

Within six years:

1. An action upon a contract obligation or liability, express or implied; except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute; except a penalty or forfeiture.

3. An action to recover damages for an injury to property, or a personal injury; except in a case where a different period is expressly prescribed in this chapter.

4. An action to recover a chattel.

5. An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery. The cause of action, in such a case, is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

6. An action to establish a will. Where the will has been lost, concealed, or destroyed, the cause of action is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts upon which its validity depends.

7. An action upon a judgment or decree, rendered in a court not of record, except where a transcript shall be filed, pursuant to section 3017 of this act, and, also, except a decree heretofore rendered in a surrogate's court of the State. The cause of action, in such a case, is deemed to have accrued when final judgment was rendered.

From Co. Proc., § 91; 2 R. S. 295. Am'd by L. 1877, c. 416 and c. 422; L. 1894, c. 307 (in effect April 17, 1894).

§ 383. [Am'd, 1877.] Within three years.

Within three years:

1. An action against a sheriff, coroner, constable, or other officer, for the non-payment of money collected upon an execution.

2. An action against a constable, upon any other liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except an escape.

3. An action upon a statute, for a penalty or forfeiture, where the action is given to the person aggrieved, or to that person and the people of the State, except where the statute imposing it prescribes a different limitation.

4. An action against an executor, administrator, or receiver, or against the trustee of an insolvent debtor, appointed, as prescribed by law, in a special proceeding instituted in a court or before a judge, brought to recover a chattel, or damages for taking, detaining, or injuring personal property, by the defendant, or the person whom he represents.

5. An action to recover damages for a personal injury, resulting from negligence.

From Co. Proc., § 92. Am'd by L. 1877, c. 416.

§ 384. [Am'd, 1896, 1900.] Within two years.

Within two years:

1. An action to recover damages for libel, slander, assault, battery, seduction, criminal conversation, false imprisonment, malicious prosecution or malpractice.

2. An action upon a statute, for a forfeiture or penalty to the people of the state.

From Co. Proc., § 93. Am'd by L. 1896, c. 335; L. 1900, c. 117 (in effect Sept. 1, 1900).

§ 385. Within one year.

Within one year:

1. An action against a sheriff or coroner, upon a liability incurred by him, by doing an act in his official capacity, or by the omission of an official duty; except the non-payment of money collected upon an execution.

2. An action against any other officer, for the escape of a prisoner, arrested or imprisoned by virtue of a civil mandate.

From Co. Proc., § 94.

§ 386. When cause of action accrues on a current account.

In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item, proved in the account on either side.

From Id., § 95.

§ 387. Action for penalty, etc., by any person who will sue.

An action upon a statute for a penalty or forfeiture, given wholly or partly to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action is not commenced within the year by a private person, it may be commenced within two years thereafter, in behalf of the people of the State, by the attorney-general, or the district-attorney of the county where the offence was committed.

From Id., § 96.

§ 388. Actions not before provided for.

An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.

From Id., § 97.

§ 389. Actions by the people subject to the same limitations.

The limitations, prescribed in this title, apply alike to actions brought in the name of the people of the State, or for their benefit, and to actions by private persons.

From Id., § 98.

§ 390. [Am'd, 1916.] Action against a non-resident, upon a demand barred by the law of his residence.

Where a cause of action, which does not involve the title to or possession of real property within the State, accrues against a person, who is not then a resident of the State, an action cannot be brought thereon in a court of the State, against him or his personal representative, after the expiration of the time, limited by the laws of his residence, for bringing a like action, provided that if the limitation of the time fixed by the laws of his residence for bringing such action be less than the time fixed by the laws of this State for a like action, the limitation fixed by the laws of this State shall apply. This section shall not apply to a case in which a person is entitled, when this section as amended takes effect, to commence such action, where he commences the same before the expiration of six months after this section as amended takes effect; in which case the provisions of law applicable thereto immediately before this section as amended takes effect shall continue to be so applicable, notwithstanding the repeal thereof.

New. Am'd by L. 1916, c. 536 (in effect May 15, 1916).

§ 390a. [Added, 1902.] Action upon cause of action arising in another state or country and barred by its laws.

Where a cause of action arises outside of this state, an action cannot be brought, in a court of this state, to enforce said cause of action, after the expiration of the time limited by the laws of the state or country where the cause of action arose, for bringing an action upon said cause of action, except where the cause of action originally accrued in favor of a resident of this State. Nothing in this act contained shall affect any pending action or proceeding.

New. Added by L. 1902, c. 193 (in effect Sept. 1, 1902).

§ 391. [Am'd, 1877.] When person liable, etc., dies without the State.

If a person, against whom a cause of action exists, dies without the State, the time which elapses between his death, and the expiration of eighteen months after the issuing, within the State, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator.

New. Am'd by L. 1877, c. 416.

§ 392. [Am'd, 1877.] Cause of action accruing between the death of a testator or intestate, and the grant of letters.

For the purpose of computing the time, within which an action must be commenced in a court of the State, by an executor or administrator, to recover personal property, taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration; or to recover damages for taking, detaining, or injuring personal property within the same period; the letters are deemed to have been issued, within six years

after the death of the testator or intestate. But where an action is barred by this section, any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of twenty-one years, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such a disability, maintain an action to recover damages by reason thereof; in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator.

New. Am'd by L. 1877, c. 416.

§ 393. No limitation of action on bank notes, etc.

This chapter does not affect an action to enforce the payment of a bill, note, or other evidence of debt issued by a moneyed corporation, or issued or put in circulation as money.

From Co. Proc., § 108.

§ 394. [Am'd, 1877, 1897.] Action against directors, etc., of banks.

This chapter does not affect an action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute; but such an action must be brought within three years after the cause of action has accrued.

From Co. Proc., § 109. Am'd by L. 1877, c. 416; L. 1897, c. 281 (in effect Sept. 1, 1897).

§ 395. Acknowledgment or new promise must be in writing.

An acknowledgment or promise contained in a writing, signed by the party to be charged thereby, is the only competent evidence of a new or continuing contract, whereby to take a case out of the operation of this title. But this section does not alter the effect of a payment of principal or interest.

From Co. Proc., § 110.

§ 396. Exceptions, as to persons under disabilities.

If a person, entitled to maintain an action specified in this title, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, is, at the time when the cause of action accrues, either:

1. Within the age of twenty-one years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time limited in this title for commencing the action; except that the time so limited cannot be extended more than five years by any such disability, except infancy; or in any case, more than one year after the disability ceases.

From Id., § 101.

§ 397. Defence or counterclaim.

A cause of action, upon which an action cannot be maintained, as prescribed in this title, cannot be effectually interposed as a defence or counterclaim.

TITLE III.

General provisions.

Sec. 398. When action deemed to be commenced.
399. Attempt to commence action in a court of record.
400. Id.; in a court not of record.
401. Exception, when defendant is without the State.
402. Id.; when a person entitled, etc., dies before limitation expires.
403. Id.; when a person liable, etc., dies within the State.
404. In suits by aliens, time of disability in case of war to be deducted.
405. Provision where judgment has been reversed.
406. Stay by injunction, etc., to be deducted.
407. Certain actions by a principal, for misconduct of an agent, etc.
408. Disability must exist when right accrues.
409. If several disabilities, no limitation until all removed.
410. Provision when the action cannot be maintained without a demand.
411. Provision in case of submission to arbitration.
412. Provision when action is discontinued, etc., after answer.
413. How objection taken, under this chapter.
414. Cases to which this chapter applies.
415. Mode of computing periods of limitation.

§ 398. [Am'd, 1877.] When action deemed to be commenced.

An action is commenced against a defendant, within the meaning of any provision of this act, which limits the time for commencing an action, when the summons is served on him; or on a co-defendant who is a joint contractor, or otherwise united in interest with him.

From Co. Proc., § 99. Am'd by L. 1877, c. 416.

§ 399. Attempt to commence action in a court of record.

An attempt to commence an action, in a court of record, is equivalent to the commencement thereof against each defendant, within the meaning of each provision of this act, which limits the time for commencing an action, when the summons is delivered, with the intent that it shall be actually served, to the sheriff, or, where the sheriff is a party, to a coroner of the county, in which that defendant, or one of two or more co-defendants, who are joint contractors, or otherwise united in interest with him, resides or last resided; or, if the defendant is a corporation, to a like officer of the county, in which it is established by law, or wherein its general business is or was last transacted, or wherein it keeps, or last kept, an office for the transaction of business. But in order to entitle a plaintiff to the benefit of this section, the delivery of the summons to an officer must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service thereof upon the defendant sought to be charged, or by the first publication of the summons, as against that defendant, pursuant to an order for service upon him in that manner.

From Co. Proc., § 99.

§ 400. Id.; in a court not of record.

The last section, excluding the provision requiring a publication or service of the summons within sixty days, applies to an attempt to commence an action, in a court not of record, where the summons is delivered to an officer authorised to serve the same, within the city or town, wherein the person resides or the

corporation is located, as specified in that section; provided that actual service thereof is made with due diligence.

New.

§ 401. [Am'd, 1877, 1888, 1896.] Exception, when defendant is without the State.

If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against a person, he departs from the state, and remains continuously absent therefrom for the space of one year or more, or if, without the knowledge of the person entitled to maintain the action, he resides within the state under a false name, the time of his absence or of such residence within the state under such false name is not a part of the time, limited for the commencement of the action. But this section does not apply while a designation, made as prescribed in section 430 or in subdivision second of section 432 of this act remains in force.

From Co. Proc., § 100. Am'd by L. 1877, c. 416; L. 1888, c. 498; L. 1896, c. 665 (in effect Sept. 1, 1896).

§ 402. Id.; when a person entitled, etc., dies before limitation expires.

If a person, entitled to maintain an action, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representative, after the expiration of that time, and within one year after his death.

From Co. Proc., § 102.

§ 403. [Am'd, 1879, 1891, 1896.] Id.; when a person liable, dies within the State.

The term of eighteen months after the death, within this state, of a person against whom a cause of action exists, or of a person who shall have died within sixty days after an attempt shall have been made to commence an action against him pursuant to the provisions of section 399 of this act, is not a part of the time limited for the commencement of an action against his executor or administrator. If letters testamentary or letters of administration upon his estate are not issued, within this state, at least six months before the expiration of the time to bring the action, as extended by the foregoing provision of this section, the term of one year after such letters are issued is not a part of the time limited for the commencement of such an action. The time during which an action is pending in a court of record between a person or persons and an executor or administrator, wherein the person or persons claim to recover from the executor or administrator any money or other property claimed by said executor or administrator to belong to the estate of the decedent, or is embraced in the inventory of the assets of said decedent's estate, is not a part of the time limited for the commencement of an action against an executor or administrator, for a claim against the estate of the decedent until the final determination of the action brought to recover said or other property claimed by said executor or administrator to belong to said decedent's estate:

1. Where the claim against the estate of the decedent is liquidated by the recovery of a judgment thereon against an executor or administrator in an action in a court of record or under section 2718 of this code,[1] after trial on the merits.

[1] This refers to former § 2718 of this Code, before the revision of the Surrogates' Courts Act by L. 1914, c. 443. Parts of this section have been embodied in §§ 2677, 2678 of this Code as it now stands, while the remaining part has been repealed.

2. Where a legatee brings an action, or institutes a proceeding, against an executor or administrator with the will annexed, to enforce the payment of a legacy.

From Co. Proc., § 102; 2 R. S. 448. Am'd by L. 1879, c. 542; L. 1891, c. 70; L. 1896, c. 897 (in effect May 26, 1896).

§ 404. In suits by aliens, time of disability in case of war to be deducted.

Where a person is disabled to sue in the courts of the State, by reason of either party being an alien subject or citizen of a country, at war with the United States, the time of the continuance of the disability is not a part of the time limited for the commencement of the action.

From Co. Proc., § 103.

§ 405. Provision where judgment has been reversed.

If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or, if he dies, and the cause of action survives, his representative, may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination.

From Id., § 104.

§ 406. Stay by injunction, etc., to be deducted.

Where the commencement of an action has been stayed by injunction, or other order of a court or judge, or by statutory prohibition, the time of the continuance of the stay is not a part of the time, limited for the commencement of the action.

From Id., § 105.

§ 407. Certain actions by a principal, for misconduct of an agent, etc.

Where an injury results from the act or omission of a deputy or agent, the time, within which an action to recover damages by reason thereof, must be commenced by the principal, against the deputy or agent, must be computed from the time, when a judgment against the principal, for the act or omission, is first recovered by the aggrieved person; and a subsequent reversal or setting aside of the judgment does not extend the time.

New.

§ 408. Disability must exist when right accrues.

A person cannot avail himself of a disability, unless it existed when his right of action or of entry accrued.

From Co. Proc., § 106.

§ 409. If several disabilities, no limitation until all removed.

Where two or more disabilities co-exist, when the right of action or of entry accrues, the limitation does not attach, until all are removed.

From Id., § 107.

§ 410. Provision when the action cannot be maintained without a demand.

Where a right exists, but a demand is necessary to entitle a person to maintain an action, the time, within which the action

must be commenced, must be computed from the time, when the right to make the demand is complete; except in one of the following cases:

1. Where the right grows out of the receipt or detention of money or property, by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time, when the person, having the right to make the demand, has actual knowledge of the facts, upon which that right depends.

2. Where there was a deposit of money, not to be repaid at a fixed time, but only upon a special demand, or a delivery of personal property, not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.

New.

§ 411. Provision in case of submission to arbitration.

Where the persons, who might be adverse parties in an action, have entered into a written agreement to submit to arbitration, or to refer the cause of action, or a controversy in which it might be available, or have entered into a written submission thereof to arbitrators; and before an award, or other determination thereupon, the agreement, or submission is revoked, so as to render it ineffectual, by the death of either party thereto, or by the act of the person against whom the action might have been brought; or the execution thereof, or the remedy upon an award or other determination thereunder, is stayed by injunction, or other order procured by him from a competent court or judge; the time which has elapsed, between the entering into the written submission or agreement, and the revocation thereof, or the expiration of the stay, is not a part of the time, limited for the commencement of the action.

New.

§ 412. Provision when action is discontinued, etc., after answer.

Where a defendant in an action has interposed an answer, in support of which he would be entitled to rely, at the trial, upon a defence or counterclaim then existing in his favor, the remedy upon which at the time of the commencement of the action, was not barred by the provisions of this chapter; and the complaint is dismissed, or the action is discontinued, or abates in consequence of the plaintiff's death; the time which intervened, between the commencement and the termination of the action, is not a part of the time, limited for the commencement of an action by the defendant, to recover for the cause of action so interposed as a defence, or to interpose the same defence in another action brought by the same plaintiff, or a person deriving title from or under him.

New.

§ 413. How objection taken, under this chapter.

The objection, that the action was not commenced within the time limited, can be taken only by answer. The corresponding objection to a defence or counterclaim can be taken only by reply; except where a reply is not required, in order to enable the plaintiff to raise an issue of fact, upon an allegation contained in the answer.

From Co. Proc., § 74.

§ 414. Cases to which this chapter applies.

The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in one of the following cases:

1. A case, where a different limitation is specially prescribed by law, or a shorter limitation is prescribed by the written contract of the parties.

2. A cause of action or a defence which accrued before the first day of July, 1848. The statutes then in force govern, with respect to such a cause of action or defence.

3. A case, not included in the last subdivision, in which a person is entitled, when this act takes effect, to commence an action, or to institute a special proceeding, or to take any proceeding therein, or to pursue a remedy upon a judgment, where he commences, institutes, or otherwise resorts to the same, before the expiration of two years after this act takes effect; in either of which cases, the provisions of law applicable thereto, immediately before this act takes effect, continue to be so applicable, notwithstanding the repeal thereof.

4. A case, where the time to commence an action has expired, when this act takes effect.

The word, "action", contained in this chapter, is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action.

New.

§ 415. Mode of computing periods of limitation.

The periods of limitation, prescribed by this chapter, except as otherwise specially prescribed therein, must be computed from the time of the accruing of the right to relief by action, special proceeding, defence, or otherwise, as the case requires, to the time when the claim to that relief is actually interposed by the party, as a plaintiff or a defendant, in the particular action or special proceeding.

New.

CHAPTER V.

Commencement of and Parties to an Action.

TITLE I.—Commencement of an Action.
TITLE II.—Parties to an Action.

TITLE I.

Commencement of an action.

Article 1. The summons and accompanying papers; personal service thereof; appearance of the defendant.
2. Substitutes for personal service in special cases.

ARTICLE FIRST.

The summons and accompanying papers; personal service thereof; appearance of the defendant.

Sec. 416. Action to be commenced by summons; time when court acquires jurisdiction.
417. Requisites of summons.
418. Form of summons.
419. Service of copy complaint or notice with summons; consequence of failure.
420. Cases where such service must be made.
421. Appearance of defendant.
422. When defendant must answer before time to appear expires.
423. Notice of no personal claim; effect of service thereof.
424. Effect of voluntary appearance.
425. Summons; when and by whom served. Sheriff's duty.
426. How personal service of summons made upon a natural person.
427, 428. Id.; in certain cases of infancy, or lunacy, etc., not judicially declared.
429. Id.; when delivery of copy to lunatic dispensed with.
430. Designation, by a resident, of a person upon whom to serve a summons during his absence; effect and revocation thereof.
431. How personal service of summons made upon a domestic corporation.
432. Id.; upon a foreign corporation.
433. Service of process, etc., to commence a special proceeding
434. Proof of service of summons, etc.; how made.

§ 416. Action to be commenced by summons; time when court acquires jurisdiction.

A civil action is commenced by the service of a summons. But from the time of the granting of a provisional remedy, the court acquires jurisdiction, and has control of all the subsequent proceedings. Nevertheless, jurisdiction thus acquired is conditional, and liable to be divested, in a case where the jurisdiction of the court is made dependent, by a special provision of law, upon some act, to be done after the granting of the provisional remedy.

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From Co. Proc., §§ 127 and 139.

§ 417. [Am'd, 1877, 1879.] Requisites of summons.

The summons must contain the title of the action, specifying the court in which the action is brought, the names of the parties to the action, and, if it is brought in the supreme court, the name of the county in which the plaintiff desires the trial; and it must be subscribed by the plaintiff's attorney; who must add to his signature his office address, specifying a place within the

State where there is a post-office. If in a city, he must add the street, and the street number, if any, or other suitable designation of the particular locality.

From Co. Proc., § 128. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 418. [Am'd, 1877.] Form of summons.

The summons, exclusive of the title of the action and the subscription, must be substantially in the following form, the blanks being properly filled:

"To the above named defendant: You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default, for the relief demanded in the complaint. Dated ."

The summons is deemed the mandate of the court.

From Co. Proc., § 120. Am'd by L. 1877, c. 416.

§ 419. [Am'd, 1877, 1879.] Service of copy complaint or notice with summons; consequence of failure.

A copy of the complaint may be served with the summons. If a copy of the complaint is not served with the summons, the plaintiff cannot take judgment by default without application to the court, unless either the defendant appears, or by[1] a notice is served with the summons, stating the sum of money for which judgment will be taken, and the case is one embraced in the next section.

From Co. Proc., § 130. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 420. [Am'd, 1877.] Cases where such service must be made.

Judgment may be taken without application to the court, where the complaint sets forth one or more causes of action, each consisting of the breach of an express contract to pay, absolutely or upon a contingency, a sum or sums of money, fixed by the terms of the contract, or capable of being ascertained therefrom, by computation only; or an express or implied contract to pay money received or disbursed, or the value of property delivered, or of services rendered by, to, or for the use of, the defendant or a third person; and thereupon demands judgment for a sum of money only. This section includes a case, where the breach of the contract, set forth in the complaint, is only partial; or where the complaint shows that the amount of the plaintiff's demand has been reduced by payment, counterclaim, or other credit.

From Co. Proc., § 129. Am'd by L. 1877, c. 416.

§ 421. Appearance of defendant.

The defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in section 417 of this act, concerning the office address of the plaintiff's attorney.

New.

[1] The word "by" is superfluous; inserted by error in engrossing.

§ 422. [Am'd, 1877.] When defendant must answer before time to appear expires.

A defendant, upon whom the plaintiff has served, with the summons, a copy of the complaint, must serve a copy of his demurrer or answer upon the plaintiff's attorney, before the expiration of the time, within which the summons requires him to answer. If a copy of the complaint is not so served, a notice of appearance entitles him only to notice of the subsequent proceedings, unless within the same time he demands the service of a copy of the complaint as prescribed in section 479 of this act.

See Co. Proc., §§ 130, 148. Am'd by L. 1877, c. 416.

§ 423. [Am'd, 1877.] Notice of no personal claim; effect of service thereof.

Where a personal claim is not made against a defendant, a notice, subscribed by the plaintiff's attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects specific real or personal property, and that a personal claim is not made against him, may be served with the summons. If the defendant so served unreasonably defends the action, costs may be awarded against him.

From Co. Proc., § 131. Am'd by L. 1877, c. 416.

§ 424. Effect of voluntary appearance.

A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him.

From Co. Proc., § 189.

§ 425. Summons; when and by whom served. Sheriff's duty.

The summons may be served by any person, other than a party to the action, except where it is otherwise specially prescribed by law. The plaintiff's attorney may, by an indorsement on the summons, fix a time within which the service thereof must be made: in that case, the service cannot be made afterwards. Where a summons is delivered for service to the sheriff of the county, wherein the defendant is found, the sheriff must serve it and return it, with proof of service, to the plaintiff's attorney, with reasonable diligence.

From Id., § 133.

§ 426. [Am'd, 1879, 1913.] How personal service of summons made upon a natural person.

Personal service of the summons upon a defendant, being a natural person, must be made by delivering a copy thereof, within the State, as follows:

1. If the defendant is an infant, under the age of fourteen years, to his father, mother or guardian; or, if there is none within the State, to the person having the care and control of him, or with whom he resides, or in whose service he is employed. If the defendant is an infant over the age of fourteen years, to the infant in person, and also to his father, mother or guardian; or, if there is none within the state, to the person having the care and control of him, or with whom he resides, or in whose service he is employed. Where the defendant is an infant under the age of fourteen years, the court shall, in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons

shall not be deemed complete until it is so delivered. Where the defendant is an infant over the age of fourteen years a similar order may be made by the court in its discretion, with or without application therefor.

2. If the defendant is a person judicially declared to be incompetent to manage his affairs, in consequence of lunacy, idiocy, or habitual drunkenness, and for whom a committee has been appointed, to the committee, and also to the defendant in person.

3. If the action is against a sheriff, for a cause specified in section 158 of this act, by delivering it to the defendant in person, or to his under-sheriff in person, or at the office of the sheriff during the hours when it is required by law to be kept open, to a deputy-sheriff or a clerk in the employment of the sheriff, or other person in charge of the office.

4. In any other case, to the defendant in person.

From Co. Proc., § 134. Am'd by L. 1879, c. 542; L. 1913, c. 279 (in effect Sept. 1, 1913).

§ 427. [Am'd, 1913.] Id.; in certain cases of infancy, or lunacy, etc., not judicially declared.

If the court has, in its opinion, reasonable ground to believe, that the defendant, by reason of habitual drunkenness, or for any other cause, is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the court may, in its discretion, with or without an application therefor, and in the defendant's interest, make an order, requiring a copy of the summons to be also delivered, in behalf of the defendant, to a person designated in the order, and that service of the summons shall not be deemed complete, until it is so delivered.

New. Am'd by L. 1913, c. 279 (in effect Sept. 1, 1913).

§ 428. [Am'd, 1877.] The same.

In a case specified in subdivision first or second of section 426 of this act, where the court has, in its opinion, reasonable ground to believe that the interest of the person, other than the defendant, to whom a copy of the summons has been delivered, is adverse to that of the defendant, or that, for any reason, he is not a fit person to protect the rights of the defendant, it may likewise make an order, as prescribed in the last section. In a case specified in subdivision second, the court may, as a part of the same order, or by a separate order, made in like manner and upon like ground, at any stage of the action, appoint a special guardian ad litem to conduct the defence for the incompetent defendant, to the exclusion of the committee, and with the same powers, and subject to the same liabilities, as a committee of the property.

New. Am'd by L. 1877, c. 416.

§ 429. Id.; when delivery of copy to lunatic dispensed with.

Where the defendant has been judicially declared to be incompetent to manage his affairs, in consequence of lunacy, and it appears satisfactorily to the court, by affidavit, that the delivery of a copy of the summons to him, in person, will tend to aggravate his disorder, or to lessen the probability of his recovery, the court may make an order, dispensing with such delivery. In that case a delivery of a copy of the summons, to a committee duly appointed for him, is sufficient personal service upon the defendant.

New.

§ 430. [Am'd, 1877, 1899.] Designation, by a resident, of a person upon whom to serve a summons during his absence; effect and revocation thereof.

A resident of the state, of full age, may execute, under his hand, and acknowledge, in the manner required by law to entitle a deed to be recorded, a written designation of another resident of the state, as a person upon whom to serve a summons, or any process or other paper for the commencement of a civil special proceeding, in any court or before any officer, during the absence from the state of New York of the person making the designation; and may file the same, with the written consent of the person so designated, executed and acknowledged in the same manner, in the office of the clerk of the county, where the person making the designation resides. The designation must specify the occupation, or other proper addition, and the residence of the person making it, and also of the person designated; and it remains in force during the period specified therein, if any; or, if no period is specified for that purpose, for three years after the filing thereof. But it is revoked earlier, by the death or legal incompetency of either of the parties thereto; or by the filing of a revocation thereof, or of the consent, executed and acknowledged in like manner. The clerk must file and record such a designation, consent, or revocation; and must note, upon the record of the original designation, the filing and recording of a revocation. While the designation remains in force, as prescribed in this section, a summons, or any process or other paper for the commencement of a civil special proceeding, against the person making it, in any court or before any officer, may be served upon the person so designated, in like manner and with like effect, as if it were served personally upon the person making the designation, notwithstanding the return of the latter to the state of New York.

New. Am'd by L. 1877, c. 416; L. 1899, c. 524 (in effect Sept. 1, 1899).

§ 431. How personal service of summons made upon a domestic corporation.

Personal service of the summons upon a defendant, being a domestic corporation, must be made by delivering a copy thereof, within the State, as follows:

1. If the action is against the mayor, aldermen, and commonalty of the city of New-York,[1] to the mayor, comptroller, or counsel to the corporation.

2. If the action is against any other city, to the mayor, treasurer, counsel, attorney, or clerk: or, if the city lacks either of those officers, to the officer performing corresponding functions, under another name.

3. In any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.

From L. 1860, c. 379, § 4; Co. Proc., § 134, subd. 1.

§ 432. [Am'd, 1877, 1903, 1909.] Id.; upon a foreign corporation.[2]

Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the State, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either

[1] By the present charter of New York City, its corporate name is "The City of New York," and actions are brought by and against it in this name (L. 1901, c. 466, §§ 3, 262, 263).

[2] Additional rules for the service of a summons upon a foreign corporation will be found in the Banking Law, § 34, and the Insurance Law, § 30.

of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose as provided in section 16 of the General Corporation Law.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the State.

4. If the person designated as provided in section 16 of the General Corporation Law dies or removes from the place where the corporation has its principal place of business within the State and the corporation does not within thirty days after such death or removal designate in like manner another person upon whom process against it may be served within the State, process against the corporation in an action upon any liability incurred within this State or if the corporation has property within the State may after such death, removal or revocation and before another designation is made be served upon the secretary of State.

From Co. Proc., § 134, subd. 1; L. 1855, c. 279, §§ 1-3. Am'd by L. 1877, c. 416; L. 1908, c. 311; L. 1909, c. 65 (see Table, p. iii, ante).

§ 433. Service of process, etc., to commence a special proceeding.

The provisions of this article, relating to the mode of service of a summons, apply likewise to the service of any process or other paper, whereby a special proceeding is commenced in a court, or before an officer, except a proceeding to punish for contempt, and except where special provision for the service thereof is otherwise made by law.

From L. 1855, c. 279, § 4.

§ 434. Proof of service of summons, etc.; how made.

Proof of service, as prescribed in this article, must be made by affidavit, except as follows:

If the service was made by the sheriff, it may be proved by his certificate thereof.

2. If the defendant served is an adult, who has not been judicially declared to be incompetent to manage his affairs, the service may be proved by a written admission, signed by him, and either acknowledged by him, and certified in like manner as a deed to be recorded in the county, or accompanied with the affidavit of a person, other than the plaintiff, showing that the signature is genuine.

A certificate, admission, or affidavit of service of a summons, must state the time and place of service. A written admission of the service of a summons, or of a paper accompanying the same, imports, unless otherwise expressly stated therein, or otherwise plainly to be inferred from its contents, that a copy of the paper was delivered to the person signing the admission.

From Co. Proc., § 138.

ARTICLE SECOND.

Substitutes for personal service in special cases.

Sec. 435. Order for service of summons from court of record, when defendant not found, etc.
436. How service must be made.
437. Papers to be filed; proof of service.
438. Cases in which service of summons by publication, etc., may be ordered.
439. Papers upon which order for publication may be made.
440. By whom order may be made; contents of order.
441. When publication must be commenced; when service deemed complete.
442. Papers to be filed; notice to defendant.
443. Id.; when service is made without the State.
444. Proof of service.
445. Defendant when allowed to defend.

§ 435. [Am'd, 1877, 1880, 1913.] Order for service of summons from court of record, when defendant not found, etc.

Where a summons is issued in any court of record, an order for the service thereof upon a defendant, whether a domestic corporation, other than a municipal corporation, a joint-stock or other unincorporated association or a natural person, residing within the state may be made by the court, or a judge thereof, or the county judge of the county where the action is triable upon satisfactory proof, by the affidavit of a person, not a party to the action, or by the return of the sheriff of the county where such defendant resides, or has its principal office or place of business, that proper and diligent effort has been made to serve the summons upon the defendant and that none of the persons mentioned in subdivision three of section 431, nor the president or treasurer of such association, can be found, or if the defendant is a natural person, that the place of his sojourn cannot be ascertained, or if he is within the state, that he avoids service, so that personal service cannot be made.

From L. 1853, c. 511. Am'd by L. 1877, c. 416; L. 1880, c. 535; L. 1913, c. 230 (in effect Sept. 1, 1913).

§ 436. [Am'd, 1877, 1896, 1913.] How service must be made.

The order must direct that the service of the summons be made, by leaving a copy thereof, and of the order, if the defendant is a domestic corporation or joint-stock or other unincorporated association at its principal office or place of business, or if a natural person at the residence of the defendant, with a person of proper age, if upon reasonable application, admittance can be obtained, and such person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer or other door of the defendant's said place of business or office, or of his residence, and by depositing another copy thereof, properly enclosed in a postpaid wrapper, addressed to the defendant at its said principal office or place of business, or to him at his place of residence, in the post-office at the place where he resides, or where said office, place of business or residence is located, or upon proof being made by affidavit that no such residence can be found, service of the summons may be made in such manner as the court may direct.

From L. 1853, c. 511. Am'd by L. 1877, c. 416; L. 1896, c. 562; L. 1913, c. 230 (in effect Sept. 1, 1913).

§ 437. Papers to be filed; proof of service.

The order, and the papers upon which it was granted, must be filed, and the service must be made, within ten days after the order is granted; otherwise the order becomes inoperative. On filing an affidavit, showing service according to the order, the summons is deemed served, and the same proceedings may be taken thereupon, as if it had been served by publication, pursuant to an order for that purpose, made as prescribed in the next section.

From L. 1853, c. 511.

§ 438. [Am'd, 1879, 1884, 1899, 1909, 1913, 1914.] Cases in which service of summons by publication, etc., may be ordered.

An order directing the service of a summons upon a defendant, by publication, may be made in either of the following cases:

1. **[Am'd, 1909, 1913.]** Where the defendant to be served is a foreign corporation; or, is an unincorporated association consisting of seven or more persons, having a president and treasurer, neither of whom is a resident of this state; or, being a domestic corporation, where after diligent effort, service cannot be made within the state upon the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent; or, being a natural person, is not a resident of the state; or where, after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the state.

2. Where the defendant, being a resident of the state, has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons; or keeps himself concealed therein, with like intent.

3. Where the defendant, being an adult, and a resident of the state, has been continuously without the state of New York more than six months next before the granting of the order, and has not made a designation of a person, upon whom to serve a summons in his behalf, as prescribed in section 430 of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.

4. Where the complaint demands judgment annulling a marriage, or for a divorce, or a separation.

5. Where the complaint demands judgment, that the defendant be excluded from a vested or contingent interest in or lien upon, specific real or personal property within the state; or that such an interest or lien in favor of either party be enforced, regulated, defined, or limited; or otherwise affecting the title to such property.

6. Where the defendant is a resident of the state or a domestic corporation; and an attempt was made to commence the action against the defendant, as required in chapter fourth of this act, before the expiration of the limitation applicable thereto as fixed in that chapter; and the limitation would have expired, within sixty days next preceding the application, if time had not been extended by the attempt to commence the action.

7. Where the action is against the stockholders of a corporation, or joint-stock company, and is authorized by a law of the state, and the defendant is a stockholder thereof.

When a copy of the summons is required by subdivision first or subdivision second of section 426 of this act, or by section 429 of this act, to be delivered to a person other than the defendant, an order, directing the service of the summons upon such person by publication, may be made as prescribed in this section, as if such person was the defendant in the action, and upon a verified complaint and the same proof with respect to such person, as is required in the next succeeding section with respect to a defendant. And sections 440 to 444, both inclusive, apply to the proceedings in like manner as if such person was a defendant.

From Co. Proc., § 135; L. 1869, c. 157, § 1. Am'd by L. 1879, c. 542; L. 1884, c. 399; L. 1899, c. 301; L. 1909, c. 492; L. 1913, c. 179; L. 1914, c. 346 (in effect Sept. 1, 1914).

§ 439. [Am'd, 1877, 1879.] Papers upon which order for publication may be made.

The order must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts required by the last section; and also, where the application is made upon the ground that the defendant is a foreign corporation, or not a resident of the State, or in a case specified in subdivision fourth, fifth, or seventh of the last section, that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons.

From Co. Proc., § 135. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 440. [Am'd, 1879, 1889, 1914.] By whom order may be made; contents of order.

The order may be made by the court or by a judge thereof or the county judge of the county where the action is triable. It must direct that service of the summons, upon the defendant named or described in the order, be made by publication thereof in two newspapers, designated in the order as most likely to give notice to the defendant, for a specified time, which the judge deems reasonable, not less than once a week for six successive weeks. It must also contain, either a direction that, on or before the day of the first publication, the plaintiff deposit in a post-office, one or more sets of copies of the summons, complaint and order, each contained in a securely closed post-paid wrapper, directed to the defendant, at a place specified in the order, or a statement that the court or judge, being satisfied, by the affidavits upon which the order was granted, that the plaintiff cannot, with reasonable diligence, ascertain a place or places, where the defendant would probably receive matter transmitted through the post-office, dispenses with the deposit of any papers therein.

From Co. Proc., § 135. Am'd by L. 1879, c. 542; L. 1889, c. 195; L. 1914, c. 346 (in effect Sept. 1, 1914).

§ 441. [Am'd, 1877, 1914.] When publication must be commenced; when service deemed complete.

The first publication in each newspaper designated in the order, or personal service upon the defendant without the State, in lieu thereof, must be made within three months after the order is granted. For the purpose of reckoning the time within which the defendant must appear or answer, service by publication is complete upon the day of the last publication, pursuant to the order.

From Co. Proc., §§ 135, 137. Am'd by L. 1877, c. 416; L. 1914, c. 346 (in effect Sept. 1, 1914).

§ 442. [Am'd, 1877.] Papers to be filed; notice to defendant.

Where service is made by publication, the summons, complaint, and order, and the papers upon which the order was made, must be filed with the clerk, on or before the day of the first publication; and a notice, subscribed by the plaintiff's attorney, and directed only to the defendant or defendants to be thus served, substantially in the following form, the blanks being properly filled up, must be subjoined to, and published with the summons:

"To : The foregoing summons is served upon you, by publication, pursuant to an order of " (naming the judge and his official title), "dated the day of , 18 , and filed with the complaint, in the office of the clerk of at ."

From Co. Proc., § 135. Am'd by L. 1877, c. 416.

§ 443. [Am'd, 1877, 1914, 1916.] Service without the State.

1. Where service is made without the State under an order for publication of the summons, the papers specified in the last section must be

previously filed; and a notice must be served with the summons, in all respects like the notice required by the last section, except that the words, "without the State of New York," must be substituted for the words, "by publication."

2. In all cases when publication is ordered, personal service of a copy of the summons and complaint and such notice, out of the State, is equivalent to publication and deposit in the post-office.

3. In the cases specified in subdivision five of section 438 the summons may be served without an order, upon a defendant without the State in the same manner as if such service were made within the State, except that a copy of the complaint shall be annexed to and served with the summons.

4. Service without the State is complete ten days after proof thereof is filed.

5. [**Am'd, 1916.**] When the summons is served personally without the state the affidavit of service must show that the person making it is a resident or citizen of the state of New York, or a sheriff, or under sheriff, deputy sheriff, constable of the county or other political subdivision in which the service is made, or an officer authorized by the laws of this state to take acknowledgments of deeds to be recorded in this state, an attorney and counsellor at law duly qualified to practice in the state where such service is made or by a United States marshal.

When such affidavit is made by a resident or citizen of the state of New York, his place of residence, and street number, if any, shall be stated therein. The affidavit of service made without the state shall contain the official designation of the person making it and shall have annexed thereto a certificate of the proper official showing that the person before whom the affidavit was sworn to was, at the time of administering the oath, qualified to act.

6. A judgment shall be conclusive upon a defendant on whom the summons is personally served without the State, with respect to the property which is the subject of the action, or which is attached therein, to the same extent as if the service upon him were made within the State.

New. Am'd by L. 1877, c. 416; L. 1914, c. 346; L. 1916, c. 439 (in effect Sept. 1, 1916).

§ 444. Proof of service.

Proof of the publication of the summons and notice must be made by the affidavit of the printer or publisher, or his foreman or principal clerk. Proof of deposit in the post-office, or of delivery, of a paper required to be deposited or delivered by the provisions of this article, must be made by the affidavit of the person, who deposited or delivered it.

From Co. Proc., § 138, subd. 3.

§ 445. [Am'd, 1877, 1914.] Defendant when allowed to defend.

Where the summons is served, pursuant to an order made as prescribed in this article, in any other manner than personally without the state and the defendant so served does not appear, he or his representatives, on application and sufficient cause shown, at any time before final judgment, must be allowed to defend the action; and, except in an action for divorce, or wherein the contrary is expressly prescribed by law, such defendant, or his representatives, must, in like manner, upon good cause shown, and upon just terms, be allowed to defend, after final judgment, at any time within one year after personal service of written notice thereof; or, if such a notice has not been served, within seven years after the filing of the judgment-roll. If the defence is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled, as the court directs; but the title to property, sold to a purchaser in good faith, pursuant to a direction contained in a judgment, or by virtue of an execution issued upon the same, shall not be affected thereby.

From Id., § 135. Am'd by L. 1877, c. 416; L. 1914, c. 346 (in effect Sept. 1, 1914).

TITLE II.

Parties to an action.

Article 1. Parties generally.
2. Parties severally liable.
3. Parties prosecuting and defending as poor persons.
4. Infant plaintiffs and defendants.

ARTICLE FIRST.

Parties generally.

Sec. 446. Who may be joined as plaintiffs.
447. Id.; as defendants.
448. Parties united in interest, when to be joined; when one or more may sue or defend for the whole.
449. Party in interest to sue. Trustee, etc., may sue alone.
450. When married woman is a party.
451. When defendant or his name is unknown.
452. When court to decide controversy or to order other parties to be brought in.
453. Supplemental summons.

§ 446. Who may be joined as plaintiffs.

All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act.

From Co. Proc., § 117.

§ 447. [Am'd, 1901, 1911.] Who may be joined as defendants.

Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party defendant for the complete determination or settlement of a question involved therein, except as otherwise expressly prescribed in this act. In any action brought affecting real estate upon which the people of the state of New York have or claim to have a lien under the transfer tax act, the said people of the state of New York may be made a party defendant in the same manner as a private person, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the matters required to be set forth by the code of civil procedure, the name or names of the decedent or decedents against whose estate there is an unpaid transfer tax, the place of residence of decedent at the time of death, the heirs at law and next of kin of decedent and if decedent left none that fact shall be stated, whether decedent died testate or intestate, and whether the estate of decedent has been administered, and if so where; and if not administered, such facts shall be stated; and also that the people of the state of New York are made a party defendant for no other reason than the lien of said transfer tax. Upon failure to state such facts, the complaint shall be dismissed as to the people of the state of New York. In such a case the summons must be served on the attorney-general, who may appear in behalf of the people.

From Id., § 118. Am'd by L. 1901, c. 609; L. 1911, c. 24 (in effect Sept. 1, 1911).

§ 448. Parties united in interest, when to be joined; when one or more may sue or defend for the whole.

Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants, except as otherwise expressly prescribed in this act. But if the consent of any one

who ought to be joined as a plaintiff, cannot be obtained, he may be made a defendant, the reason therefor being stated in the complaint. And where the question is one of a common or general interest of many persons; or where the persons, who might be made parties, are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

From Id., § 119.

§ 449. [Am'd, 1877.] Party in interest to sue. Trustee, etc., may sue alone.

Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section.

From Id., §§ 111, 113. Am'd by L. 1877, c. 416.

§ 450. [Am'd, 1877, 1879, 1890, 1909.] When married woman is a party.

In an action or special proceeding a married woman appears, prosecutes or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of his wife. The husband is not a necessary or proper party to an action or special proceeding to recover damages to the person, estate or character of another on account of the wrongful acts of his wife committed without his instigation.[1]

From Co. Proc., § 114. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1890, c. 248, § 1; L. 1909, c. 65. (See Table, p. iii, ante).

§ 451. [Am'd, 1879.] When defendant or his name is unknown.

Where the plaintiff is ignorant of the name or part of the name of a defendant, he may designate that defendant, in the summons, and in any other process or proceeding in the action, by a fictitious name, or by as much of his name as is known, adding a description, identifying the person intended. Where the plaintiff demands judgment against an unknown person, he may designate that person as unknown, adding a description, tending to identify him. In either case the person intended is thereupon regarded as a defendant in the action, and as sufficiently described therein, for all purposes including service of the summons, as prescribed in article second of the last title. When the name, or the remainder of the name, or the person, becomes known, an order must be made by the court, upon such notice and such terms as it prescribes, that the proceedings already taken be deemed amended, by the insertion of the true name, in place of the fictitious name or part of a name, or the designation as an unknown person; and that all subsequent proceedings be taken under the true name.

From Co. Proc., §§ 175, 135. Am'd by L. 1879, c. 542.

[1] The Domestic Relations Law, § 51, provides that "All sums that may be recovered in actions or special proceedings by a married woman to recover damages to her person, estate or character shall be the separate property of the wife. Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single."

§ 452. [Am'd, 1901.] When court to decide controversy, or to order other parties to be brought in.

The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment.

From Co. Proc., § 122. Am'd by L. 1901, c. 512 (in effect Sept. 1, 1901).

§ 453. [Am'd, 1877.] Supplemental summons.

Where the court directs a new defendant to be brought in, and the order is not made upon his own application, a supplemental summons must be issued, directed to him, and in the same form as an original summons; except that, in the body thereof, it must require the defendant to answer the original or the amended complaint, and the supplemental complaint, or either of them as the case requires. And each provision of this chapter, relating to personal service, or a substitute for personal service of an original summons, applies to such a supplemental summons.

New. Am'd by L. 1877, c. 416.

ARTICLE SECOND.

Parties severally liable.

Sec. 454. When persons liable for the same demand may be sued together.
455. Defendant so sued may apply for any relief.
456. Proceedings in action against defendants severally liable.
457. Application of this article to defendants jointly liable.

§ 454. [Am'd, 1877.] When persons liable for the same demand may be sued together.

Two or more persons, severally liable upon the same written instrument, including the parties to a bill of exchange or a promissory note, whether the action is brought upon the instrument, or by a party thereto to recover against other parties liable over to him; may, all or any of them, be included as defendants in the same action, at the option of the plaintiff. (2 16

From Co. Proc., § 120. Am'd by L. 1877, c. 416.

§ 455. Defendant so sued may apply for any relief.

The joinder of a person, as defendant in an action, with another person, as prescribed in the last section, does not affect his right to any order or other relief, to which he would have been entitled, if he had been separately sued in the action. (2 16

From L. 1841, c. 282, § 1

§ 456. Proceedings in action against defendants severally liable.

Where a summons, issued against two or more defendants alleged to be severally liable, is served upon some, but not upon all of them, the plaintiff may proceed against those upon whom it is served, as if they were the only defendants named therein. Where it is served upon all of them, the plaintiff may take judgment against one or more of them, where he would be entitled to judgment, if the action was against him or them alone. Where judgment is so taken, the clerk must, upon the plaintiff's application, enter an order, directing that the action be severed, and that the plaintiff may proceed against the other defendants. In any subsequent proceeding, the plaintiff may use, together with a certified copy of such an order, a copy of a paper constituting a part of the judgment-roll, with like effect as if it was the original.

From Co. Proc., § 156, subds. 2 and 3.

§ 457. Application of this article to defendants jointly liable.

The last three sections do not affect a defence or other objection of a defendant, growing out of the failure to join in the action two or more persons jointly liable; and, as regards the other parties to the action, persons jointly liable are regarded as one party, for every purpose contemplated by those sections. (2 16

From L. 1832, c. 276, § 2; L. 1835, c. 211, § 1.

ARTICLE THIRD.

Parties prosecuting and defending as poor persons.

Sec. 458. Who may petition for leave to prosecute as a poor person.
459. Contents of petition.
460. When and how leave granted.
461. Not liable for costs and fees.
462. When leave may be annulled.
463. When defendant may petition to defend as a poor person.
464. Contents of petition.
465. Proceedings thereon.
466. Appeal, when party prosecutes or defends as a poor person.
467. Costs in favor of petitioner.

§ 458. [Am'd, 1891.] Who may petition for leave to prosecute as a poor person.

A poor person, whether an adult or infant, not being of ability to sue, who alleges that he has a cause of action against another person, may apply by petition to the court in which the action is pending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have an attorney and counsel assigned to conduct his action.

From 2 R. S. 444 (Part 3, c. 8, tit. 1), § 1. Am'd by L. 1891, c. 170.

§ 459. [Am'd, 1891.] Contents of petition.

The petition must state:

1. The nature of the action brought or intended to be brought.

2. That the applicant is not worth one hundred dollars besides the wearing apparel and furniture necessary for himself and his family, and the subject-matter of the action.

It must be verified by the applicant's affidavit, unless the applicant is an infant under the age of fourteen years, and in that case by the affidavit of his guardian appointed in said action, and supported by a certificate of a counsellor at law to the effect that he has examined the case and is of the opinion that the applicant has a good cause of action.

From 2 R. S. 444 (Part 3, c. 8, tit. 1), § 2. Am'd by L. 1891, c. 170.

§ 460. When and how leave granted.

The court to which the petition is presented, if satisfied of the truth of the facts alleged, and that the applicant has a good cause of action, may, by order, admit him to prosecute as a poor person, and assign to him an attorney and counsel to prosecute his action, who must act therein without compensation.

From 2 R. S. 444 (Part 3, c. 8, tit. 1), § 3.

§ 461. Not liable for costs and fees.

A person so admitted, may prosecute his action, without paying fees to any officer; and he shall not be prevented from prosecuting the same, by reason of his being liable for the costs of a former action, brought by him against the same defendant. If judgment is rendered against him, or his complaint is dismissed, costs shall not be awarded against him.

From Id., § 4.

§ 462. When leave may be annulled.

If the person so admitted is guilty of improper conduct in the prosecution of his action, or of wilful or unnecessary delay, the court may, in its discretion, annul the order admitting him to

prosecute as a poor person; and he shall thereafter be deprived of all the privileges conferred thereby.

From Id., § 5.

§ 463. When defendant may petition to defend as a poor person.

A defendant in an action involving his right, title, or interest, in or to real or personal property, may petition the court, in which the action is pending, for leave to defend the action as a poor person, and to have an attorney and counsel assigned to conduct his defence.

New.

§ 464. Contents of petition.

The petition must contain the same matters, respecting the ability of the petitioner, required to be contained in a petition for leave to prosecute as a poor person; and it must be supported by a similar certificate, relating to the defence.

New.

§ 465. Proceedings thereon.

The provisions of this article, relating to the order, to be made upon an application for leave to prosecute as a poor person, and the proceedings subsequent thereto, apply to the order and subsequent proceedings, upon an application for leave to defend as a poor person.

New.

§ 466. Appeal when party prosecutes or defends as a poor person.

An order, made as prescribed in this article, does not authorize the petitioner to take or maintain an appeal, as a poor person; but where an appeal is taken by the adverse party, the order is applicable, in favor of the petitioner, as respondent in the appeal.

New.

§ 467. Costs in favor of petitioner.

Where costs are awarded in favor of a person, who had been admitted to prosecute or defend as a poor person, as prescribed in this article, they must be paid over to his attorney, when collected from the adverse party, and distributed among the attorney and counsel assigned to the poor person, as the court directs.

New.

ARTICLE FOURTH.

Infant plaintiffs and defendants.

Sec. 468. Right of infant to bring action.
469. Guardian for infant plaintiff must be appointed.
470. Application therefor.
471. Application for appointment of guardian for infant defendant.
472. Guardian, how appointed. Clerk, when to act.
473. Guardian for absent infant defendant.
474. Guardian not to receive property until security given.
475. Security.
476. Last two sections not to apply to general guardian.
477. Liability of defendant's guardian for costs.
477a. Appointment of guardians ad litem and special guardians by supreme court without application.

§ 468. Right of infant to bring action.

Where an infant has a right of action, he is entitled to maintain an action thereon; and the same shall not be deferred or delayed, on account of his infancy.

From 2 R. S. 446 (Part 3, c. 8, tit. 2), § 1.

§ 469. [Am'd, 1891.] Guardian for infant plaintiff must be appointed.

Before a summons is issued, in the name of an infant plaintiff, a competent and responsible person must be appointed, to appear as his guardian for the purpose of the action, who shall be responsible for the costs thereof, except where such infant prosecutes as a poor person as provided for under section 459 of this act, in which case security for costs shall not be required.

From Id., § 2; Co. Proc., § 115. Am'd by L. 1891, c. 170, § 3.

§ 470. Application therefor.

The guardian must be appointed upon the application of the infant, if he is of the age of fourteen years, or upwards; or, if he is under that age, upon the application of his general or testamentary guardian, if he has one, or of a relative or friend. If the application is made by a relative or friend, notice thereof must be given to his general or testamentary guardian, if he has one; or, if he has none, to the person with whom the infant resides.

From Co. Proc., § 116, subd. 1.

§ 471. [Am'd, 1879.] Application for appointment of guardian for infant defendant.

An infant defendant must also appear by guardian, who must be a competent and responsible person, appointed upon the application of the infant, if he is of the age of fourteen years, or upwards, and applies within twenty days after personal service of the summons, or after service thereof is complete, as prescribed in section 441 of this act; or if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. Where the application is made by a person other than the infant, notice thereof must be given to his general or testamentary guardian, if he has one within the State; or, if he has none, to the infant himself, if he is of the age of fourteen years, or upwards, and within the State; or, if he is under that age, and within the State, to the person with whom he resides.

From Id., § 116, subd. 2. Am'd by L. 1879, c. 542.

§ 472. [Am'd, 1879.] Guardian, how appointed. Clerk, when to act.

The court in which the action is brought, or a judge thereof, or if the action is brought in the supreme court, the county judge of the county where the action is triable, may appoint a guardian ad litem for an infant, either plaintiff or defendant, as prescribed in this article. The clerk must act in that capacity for an infant defendant where the court or the judge appoints him. No person, other than the clerk, shall be appointed a guardian ad litem, unless his written consent, duly acknowledged, is produced to the court or judge making the appointment.

From Co. Proc., § 115; 2 R. S. 446 (Part 3, c. 8, tit. 2), § 4. Am'd by L. 1879, c. 542.

§ 473. [Am'd, 1877, 1889.] Guardian for absent infant defendant.

Where an infant defendant resides out of the State or resides within the State, and is temporarily absent therefrom, the court may, in its discretion, make an order designating a person to be his guardian ad litem, unless he, or some one in his behalf, procures such a guardian to be appointed, as prescribed in the last two sections, within a specified time after service of a copy of the order. The court must give special directions in the order, respecting the service thereof, which may be upon the infant. The summons may be served by delivering a copy to the guardian so appointed, with like effect as where a summons is served without the State upon an adult defendant, pursuant to an order for that purpose, granted as prescribed in section 438 of this act; except that the time to appear or answer is twenty days after the service of the summons, exclusive of the day of service.

From Co. Proc., § 116. Am'd by L. 1877, c. 416; L. 1889, c. 494.

§ 474. Guardian not to receive property until security given.

Except in a case where it is otherwise specially prescribed by law, a guardian, appointed for an infant, as prescribed in this article, shall not be permitted to receive money or property of the infant, other than costs and expenses allowed to the guardian by the court, until he has given sufficient security, approved by a judge of the court, or a county judge, to account for and apply the same, under the direction of the court.

From Co. Proc., § 420.

§ 475. Security.

The security must be a bond to the infant, in such penalty as the judge directs, not less than twice the sum, or the value of the property, to be received, executed by the guardian and at least two sureties, approved by the judge, and filed in the office of the clerk. The infant, or any other party to the action, may afterwards apply for an order, directing a new bond to be given, with an increased penalty; or the court may so direct, of its own motion.

From 2 R. S. 446 (Part 3, c. 8, tit. 2), § 5.

§ 476. Last two sections not to apply to general guardian.

The last two sections do not apply to the general guardian of the infant, who has been appointed his guardian ad litem, as prescribed in this article; but the court may, at any time, require the general guardian to give additional security for the faithful

discharge of his trust, before receiving money or property of the infant, under a judgment or order in the action.

See Rule 54 of General Rules of Practice.

§ 477. Liability of defendant's guardian for costs.

A person appointed guardian, as prescribed in this article, for an infant defendant in an action, is not liable for the costs of the action, unless specially charged therewith by the order of the court, for personal misconduct. (205)

From 2 R. S. 447 (Part 3, c. 8, tit. 2), § 12.

§ 477a. [Added, 1916.] Appointment of guardians ad litem and special guardians by supreme court without application.

The supreme court may appoint a guardian ad litem or special guardian for an infant or an incompetent person, at any stage in any action or proceeding, when it appears to the court necessary for the proper protection of the rights and interest of such infant or incompetent person and fix the fees and compensation of such guardians, except when it is otherwise expressly provided by law. (207)

Added by L. 1916, c. 440 (in effect Sept. 1, 1916).

CHAPTER VI.

Pleadings in Courts of Record, including Counterclaims.

TITLE I.— The Consecutive Pleadings in an Action.
TITLE II.— Provisions Generally Applicable to Pleadings.

TITLE I.

The consecutive pleadings in an action.

Article 1. Complaint.
2. Demurrer.
3. Answer.
4. Reply.

ARTICLE FIRST.

Complaint.

Sec. 478. First pleading to be complaint.
479. Copy complaint, when to be served.
480. Consequence of failure.
481. Complaint; what to contain.
482. When interlocutory and final judgment may be demanded.
483. Causes of action to be separately stated.
484. What causes of action may be joined in the same complaint.
485, 486. [Stricken out.]

§ 478. First pleading to be complaint.

The first pleading, on the part of the plaintiff, is the complaint.

From Co. Proc., § 141.

§ 479. [Am'd, 1877.] Copy complaint, when to be served.

If a copy of the complaint is not delivered to a defendant, at the time of the delivery of a copy of the summons to him, either within or without the State, his attorney may, at any time within twenty days after the service of the summons is complete, serve upon the plaintiff's attorney a written demand of a copy of the complaint, which must be served within twenty days thereafter. The demand may be incorporated into the notice of appearance. But where the same attorney appears for two or more defendants, only one copy of the complaint need be served upon him; and if, after service of a copy of the complaint upon him, as attorney for a defendant, he appears for another defendant, the last defendant must answer the complaint within twenty days after he appears in the action.

From Co. Proc., § 130. Am'd by L. 1877, c. 416.

§ 480. Consequence of failure.

If the plaintiff's attorney fails to serve a copy of the complaint, as prescribed in the last section, the defendant may apply to the court for a dismissal of the complaint.

New.

§ 481. [Am'd, 1904, 1905.] Complaint; what to contain.

The complaint must contain:

1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting each cause of action without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled.

From Co. Proc., § 142. Am'd by L. 1904, c. 500; L. 1905, c. 431 (in effect May 16, 1905).

§ 482. [Am'd, 1877.] When interlocutory and final judgment may be demanded. (2 5 6)

In an action triable by the court, without a jury, the plaintiff may, in a proper case, demand an interlocutory judgment, and also a final judgment, distinguishing them clearly.

New. Am'd by L. 1877, c. 416.

§ 483. Causes of action to be separately stated. Rule 90

Where the complaint sets forth two or more causes of action, the statement of the facts constituting each cause of action must be separate and numbered.

From Co. Proc., § 167.

§ 484. [Am'd, 1877, 1900, 1906, 1907, 1909.] What causes of action may be joined in the same complaint. (2 5 8)

The plaintiff may unite in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.
2. For personal injuries except libel, slander, criminal conversation or seduction.
3. For libel or slander.
4. For injuries to real property.
5. Real property, in ejectment, with or without damages for the withholding thereof.
6. For injuries to personal property.
7. Chattels, with or without damages for the taking or detention thereof.
8. Upon claims against a trustee, by virtue of a contract, or by operation of law.
9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.
10. For penalties incurred under the forest, fish and game law.
11. For penalties incurred under the agricultural law.
12. For penalties incurred under the public health law.

But it must appear, on the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial.

From Co. Proc., § 167. Am'd by L. 1877, c. 416; L. 1900, c. 590; L. 1906, c. 29; L. 1907, c. 26; L. 1909, c. 65.

§§ 485, 486. [Stricken out by L. 1877, c. 416.]

ARTICLE SECOND

Demurrer.

Sec. 487. Defendant must demur or answer.
488. When he may demur.
489. [Stricken out.]
490. Demurrer to complaint must specify grounds of objection.
491. [Stricken out.]
492. Demurrer to all or part of the complaint; demurrer to part, and answer to part.
493. Defendant may demur to reply.
494. When plaintiff may demur to answer.
495. Demurrer to counterclaim, when defendant demands an affirmative judgment.
496. Demurrer to counterclaim must specify grounds of objection.
497. Amendments in certain cases after decision of demurrer.
498. When objection may be taken by answer.
499. Objection; when deemed waived.

§ 487. Defendant must demur or answer.

The only pleading, on the part of the defendant, is either a demurrer or an answer.

From Co. Proc., § 143.

§ 488. [Am'd, 1877.] When he may demur.

The defendant may demur to the complaint, where one or more of the following objections thereto appear upon the face thereof:

1. That the court has not jurisdiction of the person of the defendant.
2. That the court has not jurisdiction of the subject of the action.
3. That the plaintiff has not legal capacity to sue.
4. That there is another action pending between the same parties, for the same cause.
5. That there is a misjoinder of parties plaintiff.
6. That there is a defect of parties, plaintiff or defendant.
7. That causes of action have been improperly united.
8. That the complaint does not state facts sufficient to constitute a cause of action.

From Id., § 144. Am'd by L. 1877, c. 416.

§ 489. [Stricken out by L. 1877, c. 416.]

§ 490. [Am'd, 1877.] Demurrer to complaint must specify grounds of objection.

The demurrer must distinctly specify the objections to the complaint; otherwise it may be disregarded. An objection, taken under subdivision first, second, fourth, or eighth of section 488 of this act, may be stated in the language of the subdivision; an objection, taken under either of the other subdivisions, must point out specifically the particular defect relied upon.

From Co. Proc., § 145. Am'd by L. 1877, c. 416.

§ 491. [Stricken out by L. 1877, c. 416.]

§ 492. Demurrer to all or part of the complaint; demurrer to part, and answer to part.

The defendant may demur to the whole complaint, or to one or more separate causes of action, stated therein. In the latter case, he may answer the causes of action not demurred to.

From Co. Proc., §§ 145, 151.

§ 493. Defendant may demur to reply.

The defendant may also demur to the reply, or to a separate traverse to, or avoidance of, a defence or counterclaim, contained in the reply, on the ground that it is insufficient in law, upon the face thereof.

From Co. Proc., § 155.

§ 494. When plaintiff may demur to answer.

The plaintiff may demur to a counterclaim or a defence consisting of new matter, contained in the answer, on the ground that it is insufficient in law, upon the face thereof.

From Id., § 153.

§ 495. [Am'd, 1877.] Demurrer to counterclaim, when defendant demands an affirmative judgment.

The plaintiff may also demur to a counterclaim, upon which the defendant demands an affirmative judgment, where one or more of the following objections thereto, appear on the face of the counterclaim:

1. That the court has not jurisdiction of the subject thereof.
2. That the defendant has not legal capacity to recover upon the same.
3. That there is another action pending between the same parties, for the same cause.
4. That the counterclaim is not of the character specified in section 501 of this act.
5. That the counterclaim does not state facts sufficient to constitute a cause of action.

(278)

See Co. Proc., § 153. Am'd by L. 1877, c. 416.

§ 496. [Am'd, 1877.] Demurrer to counterclaim must specify grounds of objection.

A demurrer, taken under the last section, must distinctly specify the objections to the counterclaim; otherwise it may be disregarded. The mode of specifying the objections is the same, as where a demurrer is taken to a complaint.

See Co. Proc., § 153. Am'd by L. 1877, c. 416.

§ 497. [Am'd, 1877.] Amendments in certain cases after decision of demurrer.

Upon the decision of a demurrer, either at a general or special term, or in the court of appeals, the court may, in its discretion, allow the party in fault to plead anew or amend, upon such terms as are just. If a demurrer to a complaint is allowed, because two or more causes of action have been improperly united, the court may, in its discretion, and upon such terms as are just, direct that the action be divided into as many actions, as are necessary for the proper determination of the causes of action therein stated.

From Co. Proc., § 172. Am'd by L. 1877, c. 416.

§ 498. [Am'd, 1877.] When objection may be taken by answer.

Where any of the matters enumerated in section 488 of this act as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer.

From Co. Proc., § 147. Am'd by L. 1877, c. 416.

§ 489. Objection; when deemed waived.

If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action

From Co. Proc., § 148.

(278)

See sections 279-280-1-2-+
3 Cal Jur. Pl. & Pr. § 6

ARTICLE THIRD.

Answer.

Sec. 500. Answer; what to contain.
501. Counterclaim defined.
502. Rules respecting the allowance of counterclaims.
503. Judgment, when demand and counterclaim are equal or unequal.
504. Id.; for affirmative relief.
505. Counterclaim, when defendant is sued in a representative capacity.
506. Id.; when plaintiff is an executor or administrator.
507. Defendant may interpose several defences or counterclaims; rules relating thereto.
508. Partial defences.
509. When defendant to demand affirmative judgment.
510. [Stricken out.]
511. When pleadings admit part of plaintiff's claim to be just, action may be severed, etc.
512. Judgment, where counterclaim only is interposed for less than plaintiff's claim.
513. Dilatory defences to be verified.

§ 500. [Am'd, 1877, 1904, 1905.] Answer; what to contain. (261)

The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defence or counterclaim, in ordinary and concise language without repetition.

From Co. Proc., § 149. Am'd by L. 1877, c. 416; L. 1904, c. 500; L. 1905, c. 431 (in effect May 16, 1905).

§ 501. [Am'd, 1877.] Counterclaim defined.

The counterclaim, specified in the last section, must tend, in some way, to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: (266)

1. A cause of action arising out of the contract or transaction, set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action on contract, any other cause of action on contract, existing at the commencement of the action.

From Co. Proc., § 150. Am'd by L. 1877, c. 416.

§ 502. [Am'd, 1877.] Rules respecting the allowance of counterclaims.

But the counterclaim, specified in subdivision second of the last section, is subject to the following rules:

1. If the action is founded upon a contract, which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand, existing against the party thereto, or an assignee of the contract, at the time of the assignment thereof, and belonging to the defendant, in good faith, before notice of the assignment, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the party, or the assignee, while the contract belonged to him.

2. If the action is upon a negotiable promissory note or bill of exchange, which has been assigned to the plaintiff after it

became due, a demand, existing against a person who assigned or transferred it, after it became due, must be allowed as a counterclaim, to the amount of the plaintiff's demand, if it might have been so allowed against the assignor, while the note or bill belonged to him.

3. If the plaintiff is a trustee for another, or if the action is in the name of a plaintiff, who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim; but so much of a demand existing against the person whom he represents, or for whose benefit the action is brought, as will satisfy the plaintiff's demand, must be allowed as a counterclaim, if it might have been so allowed in an action brought by the person beneficially interested.

From 2 R. S. 354 (Part 3, c. 6, tit. 2), § 18, subds. 7-10. Am'd by L. 1877, c. 416.

§ 503. [Am'd, 1877.] Judgment, when demand and counterclaim are equal or unequal.

Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff. Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover, from another person, so much thereof as the judgment does not cancel.

From 2 R. S. 355, §§ 21, 22. Am'd by L. 1877, c. 416.

§ 504. Id.; for affirmative relief.

In a case not specified in the last section, where a counterclaim is established, which entitles the defendant to an affirmative judgment, demanded in the answer, judgment must be rendered for the defendant accordingly.

From Co. Proc., § 263, last clause.

§ 505. Counterclaim, when defendant is sued in a representative capacity.

In an action against an executor or an administrator, or other person sued in a representative capacity, the defendant may set forth, as a counterclaim, a demand belonging to the decedent, or other person whom he represents, where the person so represented would have been entitled to set forth the same, in an action against him.

From 2 R. S. 355, § 25.

§ 506. Id.; when plaintiff is an executor or administrator.

In an action brought by an executor or administrator, in his representative capacity, a demand against the decedent, belonging, at the time of his death, to the defendant, may be set forth by the defendant as a counterclaim, as if the action had been brought by the decedent in his life-time; and, if a balance is found to be due to the defendant, judgment must be rendered therefor against the plaintiff, in his representative capacity. Execution can be issued upon such a judgment only in a case where it could be issued upon a judgment in an action against the executor or administrator.

From Id., §§ 23, 24

§ 507. [Am'd, 1879.] Defendant may interpose several defences or counterclaims; rules relating thereto.

A defendant may set forth, in his answer, as many defences or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable. Each defence or counterclaim must be separately stated, and numbered. Unless it is interposed as an answer to the entire complaint, it must distinctly refer to the cause of action which it is intended to answer.

From Co. Proc., § 150. Am'd by L. 1879, c. 542.

§ 508. [Am'd, 1877.] Partial defences.

A partial defence may be set forth, as prescribed in the last section; but it must be expressly stated to be a partial defence to the entire complaint, or to one or more separate causes of action, therein set forth. Upon a demurrer thereto, the question is, whether it is sufficient for that purpose. Matter tending only to mitigate or reduce damages, in an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, is a partial defence, within the meaning of this section.

New. See § 536, post. Am'd by L. 1877, c. 416.

§ 509. [Am'd, 1877.] When defendant to demand affirmative judgment.

Where the defendant deems himself entitled to an affirmative judgment against the plaintiff, by reason of a counterclaim interposed by him, he must demand the judgment in his answer.

New. Am'd by L. 1877, c. 416.

§ 510. [Stricken out by L. 1877, c. 416.]

§ 511. [Am'd, 1877, 1879.] When pleadings admit part of plaintiff's claim to be just, action may be severed, etc.

Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part so admitted; and if the plaintiff so elects, that the action be continued, with like effect, as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim. The order must prescribe the time and manner of the plaintiff's election. If the plaintiff elects to continue the action, his right to costs upon the judgment is the same, as if it was taken in an action brought for only that part of the claim. If the plaintiff does not elect to continue the action, costs must be awarded, as upon final judgment in any other case.

From Co. Proc., § 244. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 512. Judgment, where counterclaim only is interposed for less than plaintiff's claim.

In an action upon contract, where the complaint demands judgment for a sum of money only, if the defendant, by his answer, does not deny the plaintiff's claim, but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff, upon filing with the clerk an admission of the counterclaim, may take judgment for the excess, as upon a default for want

of an answer. The admission must be made a part of the judgment-roll.

From Co. Proc., § 246.

§ 513. Dilatory defences to be verified.

A defence which does not involve the merits of the action, shall not be pleaded, unless it is verified as prescribed in title second of this chapter.

From 2 R. S. 352 (Part 3, c. 6, tit. 2), § 7.

ARTICLE FOURTH.

Reply. (272-273-274)

Sec. 514. Reply; what to contain.
515. Judgment upon failure to reply.
516. Cases where the court may require a reply.
517. Plaintiff may set forth several avoidances in reply.

§ 514. [Am'd, 1877, 1904, 1905.] Reply; what to contain.

Where the answer contains a counterclaim, the plaintiff, if he does not demur, may reply to the counterclaim. The reply must contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counterclaim.

From Co. Proc., § 153. Am'd by L. 1877, c. 416; L. 1904, c. 500; L. 1905, c. 431 (in effect May 16, 1905).

§ 515. Judgment upon failure to reply.

If the plaintiff fails to reply or demur to the counterclaim, the defendant may apply, upon notice, for judgment thereupon; and, if the case requires it, a reference may be ordered, or a writ of inquiry may be issued, as prescribed in chapter eleventh of this act, where the plaintiff applies for judgment.

From Co. Proc., § 154.

§ 516. Cases where the court may require a reply.

Where an answer contains new matter, constituting a defence by way of avoidance, the court may, in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter. In that case, the reply, and the proceedings upon failure to reply, are subject to the same rules as in the case of a counterclaim.

From Id., § 153.

§ 517. [Am'd, 1877.] Plaintiff may set forth several avoidances in reply.

A reply may contain two or more distinct avoidances of the same defence or counterclaim; but they must be separately stated and numbered.

New. Am'd by L. 1877, c. 416.

TITLE II.

Provisions generally applicable to pleadings. (275-276

Sec. 518. Application and effect of this chapter.
519. Pleadings to be liberally construed.
520. Pleadings to be subscribed; within what time to be served.
521. When defendant to serve copy answer on co-defendant.
522. Allegation not denied; when to be deemed true.
523. When pleading must be verified; and when verification may be omitted.
524. Form and construction of certain allegations and denials in verified pleading.
525. Verification; how and by whom made.
526. Form of affidavit of verification.
527. When verification may be confined to a counterclaim.
528. Remedy for defective verification, or want of verification.
529. When defendant not excused from verifying answer to charge of fraud.
530. Private statute; how pleaded.
531. Account; how pleaded. Bill of particulars.
532. Judgment. How pleaded.
533. Conditions precedent; how pleaded.
534. Instrument for payment of money; how pleaded.
535. Pleadings in libel and slander.
536. Pleading mitigating circumstances, in action for a wrong.
537. Frivolous pleadings; how disposed of.
538. Sham defences to be stricken out.
539. Material variances; how provided for.
540. Immaterial variances; how provided for.
541. What to be deemed a failure of proof.
542. Amendments of course.
543. Amended pleading to be served; answer thereto.
544. Supplemental pleadings.
545. Motion to strike out irrelevant, etc., matter.
546. Indefinite or uncertain allegations.
547. Judgment on the pleadings

§ 518. Application and effect of this chapter.

This chapter prescribes the form of pleadings in an action, and the rules by which the sufficiency thereof is determined, except where special provision is otherwise made by law.

From Co. Proc., § 140.

§ 519. Pleadings to be liberally construed.

The allegations of a pleading must be liberally construed, with a view to substantial justice between the parties.

From Co. Proc., § 159.

§ 520. Pleadings to be subscribed; within what time to be served.

A pleading must be subscribed by the attorney for the party. A copy of each pleading, subsequent to the complaint, must be served on the attorney for the adverse party, within twenty days after service of a copy of the preceding pleading. (276

From Co. Proc., § 150.

§ 521. [Am'd, 1884.] When defendant to serve copy answer on co-defendant.

Where the judgment may determine the ultimate rights of two or more defendants, as between themselves, a defendant who requires such a determination must demand it in his answer, and must at least twenty days before the trial serve a copy of his answer upon the attorney for each of the defendants to be affected by the determination, and personally, or as the court or (276

judge may direct, upon defendants, so to be affected who have not duly appeared therein by attorney. The controversy between the defendants shall not delay a judgment, to which the plaintiff is entitled, unless the court otherwise directs.

New. Am'd by L. 1884, c. 400.

§ 522. Allegation not denied; when to be deemed true. (243)

Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party, by traverse or avoidance, as the case requires.

From Co. Proc., § 168.

§ 523. When pleading must be verified; and when verification may be omitted. (248)

Where a pleading is verified, each subsequent pleading, except a demurrer, or the general answer of an infant by his guardian ad litem, must also be verified. But the verification may be omitted, in a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying, as a witness, concerning an allegation or denial contained in the pleading. A pleading cannot be used, in a criminal prosecution against the party, as proof of a fact admitted or alleged therein.

From Id., §§ 156, 157; L. 1854, c. 75.

§ 524. Form and construction of certain allegations and denials in verified pleading.

The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are therein stated to be made upon the information and belief of the party, they must be regarded, for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information, to form a belief, with respect to a matter, must, for the same purposes, be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

New.

§ 525. [Am'd, 1879.] Verification; how and by whom made.

The verification must be made by the affidavit of the party, or, if there are two or more parties united in interest, and pleading together, by at least one of them, who is acquainted with the facts, except as follows:

1. Where the party is a domestic corporation, the verification must be made by an officer thereof.

2. Where the people of the State are, or a public officer, in their behalf, is the party, the verification may be made by any person acquainted with the facts.

3. Where the party is a foreign corporation; or where the party is not within the county where the attorney resides, or if the latter is not a resident of the State, the county where he has his office, and capable of making the affidavit; or if there are two or more parties united in interest, and pleading together,

where neither of them, acquainted with the facts is within that county, and capable of making the affidavit; or where the action or defence is founded upon a written instrument for the payment of money only, which is in the possession of the agent or the attorney; or where all the material allegations of the pleading are within the personal knowledge of the agent or the attorney; in either case the verification may be made by the agent of or the attorney for the party.

From Co. Proc., § 157. Am'd by L. 1879, c. 542.

§ 526. Form of affidavit of verification.

The affidavit of verification must be to the effect, that the pleading is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. Where it is made by a person, other than the party, he must set forth, in the affidavit, the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why it is not made by the party.

From Co. Proc., § 157.

§ 527. When verification may be confined to a counterclaim.

Where the complaint is not verified, and the answer sets up a counterclaim, and also a defence by way of denial or avoidance, the affidavit of verification may be made to refer exclusively to the counterclaim. In that case, the last three sections are applicable to the affidavit and the counterclaim, as if the latter was a separate pleading.

New.

§ 528. Remedy for defective verification, or want of verification.

The remedy for a defective verification of a pleading is to treat the same as an unverified pleading. Where the copy of a pleading is served without a copy of a sufficient verification, in a case where the adverse party is entitled to a verified pleading, he may treat it as a nullity, provided he gives notice, with due diligence, to the attorney of the adverse party, that he elects so to do.

New.

§ 529. When defendant not excused from verifying answer to charge of fraud.

A defendant is not excused from verifying his answer to a complaint, charging him with having confessed or suffered a judgment, or executed a conveyance, assignment, or other instrument, or transferred or delivered money, or personal property, with intent to hinder, delay, or defraud his creditors, or with being a party or privy to such a transaction by another person, with like intent towards the creditors of that person; or with any fraud whatever, affecting a right or the property of another.

From 2 R. S. 174 (Part 3, c. 1, tit. 2), § 41; L. 1833, c. 14, § 1.

§ 530. [Am'd, 1877.] Private statute; how pleaded.

In pleading a private statute, or a right derived therefrom, it is sufficient to designate the statute by its chapter, year of passage, and title, or in some other manner with convenient certainty, without setting forth any of the contents thereof.

From Co. Proc., § 168. Am'd by L. 1877, c. 416.

§ 531. [Am'd, 1904.] Account, how pleaded. Bill of particulars.

It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but in that case, he must deliver to the adverse party, within ten days after a written demand thereof, a copy of the account, which, if the pleading is verified, must be verified by his affidavit, to the effect, that he believes it to be true; or, if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney resides, or capable of making the affidavit, by the affidavit of the agent or attorney. If he fails so to do, he is precluded from giving evidence of the account. The court, or a judge authorized to make an order in the action, may direct the party to deliver a further account, where the one delivered is defective. Upon application in any case, the court, or a judge authorized to make an order in the action, may, upon notice, direct a bill of the particulars of the claim of either party to be delivered to the adverse party, and in case of default the court shall preclude him from giving evidence of the part or parts of his affirmative allegation of which particulars have not been delivered.

From Co. Proc., § 158. Am'd by L. 1904, c. 500 (in effect April 29, 1904).

§ 532. Judgments; how pleaded.

In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction.

From Id., § 161.

§ 533. Conditions precedent; how pleaded.

In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state, generally, that he, or the person whom he represents, duly performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance.

From Id., § 162.

§ 534. Instrument for payment of money; how pleaded.

Where a cause of action, defence, or counterclaim, is founded upon an instrument for the payment of money only, the party may set forth a copy of the instrument, and state that there is due to him thereon, from the adverse party, a specified sum, which he claims. Such an allegation is equivalent to setting forth the instrument, according to its legal effect.

From Id., § 162.

§ 535. Pleadings in libel and slander.

It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and, if that allegation is controverted, the plaintiff must establish it on the trial. In such an action, the defendant may prove mitigating circumstances, notwithstanding that he has pleaded or attempted to prove a justification.

From Id., § 164.

§ 536. [Am'd, 1877.] Pleading mitigating circumstances in action for a wrong.

In an action to recover damages for the breach of a promise to marry, or for a personal injury, or an injury to property, the

defendant may prove, at the trial, facts, not amounting to a total defence, tending to mitigate or otherwise reduce the plaintiff's damages, if they are set forth in the answer, either with or without one or more defences to the entire cause of action. A defendant, in default for want of an answer, may, upon a reference or inquiry to ascertain the amount of the plaintiff's damages, prove facts of that description.

From Co. Proc., § 165. Am'd by L. 1877, c. 416.

§ 537. [Am'd, 1877, 1879.] Frivolous pleadings; how disposed of.

If a demurrer, answer or reply is frivolous, the party prejudiced thereby, upon a previous notice to the adverse party, of not less than five days, may apply to the court or to a judge of the court for judgment thereupon, and judgment may be given accordingly. If the application is denied, an appeal cannot be taken from the determination, and the denial of the application does not prejudice any of the subsequent proceedings of either party. Costs, as upon a motion, may be awarded upon an application pursuant to this section.

From Co. Proc., § 247. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 538. Sham defences to be stricken out.

A sham answer or a sham defence may be stricken out by the court, upon motion, and upon such terms as the court deems just.

From Co. Proc., § 152.

§ 539. Material variances; how provided for.

A variance, between an allegation in a pleading and the proof, is not material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. If a party insists that he has been misled, that fact, and the particulars in which he has been misled, must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended, upon such terms as it deems just.

From Id., § 169.

§ 540. Immaterial variances; how provided for.

Where the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

From Id., § 170.

§ 541. What to be deemed a failure of proof.

Where, however, the allegation to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not a case of variance, within the last two sections, but a failure of proof.

From Id., § 171.

§ 542. [Am'd, 1897.] Amendments of course.

Within twenty days after a pleading, or the answer, demurrer or reply thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had. But if it is made to appear to the court that the pleading was amended for the purpose of delay, and

that the adverse party will thereby lose the benefit of a term, for which the cause is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form, and such terms imposed as the court deems just.

From Co. Proc., § 172. Am'd by L. 1897, c. 470 (in effect Sept. 1, 1897).

§ 543. Amended pleading to be served; answer thereto. Where a pleading is amended, as prescribed in the last section, a copy thereof must be served upon the attorney for the adverse party. A failure to demur to, or answer the amended pleading, within twenty days thereafter, has the same effect as a like failure to demur to, or answer the original pleading.

From Co. Proc., §§ 172, 146.

§ 544. [Am'd, 1877.] Supplemental pleadings. Upon the application of either party, the court may, and, in a proper case, must, upon such terms as are just, permit him to make a supplemental complaint, answer or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made; including the judgment or decree of a competent court, rendered after the commencement of the action, determining the matters in controversy, or a part thereof. The party may apply for leave to make a supplemental pleading, either in addition to, or in place of, the former pleading. In the former event, if the application is granted, a provisional remedy, or other proceeding already taken in the action, is not affected by the supplemental pleading; but the right of the adverse party to have it vacated or set aside, depends upon the case presented by the original and supplemental pleadings.

From Id., § 177. Am'd by L. 1877, c. 416.

§ 545. [Am'd, 1877.] Motion to strike out irrelevant, etc., matter. Irrelevant, redundant, or scandalous matter, contained in a pleading, may be stricken out, upon the motion of a person aggrieved thereby. Where scandalous matter is thus stricken out, the attorney whose name is subscribed to the pleading may be directed to pay the costs of the motion, and his failure to pay them may be punished as a contempt of the court.

From Co. Proc., § 160. Am'd by L. 1877, c. 416.

§ 546. [Am'd, 1877.] Indefinite or uncertain allegations. Where one or more denials or allegations, contained in a pleading, are so indefinite or uncertain that the precise meaning or application thereof is not apparent, the court may require the pleading to be made definite and certain, by amendment.

From Co. Proc., § 160. Am'd by L. 1877, c. 416.

§ 547. [Added, 1908.] Judgment on the Pleadings. If either party is entitled to judgment upon the pleadings, the court may upon motion at any time after issue joined give judgment accordingly.

Added by L. 1908, c. 166 (in effect Sept. 1, 1908).

CHAPTER VII.

General Provisional Remedies in an Action.

TITLE I.— Arrest, Pending the Action, and Proceedings Thereupon.
TITLE II.— Injunction.
TITLE III.— Attachment of Property.
TITLE IV.— Other Provisional Remedies; General and Miscellaneous Provisions.

TITLE I.

Arrest, pending the action, and proceedings thereupon.

Article 1. Cases where an order of arrest may be granted, and persons liable to arrest.
2. Granting, executing, and vacating or modifying the order of arrest.
3. Discharging the defendant upon bail or deposit; jurisdiction of the bail and disposition of the deposit.
4. Charging and discharging bail.

ARTICLE FIRST.

Cases where an order of arrest may be granted, and persons liable to arrest.

Sec. 548. No person to be arrested in civil proceedings, without a statutory provision. Ne exeat abolished.
549. When the right to arrest depends upon the nature of the action.
550. When the right to arrest depends partly upon extrinsic facts.
551. Order, when and where granted; when of right, and when discretionary.
552. Foreign judgment not to affect right to arrest.
553. Women not to be arrested, except, etc.
554. Idiot, lunatic, or infant under fourteen, if arrested, to be discharged.
555. Person sued in a representative capacity, not to be arrested.

§ 548. [Omitted; see Table, p. iii.] No person to be arrested in civil proceedings, without a statutory provision. Ne exeat abolished.

A person shall not be arrested in a civil action or special proceeding, except as prescribed by statute. The writ of ne exeat is hereby abolished.

From Co. Proc., § 178. Am'd by L. 1877, c. 416.

§ 549. [Am'd, 1877, 1879, 1886.] When the right to arrest depends upon the nature of the action.[1]

A defendant may be arrested in an action, as prescribed in this title, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

[1] When this Code was first enacted, the substantial provisions of what are now subdivisions 2 and 4 of § 549 (except the first four lines of subd. 2, i. e., to the words, "or to recover a chattel"), were included in § 550, and were thus brought under the heading — "Where the right to arrest depends partly upon extrinsic facts." By the amendatory acts of 1879 and 1886, they were transferred (somewhat amended) to § 549, and thus brought under the heading — "Where the right to arrest depends upon the nature of the action." This has affected the relation of § 1487 to these sections. See the cases cited under that section in the Table of Cited Cases, post; also Segelken v. Meyer, 94 N. Y. 473.

2. To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; breach of a promise to marry; misconduct or neglect in office, or in a professional employment; fraud, or deceit; or to recover a chattel where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof; or to recover for money received, or to recover property or damages for the conversion or misapplication of property where it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by a public officer or by an attorney, solicitor or counsellor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover unless he proves the same on the trial of the action; and a judgment for the defendant is not a bar to the new action to recover the money or chattel.

3. To recover moneys, funds, or property held or owned by the State, or held or owned officially or otherwise for or in behalf of a public or governmental interest by a municipal or other public corporation, board, officer, custodian, agency, or agent, of the State or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same.

4. In an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability, or that he has, since the making of the contract, or in contemplation of making of the same, removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only.

From Co. Proc., § 179. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1886, c. 672.

§ 550. [Am'd, 1877, 1879, 1886.] When the right to arrest depends partly upon extrinsic facts.[1]

A defendant may also be arrested in an action wherein the judgment demanded requires the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, where the defendant is not a resident of the State, or, being a resident, is about to depart therefrom, by reason of which non-residence or departure there is danger that a judgment or an order requiring the performance of the act will be rendered ineffectual.

New. Intended to provide a substitute for the writ of ne exeat, abolished by § 548. Am'd by L. 1877, c. 416 and c. 422; L. 1879, c. 542; L. 1886, c. 672.

[1] See foot-note to § 549.

§ 551. [Am'd, 1877, 1886.] Order when and where granted; when of right, and when discretionary.

In a case specified in the last section, the order of arrest can be granted only by the court, is always in its discretion, and may be granted or served, either before or after final judgment, unless an appeal from the judgment is pending, upon which security has been given, sufficient to stay the execution thereof. In either of the cases specified in section 549, the order cannot be served after final judgment; but it may be granted, where a proper case therefor is presented, at any time before final judgment.

New. Am'd by L. 1877, c. 416 and c. 422; L. 1886, c. 672.

§ 552. Foreign judgment not to affect right to arrest.

The recovery of judgment in a court, not of the State, for the same cause of action; or, where the action is founded upon fraud or deceit, for the price or value of the property obtained thereby; does not affect the right of the plaintiff to arrest the defendant, as prescribed in this title.

New.

§ 553. [Am'd, 1877.] Woman not to be arrested, except, etc.

A woman cannot be arrested, as prescribed in this title, except in a case where the order can be granted only by the court; or where it appears, that the action is to recover damages for a wilful injury to person, character, or property.

From Co. Proc., § 179, last sentence. Am'd by L. 1877, c. 416.

§ 554. [Am'd, 1877.] Idiot, lunatic, or infant under fourteen, if arrested, to be discharged.

A lunatic, an idiot, or an infant under the age of fourteen years, if arrested, may be discharged from arrest, as a privileged person, in the discretion of the court. The application for his discharge may be made, in his behalf, by a relative, or by any other person whom the court or judge permits to represent him, for the purpose.

New. Am'd by L. 1877, c. 416.

§ 555. Person sued in a representative capacity, not to be arrested.

A person prosecuted in a representative capacity, as heir, executor, administrator, legatee, devisee, next of kin, assignee, or trustee, cannot be arrested, as prescribed in this title, except for his personal act.

From 2 R. S. 348 (Part 3, c. 6, tit. 1), § 8.

ARTICLE SECOND.

Granting, executing, and vacating or modifying the order of arrest.

Sec. 556. Order required for arrest; how granted.
557. Proof necessary to procure order.
558. When order may be granted; effect of complaint subsequently made.
559. Security, upon order of arrest made by a judge.
560. Id.; upon order of arrest granted by the court.
561. Contents of the order; to whom directed; when to be executed.
562. Copies of papers to be delivered to defendant; originals to be filed.
563. Arrest; how made.
564. General provision as to privilege from arrest; discharge of privileged person.
565. Privilege of officers of courts.
566. Defendant arrested to have twenty days to answer.
567. When application to be made to vacate order of arrest, etc.
568. How and to whom application must be made; opposing it by new proofs.
569–571. [Repealed].
572. Supersedeas, unless defendant is charged in execution, etc.

§ 556. [Am'd, 1877.] Order required for arrest; how granted.

An order for the arrest of the defendant, except as otherwise prescribed in section 551 of this act, must be obtained from a judge of the court in which the action is brought, or from any county judge.

From Co. Proc., § 180. Am'd by L. 1877, c. 416.

See new Rule 57

§ 557. [Am'd, 1877, 1879.] Proof necessary to procure order.

The order may be granted, in a case specified in section 549 of this act, where it appears by the affidavit of the plaintiff or any other person, that a sufficient cause of action exists against the defendant, as prescribed in that section. It may be granted, in a case specified in section 550 of this act, upon the like proof that a sufficient cause of action exists against the defendant, as prescribed in that section, and of the other matters, extrinsic to the cause of action, specified in that section. The affidavit may also contain any statement, tending to determine the amount of bail to be required.

From Co. Proc., § 181. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 558. [Am'd, 1877, 1879, 1886.] When order may be granted; effect of complaint subsequently made.

Subject to the provisions of the last preceding section, the order may be granted at any time after the commencement of the action. It may also be granted to accompany the summons, but at any time after the filing or service of the complaint, the order of arrest must be vacated on motion, if the complaint fails to set forth a sufficient cause of action, as required by section 549 of this act, but where the order is applied for after the filing or service of the complaint the court before granting the same may without notice direct the service of an amended complaint so as to conform to the allegations required in subdivisions two and four of section 549 of this act.

From Co. Proc., § 183. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1886, c. 672.

§ 559. [Am'd, 1879.] Security, upon order of arrest made by a judge.

Except where the action is brought for a cause specified in subdivision third of section 549 of this act, or in a case where it is specially prescribed by law that security may be dispensed with, or the security to be given is specially regulated by law, the judge, before he grants the order, must require a written undertaking on the part of the plaintiff, with two sufficient sureties, to the effect that, if the defendant recovers judgment, or if it is finally decided that the plaintiff was not entitled to the order of arrest, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least equal to one-tenth of the amount of bail required by the order, and not less than two hundred and fifty dollars.

From Co. Proc., § 182. Am'd by L. 1879, c. 542.

§ 560. Id.; upon order of arrest granted by the court.

Where the order can be granted only by the court, an undertaking on the part of the plaintiff may be dispensed with. If it is required, its form, and the security to be given thereupon, must be such as the court prescribes.

New. Covers case of a ne exeat. See §§ 550, 551.

§ 561. [Am'd, 1877.] Contents of the order; to whom directed; when to be executed.

The order must be subscribed by the plaintiff's attorney, and, except where it is granted by the court, by the judge. It may be directed, either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff forthwith to arrest the defendant, if he is found within his county; to hold him to bail in a specified sum; and to return the order, with his proceedings thereunder, as prescribed by law. The plaintiff's attorney may, at his option, by an indorsement upon the order, or, where it was granted by the court, upon the copy thereof, delivered to the sheriff, fix a time within which the defendant must be arrested. In that case, he cannot be arrested afterwards, under the same order.

From Co. Proc., § 183. Am'd by L. 1877, c. 416.

§ 562. [Am'd, 1877, 1879.] Copies of papers to be delivered to defendant; originals to be filed.

The order of arrest, or, where it was granted by the court, a certified copy thereof, subscribed by the plaintiff's attorney; and, in either case, the papers upon which the order was granted, with the undertaking, if any; must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy thereof. The papers, upon which the order was granted, with the undertaking, if any, must be filed, with the order of arrest, or a certified copy thereof, at the time prescribed for filing the same, in section 590 of this act.

From Co. Proc., § 184. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 563. Arrest; how made.

The sheriff must execute the order by arresting the defendant, if he is found within his county, and keeping him in custody, until discharged by law.

From Co. Proc., § 185.

§ 564. [Am'd, 1877, 1895.] General provision as to privilege from arrest; discharge of privileged person.

This title does not abridge or affect a privilege from arrest given by law, or a right of action for a breach thereof. A privileged person is entitled to be discharged from arrest, where other provision is not made therefor by law, by the court, or a judge thereof; or by the county judge of the county where the arrest was made. The order must be made, upon proof, by affidavit, of the facts entitling the applicant to the discharge; and the arrest and discharge are not a bar to a new arrest, after the privilege has ceased. The court or judge may make the order without notice, or may require notice to be given to the sheriff, or to the plaintiff, or to both.

New. Am'd by L. 1877, c. 416; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 565. [Omitted; see Table, p. iii.] Privilege of officers of courts.

An officer of a court of record, appointed or elected pursuant to law, is privileged from arrest, during the actual sitting, which he is required to attend, of a term of the court of which he is an officer, and no longer; but an attorney or counsellor is not thus privileged, unless he is employed in a cause, to be heard at that term.

From 2 R. S. 290 (Part 3, c. 3, tit. 2), § 86.

§ 566. Defendant arrested to have twenty days to answer.

Except where an order of arrest can be granted only by the court, a defendant, arrested before answer, has twenty days, after the arrest, in which to answer the complaint; and judgment must be stayed accordingly.

From Co. Proc., § 183.

§ 567. [Am'd, 1877.] When application to be made to vacate order of arrest, etc.

Except where an order of arrest can be granted only by the court, a defendant, arrested as prescribed in this title, may, at any time before final judgment, or, if he was arrested within twenty days before final judgment, at any time within twenty days after the arrest, apply to vacate the order of arrest; or to reduce the amount of bail; or to increase the security given by the plaintiff; or for one or more of those forms of relief, together, or in the alternative. In a case where the order of arrest can be granted only by the court, a like application may be made, at any time within twenty days after the arrest; and an application to increase the security given by the plaintiff, may be made at any time before final judgment.

From Id., §§ 183, 204. Am'd by L. 1877, c. 416.

§ 568. [Am'd, 1877.] How and to whom motion must be made; opposing it by new proofs.

An application, specified in the last section, may be founded only upon the papers upon which the order was granted; in which case, it must be made to the court, or, if the order was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper; and the application must be heard upon those papers only. Or it may be founded upon proof, by affidavit, on the part of the defendant; in which case, it must be made to the court, or, if the order was granted by a judge out of court, to any judge of the

court, upon notice, and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground of arrest recited in the order, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case, the plaintiff may show any matter in avoidance thereof, which he might show upon the trial.

Substitute for Co. Proc., § 205. Am'd by L. 1877, c. 416.

§§ 569, 570, 571. [Stricken out by L. 1877, c. 416.]

§ 572. [Am'd, 1877, 1882, 1886.] Supersedeas, unless defendant is charged in execution, etc.

Except in a case where an order of arrest can be granted only by the court, if the plaintiff unreasonably delays the trial of the action or neglects to enter judgment therein within ten days after it is in his power to do so, or neglects to issue execution against the person of the defendant within ten days after the return of the execution against the property, and in any event neglects to issue the same within three months after the entry of the judgment, or whenever it shall appear to the satisfaction of the court that the plaintiff in an action, or a judgment creditor in a judgment, delays the enforcement of his remedies therein by collusion, or for the purpose of allowing the debtor to remain in prison under the mandate in any other action, before the issuing of the mandate in favor of such creditor, so as to produce a continued and extended imprisonment by virtue of the separate mandates in the different actions, the defendant must upon his application, made upon notice to the plaintiff, be discharged from custody if he has already been taken under the mandate against him in such action; or if he has not yet been imprisoned therein, be relieved from imprisonment by virtue of such mandate, by the court in which the action was commenced, unless reasonable cause is shown why the application should not be granted. A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action.

From Co. Proc., § 288. Am'd by L. 1877, c. 416; L. 1882, c. 397; L. 1886, c. 672.

ARTICLE THIRD.

Discharging the defendant upon bail or deposit; justification of the bail and disposition of the deposit

Sec. 573. Defendant to be discharged on bail or deposit.
574. When defendant may elect to give bail, etc., or bond for liberties.
575. Undertaking of the bail; what to contain.
576. Examination of persons offered as bail.
577. Filing, etc., of papers; plaintiff's acceptance or rejection of bail.
578. Notice of justification; new undertaking, if other bail is given.
579. Qualifications of bail.
580. Justification of bail.
581. Allowance of bail.
582. Deposit of money with sheriff.
583. Payment of deposit into court by sheriff.
584. Substituting bail for deposit.
585. How deposit disposed of.
586. When deposit to be paid to a third person.
587. Sheriff, when liable as bail; his discharge from liability.
588. Proceedings on judgment against sheriff.
589. Bail liable to sheriff.
590. Filing papers if bail not given.

§ 573. Defendant to be discharged on bail or deposit.

The defendant, at any time before he is in contempt, where the order can be granted only by the court, or, in any other case, at any time before execution against his person, must be discharged from arrest, either upon giving bail, or upon depositing the sum specified in the order of arrest. The defendant may give bail, or make the deposit, immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to see[1] to and to procure bail, before being committed to jail.

From Co. Proc., § 186.

§ 574. When defendant may elect to give bail, etc., or bond for liberties.

Where the defendant is actually confined in the jail, by virtue of an order of arrest, and final or interlocutory judgment has been rendered against him in the action, but an execution against his person has not been issued, he may elect, either to give a bond for the liberties of the jail, or to give bail or make a deposit, as prescribed in this article.

New.

§ 575. Undertaking of the bail; what to contain.

The defendant may give bail, by delivering to the sheriff a written undertaking, in the sum specified in the order of arrest, executed by two or more sufficient bail, stating their places of residence and occupations, to the following effect:

1. If the order of arrest could be granted only by the court, that the defendant will obey the direction of[2] court, or of an appellate court, contained in an order or a judgment, requiring him to perform the act specified in the order; or, in default of his so doing, that he will, at all times, render himself amenable to proceedings to punish him for the omission.

2. If the action is to recover a chattel, that the defendant will deliver it to the plaintiff, if delivery thereof is adjudged in the action, and will pay any sum recovered against him in the action.

[1] Error in engrossing for "seek."
[2] Word "the" omitted by error in engrossing.

3. In any other case, that the defendant will, at all times, render himself amenable to any mandate, which may be issued to enforce a final judgment against him in the action.

Substitute for Co. Proc., § 187.

§ 576. [Am'd, 1877, 1879.] Examination of persons offered as bail.

It is not necessary that the undertaking should be approved, or accompanied with an affidavit of justification of the bail. But the officer, taking the acknowledgment of the undertaking, must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The examination must be reduced to writing, subscribed by the bail, and annexed to the undertaking.

From 2 R. S. 380 (Part 3, c. 6, tit. 6), § 20. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 577. [Am'd, 1879.] Filing, etc., of papers; plaintiff's acceptance or rejection of bail.

Within three days after bail is given, the sheriff must deliver to the plaintiff's attorney copies, certified by him, of the order of arrest, return and undertaking. The plaintiff's attorney, within ten days thereafter, must serve upon the sheriff a notice that he does not accept the bail; otherwise he is deemed to have accepted them, and the sheriff is exonerated from liability.

From Co. Proc., § 192. Am'd by L. 1879, c. 542.

§ 578. Notice of justification; new undertaking, if other bail is given.

Within ten days after the receipt of the notice, the sheriff or the defendant may serve upon the plaintiff's attorney, notice of the justification of the same or other bail, specifying the place of residence and occupation of each of the latter, before a judge of the court, or a county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter, and the place to be within the county where one of the bail resides, or where the defendant was arrested. If other bail are given, a new undertaking must be executed, as prescribed in section 575 of this act.

From Co. Proc., § 193.

§ 579. Qualifications of bail.

The qualifications of bail are as follows:

1. Each of them must be a resident of, and a householder or freeholder within the State.

2. Each of them must be worth the sum specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify, severally, in sums less than that specified in the order, if the whole justification is equivalent to that of two sufficient bail.

From Id., § 194.

§ 580. Justification of bail.

For the purpose of justification, each of the bail must attend before the judge, at the time and place mentioned in the notice, and be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, in his discretion, thinks proper. The judge may, in his discretion, adjourn the examination from day to day, until it is completed; but such an

adjournment must always be to the next judicial day, unless by consent of parties. If required by the plaintiff's attorney, the examination must be reduced to writing, and subscribed by the bail.

From Co. Proc., § 195.

§ 581. Allowance of bail.

If the judge finds the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is thereupon exonerated from liability.

From id., § 196.

§ 582. [Am'd. 1904.] Deposit of money with sheriff.

A defendant, or other person arrested or attached on civil process, who is entitled to release on bail, or to jail liberties on giving the undertaking required by section 150 of this act, may instead of giving bail, or such undertaking, deposit with the sheriff the sum specified in, or endorsed upon such process, or which might be required in such undertaking. The sheriff must thereupon give the prisoner a certificate of the deposit and discharge him from custody. A deposit so made in lieu of an undertaking for jail liberties must be applied, under direction of the court, in satisfaction of any judgment for escape of the prisoner from such liberties and in payment of any expense incurred in the defense of an action for such escape, and thereafter the surplus, if any, and in case there has been no such escape, the whole of such deposit must be refunded to the prisoner or his representative, and in case of a deposit in lieu of bail on attachment against the person, it shall abide the disposition of the court, or a judge thereof, or a county judge.

From Id., § 197. Am'd by L. 1904, c. 384 (in effect April 26, 1904).

§ 583. Payment of deposit into court by sheriff.

The sheriff must, within four days after the deposit, pay it into court. He must take, from the officer receiving it, two certificates of the payment, one of which he must deliver to the plaintiff, and the other to the defendant. For a default in making the payment, the official bond of the sheriff may be prosecuted, as in any other case of delinquency.

From Id., § 198.

§ 584. Substituting bail for deposit.

If money is deposited, as prescribed in the last two sections, bail may be given, and may justify upon notice, at any time before the expiration of the right to be discharged on bail. Thereupon the judge, before whom the justification is had, must direct, in the order of allowance, that the money deposited be refunded to the defendant or his representative, and it must be refunded accordingly.

From Id., § 199.

§ 585. How deposit disposed of.

If money deposited is not refunded, as prescribed in the last section, it is, in a case where the order of arrest could be granted only by the court, subject to the direction of the court, as justice requires, before and after the judgment. In any other case, if it remains on deposit, when final judgment is rendered for the plaintiff, it must be applied, under the direction of the court, in satisfaction of the judgment, and the surplus, if any, must be refunded to the defendant, or his representative. If the final judgment is for the defendant, or the action abates or is discontinued, the sum deposited, and remaining unapplied, must be refunded to the defendant or his representative.

Substitute for Co. Proc., § 200.

§ 586. When deposit to be paid to a third person.

At any time before the deposit is paid into court, the defendant may deliver to the sheriff a written direction, to pay it to a third person, therein specified, in the event that the defendant becomes entitled to a return thereof; but without expressing any other contingency. The direction must be acknowledged or proved and certified, in like manner as a deed to be recorded; and the sheriff must deliver it to the officer who receives the deposit, who must note the substance thereof, with the entries of the deposit, in his books, and upon the two certificates of payment into court. The money thus deposited is deemed the property of the third person, subject to the plaintiff's interest therein, and subject to the rights of a creditor of the defendant, where the direction was given for the purpose of hindering, delaying, or defrauding creditors. The money, or the residue thereof, must be paid to the third person, where, by the provisions of the last two sections, it is required to be refunded to the defendant, or his representative.

New.

§ 587. [Am'd, 1877.] Sheriff, when liable as bail; his discharge from liability.

If, after the defendant is arrested, he escapes or is rescued, or the bail, if any, given by him, do not justify, when they are not accepted, or if the sheriff fails to pay the deposit into court as required by section 583 of this act, the sheriff is liable as bail. But the sheriff may, except in an action to recover a chattel, discharge himself from liability, by the giving and justification of bail, as follows:

1. If the case is one where the order could be granted only by the court, at any time before the court directs the performance of the act specified in the order.

2. In any other case, at any time before an execution is issued against the person of the defendant, upon a judgment in the action.

From Co. Proc., § 201. Am'd by L. 1877, c. 416.

§ 588. Proceedings on judgment against sheriff.

If judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the official bond of the sheriff may be prosecuted, as in any other case of delinquency.

From Co. Proc., § 202.

§ 589. [Am'd, 1877.] Bail liable to sheriff.

The bail taken upon the arrest, unless they justify, or other bail are given and justify, are liable to the sheriff for all damages, which he sustains by reason of the omission.

From Id., § 203. Am'd by L. 1877, c. 416.

§ 590. [Am'd, 1879.] Filing papers if bail not given.

Within ten days after the defendant is arrested, if he does not give bail, or if he gives bail, within ten days after the justification of the bail, the sheriff must file with the clerk the order of arrest, or, where it was granted by the court, the certified copy thereof delivered to him, with his return thereupon indorsed, the papers upon which the order of arrest was granted, and the undertaking given on the part of the plaintiff. Where an order of arrest, directing the arrest of two or more defendants, has been executed as to one or more, but not as to all of them, the sheriff may file a copy of the order of arrest, instead of the original.

New. See § 561, ante. Am'd by L. 1879, c. 542.

ARTICLE FOURTH.

Charging and discharging bail.

Sec. 591. When defendant may be surrendered.
592. How surrender to be made; exoneration of bail thereupon.
593. Bail may arrest defendant.
594. Voluntary surrender; exoneration of bail thereupon.
595. Rights, etc., of sheriff who is liable as bail.
596. Bail; how proceeded against.
597. Certain executions necessary before action against bail.
598. Duty of sheriff on such executions.
599. Defences in action against bail.
600. Relief of bail where principal is imprisoned on criminal charge.
601. Bail exonerated by death, etc.

§ 591. When defendant may be surrendered.

Except in an action to recover a chattel, the bail may surrender the defendant in their own exoneration, or the defendant may surrender himself in exoneration of the bail, before the expiration of the time to answer, in an action against them. The surrender must be made to the sheriff of the county, where the defendant was arrested.

From Co. Proc., § 188, first and last clauses.

§ 592. How surrender to be made; exoneration of bail thereupon.

Where the bail surrender the defendant, the surrender must be made in the following manner:

1. They must take the defendant to the sheriff, and require him, in writing, to take the defendant into his custody.

2. A certified copy of the undertaking of the bail must be delivered to the sheriff, who must detain the defendant in his custody thereupon, as upon the original mandate, and must, by a certificate in writing, acknowledge the surrender. Upon the application of the bail, made upon notice to the plaintiff's attorney, and upon production of the sheriff's certificate and a copy of the undertaking, a judge of the court, or the county judge of the county where the action is triable, may make an order, directing that the bail be exonerated. On filing the order and the papers used on the application therefor, the bail are exonerated accordingly.

From Id., rest of § 188.

§ 593. [Am'd, 1877.] Bail may arrest defendant.

For the purpose of surrendering the defendant, the bail, at any place or at any time before they are finally charged, may themselves arrest him, or, by a written authority, indorsed on a certified copy of the undertaking, may empower another person to do so, and one or more of the bail may thus arrest and surrender the defendant, although the others do not join with him or them, for that purpose.

From Id., § 189. Am'd by L. 1877, c. 416.

§ 594. Voluntary surrender; exoneration of bail thereupon.

Where the defendant surrenders himself in exoneration of his bail, he must present himself to the sheriff, and require the sheriff, in writing, to take him into custody, in exoneration of his bail. The sheriff must detain him accordingly, as prescribed in subdivision second of section 592 of this act; and, if requested by the

bail, at any time after the surrender, the sheriff must, by a certificate in writing, acknowledge the surrender. An order for the exoneration of the bail may be procured, as prescribed in section 592 of this act.

New.

§ 595. Rights, etc., of sheriff who is liable as bail.

Where the sheriff is liable as bail, he has all the rights and privileges, and is subject to all the duties and liabilities of bail: and bail given by him, in order to discharge himself from liability, must be regarded as the bail of the defendant in the action. But this section does not apply to an action to recover a chattel: or to a case where a defence arises to an action against the bail, in consequence of an act or omission of the sheriff.

New.

§ 596. Bail; how proceeded against.

In case of failure to comply with the undertaking, the bail may be proceeded against by action, and not otherwise.

From Co. Proc., § 190

§ 597. Certain executions necessary before action against bail.

An action may be brought, as prescribed in the last section, in a case where the order of arrest could be granted only by the court, at any time after the bail have failed to comply with their undertaking. Where the undertaking was given in an action to recover a chattel, an action may be brought thereupon, at any time after the return, wholly or partly unsatisfied, of an execution for the delivery of the possession of the chattel, with respect to which the order of arrest was granted. In any other case, an action cannot be brought, as prescribed in the last section, until the following requisites have been complied with:

1. An execution, against the property of the defendant, must have been issued to the sheriff of the county in which he was arrested, and returned by that sheriff, wholly or partly unsatisfied.

2. An execution, against the person of the defendant, must have been issued to the same sheriff, and by him returned, not less than fifteen days after its receipt, to the effect that the defendant could not be found within his county.

From 2 R. S. 382 (Part 3, c. 6, tit. 6), § 31.

§ 598. [Am'd, 1877.] Duty of sheriff on such executions.

The sheriff must diligently endeavor to enforce an execution issued and delivered to him, as prescribed in the last section, notwithstanding any direction he may receive from the plaintiff, or his attorney.

From Id., § 32. Am'd by L. 1877, c. 416.

§ 599. [Am'd, 1877.] Defences in action against bail.

In an action against bail, it is a defence, that an execution, against the property, or against the person, of the defendant in the original action, was not issued, as prescribed in section 597 of this act; or that it was not issued in sufficient time to enable the sheriff to enforce it; or that a direction was given, or other fraudulent or collusive means were used, by the plaintiff or his attorney, to prevent the service thereof.

From 2 R. S. 382, § 33. Am'd by L. 1877, c. 416.

§ 600. Relief of bail where principal is imprisoned on criminal charge.

If the defendant in the original action, after his discharge upon bail, is imprisoned, either within or without the State, upon a criminal charge, or a conviction of a criminal offence, the court, in which an action against the bail is pending, may, before the expiration of the time to answer, and upon notice to the adverse party, make such an order for the relief of the bail, as justice requires.

From L. 1845, c. 231, § 4.

§ 601. [Am'd, 1877.] Bail exonerated by death, etc.

Except in an action to recover a chattel, the bail must be exonerated where either of the following events occurs, before the expiration of the time to answer in an action against them:

1. The death of the original defendant.

2. His legal discharge from the obligation to render himself amenable to the process, direction, or proceedings, with respect to which the undertaking of the bail was made.

3. His surrender to the sheriff of the county where he was arrested, as prescribed in this article.

Where either event occurs, after the commencement of the action against the bail, the court may, in its discretion, impose the payment of the plaintiff's costs and expenses, incurred after the return of the execution against the person, as a condition of allowing the exoneration. And the court may, by an order, made upon notice to the adverse party, grant such further time as it deems just, after answer, for the surrender of the original defendant. In that case, his surrender, within the time so granted, has the same effect, as if it had been made before answer.

From 2 R. S. 380 (Part 3, c. 6, tit. 6), §§ 16, 34; L. 1845, c. 231; § 4, Co. Proc., § 191. Am'd by L. 1877, c. 416.

TITLE II.

Injunction.

Article 1. Cases where an injunction may be granted; granting and service of an injunction order.
2. Security.
3. Vacating or modifying an injunction order.

ARTICLE FIRST.

Cases where an injunction may be granted; granting and service of an injunction order.

Sec. 602. Writ of injunction abolished, and order substituted.
603. Injunction, when the right thereto depends upon the nature of the action.
604. Id.; when the right thereto depends upon extrinsic facts.
605. Restrictions upon injunction to restrain State officers.
606. By whom injunction granted in other cases.
607. Proof necessary to procure injunction.
608. At what time the order may be granted.
609. When notice required or not required. Injunction pending an application.
610. Order must recite grounds; service of order.

§ 602. Writ of injunction abolished, and order substituted.

The writ of injunction has been abolished. A temporary injunction may be granted by order, as prescribed in this article.

From Co. Proc., § 218.

§ 603. Injunction, when the right thereto depends upon the nature of the action.

Where it appears, from the complaint, that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act, the commission or continuance of which, during the pendency of the action, would produce injury to the plaintiff, an injunction order may be granted to restrain it. The case, provided for in this section, is described in this act, as a case, where the right to an injunction depends upon the nature of the action.

From Co. Proc., § 219.

§ 604. [Am'd, 1877.] Id.; when the right thereto depends upon extrinsic facts.

In either of the following cases, an injunction order may also be granted in an action:

1. Where it appears, by affidavit, that the defendant, during the pendency of the action, is doing, or procuring, or suffering to be done, or threatens, or is about to do, or to procure, or suffer to be done, an act, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to restrain him therefrom.

2. Where it appears, by affidavit, that the defendant, during the pendency of the action, threatens, or is about to remove, or to dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted, to restrain the removal or disposition.

From Co. Proc., § 219 Am'd by L. 1877, c. 416.

§ 605. [Am'd, 1895.] Restrictions upon injunction to restrain State officers.

Where a duty is imposed by statute upon a State officer, or board of State officers, an injunction order to restrain him or them, or a person employed by him or them, from the performance of that duty, or to prevent the execution of the statute, shall not be granted, except by the supreme court, at a term thereof, sitting in the department in which the officer or board is located, or the duty is required to be performed; and upon notice of the application therefor to the officer, board, or other person to be restrained.

From L. 1851, c. 488, §§ 1, 2. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 606. [Am'd, 19 2.] By whom injunction granted in other cases.

Except where it is otherwise specially prescribed by law, an injunction order may be granted by the court in which the action is brought, or by a judge thereof, or by any county judge; and where it is granted by a judge, it may be enforced as the order of the court. An injunction order which may be modified or vacated by the appellate division may also be granted or continued by the appellate division, or a justice thereof, pending appeal to that court or to the court of appeals from an order or judgment denying or vacating an injunction.

From Co. Proc., § 218. Am'd by L. 1913, c. 112 (in effect Sept. 1, 1913).

§ 607. [Am'd, 1877.] Proof necessary to procure injunction.

The order may be granted, where it appears to the court or judge, by the affidavit of the plaintiff, or any other person, that sufficient grounds exist therefor.

From Id., § 220. Am'd by L. 1877, c. 416.

§ 608. [Am'd, 1877.] At what time the order may be granted.

The order may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment.

From Co. Proc., § 220. Am'd by L. 1877, c. 416.

§ 609. [Am'd, 1877.] When notice required or not required. Injunction pending an application.

The order may be granted, upon or without notice, in the discretion of the court or judge, unless the defendant has answered; in which case, it can be granted only upon notice, or an order to show cause. Where an application for an injunction is made upon notice, or an order to show cause, either before or after answer, the court or judge may enjoin the defendant, until the hearing and decision of the application.

From Co. Proc., §§ 221, 223. Am'd by L. 1877, c. 416.

§ 610. Order must recite grounds; service of order.

The injunction order must briefly recite the grounds for the injunction. Where it is granted by the court, it must be served by delivering a certified copy thereof; where it is granted by a judge, it must be served by showing the original order, and delivering a copy thereof. Service of the order, upon a corporation, may be made as prescribed in this act, for making personal service of a summons upon a corporation. Copies of the papers, upon which the order was granted, must be delivered with the copy of the order.

New, except last sentence, which is from Co. Proc., § 220.

ARTICLE SECOND.

Security.

Sec. 611. Security, on staying proceedings in an action, before trial.
612. Id.; after trial, and before judgment.
613. Id.; after judgment.
614. Money deposited may be paid over.
615. Undertaking to be cancelled thereupon.
616. Security on staying proceedings after verdict, in ejectment or dower.
617. Id.; damages to include waste.
618. Deposit may be dispensed with.
619. Undertaking and deposit; when dispensed with.
620. Security in other cases.
621. Special cases excepted.
622. [Repealed.]
623. Damages; how ascertained.
624. Damages sustained by a third person.
625. Action on the undertaking.

§ 611. Security, on staying proceedings in an action, before trial.

An injunction order shall not be granted, to stay the trial of an action, in which the complaint demands judgment for a sum of money only, after issue has been joined therein, unless the party applying therefor gives an undertaking to the party enjoined, with sufficient sureties, to the effect, that he will pay to the party enjoined, or his representative, all damages and costs, which may be recovered by him in the action stayed by the injunction, not exceeding a sum, specified in the undertaking; and, also, all damages and costs that may be awarded to him, in the action in which the injunction order is granted.

From 2 R. S. 188 (Part 3, c. 1, tit. 2), § 139.

§ 612. Id.; after trial, and before judgment.

An injunction order shall not be granted, to stay proceedings in an action specified in the last section, after verdict, report, or decision, and before final judgment thereupon, unless a sum of money, sufficient to cover the sum awarded by the verdict, report, or decision, and the costs of the action, is first paid, by the party applying for the injunction into the court, in which his action is commenced, or an undertaking for the payment thereof, with interest, is given, as prescribed in this article.

From Id., § 140.

§ 613. [Am'd, 1877.] Id.; after judgment.

An injunction order shall not be granted, to stay proceedings upon a judgment for a sum of money, unless the following requisites are complied with, by the party applying therefor:

1. The full amount of the judgment, including interest and costs, must be paid by him, into the court in which his action is commenced; or an undertaking in lieu thereof must be given, as prescribed in this article.

2. He must also give an undertaking, with sufficient sureties, to pay to the party enjoined, all damages and costs, which may be awarded to him by the court, in the action in which the injunction order is granted; not exceeding a sum, specified in the undertaking.

From Id., § 141. Am'd by L. 1877, c. 416.

§ 614. Money deposited may be paid over.

Money paid into court, as prescribed in the last two sections, may be paid over, by the direction of the court, to the party

whose proceedings are stayed, upon his giving an undertaking to the people of the State, with sufficient sureties, in a sum fixed by the court, to pay the money and interest, or any part thereof, as directed in the order or judgment of the court.

From 2 R. S. 189, § 142.

§ 615. Undertaking to be cancelled thereupon.

Where money so paid into court has been paid over to the party whose proceedings are stayed, if the final decision of the action, in which the injunction order is granted, is against the party obtaining it, the court must give such directions, as justice requires, with respect to cancelling the undertaking given by the successful party; making perpetual the injunction staying collection of the judgment; and requiring the judgment to be discharged of record.

From Id., § 143.

§ 616. Security on staying proceedings after verdict, in ejectment or dower.

An injunction order shall not be granted, to stay proceedings in an action of ejectment, or for dower, after verdict, report, or decision, unless the party applying therefor gives an undertaking, with sufficient sureties, to pay to the party enjoined, or his representative, all damages and costs, not exceeding a sum specified in the undertaking, which may be awarded to him, in the action wherein the injunction was granted.

From Id., § 144.

§ 617. Id.; damages to include waste.

Where an undertaking is given, as prescribed in the last section, the damages to be paid, upon the vacating of the injunction order, or the decision of the action against the party obtaining it, include, not only the reasonable rents and profits of the real property, recovered by the verdict, report, or decision, but all waste committed upon the property, after the granting of the injunction.

From 2 R. S. 190, § 145.

§ 618. Deposit may be dispensed with.

In a case where money is required by the foregoing sections of this article, to be paid into court, the court or judge may dispense with the payment, and may require the party to give, in lieu thereof, an undertaking, with two or more sureties, to pay the sum specified, with interest, as directed by the court. If an undertaking is required, in addition to the deposit, both undertakings may be contained in the same instrument, at the election of the party applying for the injunction.

From Id., § 146.

§ 619. Undertaking and deposit; when dispensed with.

The foregoing sections of this article do not apply to a case, where an injunction order is applied for, to stay proceedings in another action, on the ground that a judgment, verdict, report, or decision therein was obtained by actual fraud. In that case, the court or judge granting the injunction order may dispense with the deposit of money, or the execution of an undertaking, except as prescribed in the next section.

From 2 R. S. 190, § 147.

§ 620. [Am'd, 1877.] Security in other cases.

Where special provision is not otherwise made by law for the security to be given upon an injunction order, the party applying therefor must give an undertaking, executed by him, or by one or more sureties, as the court or judge directs, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding a sum, specified in the undertaking, as he may sustain by reason of the injunction, if the court finally decides that the plaintiff was not entitled thereto.

From Co. Proc., § 222. Am'd by L. 1877, c. 416.

§ 621. Special cases excepted.

The foregoing provisions of this article do not affect any special statutory provision, whereby security upon granting an injunction order may be dispensed with, in a particular case, or the security to be given in a particular case is otherwise regulated.

New.

§ 622. [Stricken out by L. 1877, c. 416.]

§ 623. [Am'd, 1877.] Damages, how ascertained.

The damages, sustained by reason of an injunction, may be ascertained and determined by the court, or by a referee, appointed by the court, or by a writ of inquiry, or otherwise, as the court shall direct; and the decision of the court thereupon, or an order confirming the report of the referee, is conclusive, as to the amount of those damages, upon all the persons who have executed the undertaking, unless it is reversed upon appeal. The court may, in its discretion, direct that the sureties have notice of the hearing, or of an appeal, and may prescribe the time and manner of giving them notice.

From Co. Proc., §§ 222, 224; 2 R. S. 190, § 145. Am'd by L. 1877, c. 416.

§ 624. Damages sustained by a third person.

Where the defendant enjoined was an officer of a corporation, or joint-stock association, or a bailee, agent, trustee, or other representative of another, and the damages, sustained by him, are less than the sum specified in the undertaking, the court or the referee may also separately ascertain and determine the damages sustained, by reason of the injunction, by the corporation, association, or person, whom the defendant represents, to an amount not exceeding the surplus of the sum specified in the undertaking; and those damages may be recovered in a separate action, brought as prescribed in the next section.

New.

§ 625. Action on the undertaking.

Where the damages have been ascertained by the decision of the court, or the confirmation of a referee's report, as prescribed in the last two sections, any person, entitled to the benefit of an undertaking, executed pursuant to the provisions of this title, may bring an action thereon, without further leave of the court.

New.

ARTICLE THIRD.

Vacating or modifying an injunction order.

Sec. 626. Application to vacate or modify, without notice.
627. Id.; upon notice.
628. When prior motion not to prejudice subsequent application.
629. New undertaking may be required.
630. Verified answer to have the effect only of an affidavit.
631-634. [Repealed.]

§ 626. [Am'd, 1895.] Application to vacate or modify, without notice.

Where the injunction order was granted without notice, the party enjoined may apply, upon the papers upon which it was granted, for an order vacating or modifying the injunction order. Such an application may be made, without notice, to the judge or justice who granted the order, or who held the term of the court where it was granted; or to a term of the appellate division of the supreme court. It cannot be made without notice, to any other judge, justice or term, unless the applicant produces proof, by affidavit, that, by reason of the absence or other disability of the judge or justice who granted the order, the application cannot be made to him; and that the applicant will be exposed to great injury, by the delay required for an application upon notice. The affidavit must be filed with the clerk; and a copy thereof, and of the order vacating or modifying the injunction order, must be served upon the plaintiff's attorney, before that order takes effect.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 627. [Am'd, 1879.] Application to vacate or modify upon notice.

Where the injunction order was granted without notice, or where it was granted upon notice, with leave to apply to vacate or modify it, the party enjoined may apply, upon notice, to the judge who granted it, or to the court, at a term where a contested motion in the action may be heard, for an order, vacating or modifying the injunction order. Such an application may be founded upon the papers upon which the injunction was granted; or upon proof, by affidavit, on the part of the defendant; or both. Where it is founded upon proof on the part of the defendant, it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain the injunction.

From Co. Proc., §§ 225, 227. Am'd by L. 1879, c. 542.

§ 628. When prior motion not to prejudice subsequent application.

The granting or denial of an application, made as prescribed in the last section, founded only upon the papers upon which the injunction order was granted, does not prejudice a subsequent application, seasonably made, founded upon proof, by affidavit, on the part of the defendant. And the granting or denial of either application does not prejudice a subsequent application, seasonably made, founded upon the failure of a complaint, which had not been made at the time of the former application, to set forth a cause of action, sufficient to entitle the plaintiff to the injunction order, upon one or more grounds, recited therein.

New.

§ 629. [Am'd, 1883, 1884.] New undertaking may be required.

Upon the hearing of an application, upon notice, to vacate or modify an injunction order, the court or judge may require a new undertaking, in the same or in a different sum, to be given by the plaintiff, with the like sureties, and to the like effect, as upon granting an original order. The persons executing the new undertaking become liable thereon, as if they had executed it upon the granting of the original order. The persons who executed the original undertaking remain liable thereon, until the new undertaking is given and approved, and no longer. Upon such hearing the court or judge may where the alleged wrong or injury is not irreparable and is capable of being adequately compensated for in money, vacate the injunction order upon the defendant's executing an undertaking in such form and amount and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff against any loss sustained by reason of vacating such injunction order.

New. Am'd by L. 1883, c. 404; L. 1884, c. 401.

§ 630. Verified answer to have the effect only of an affidavit.

Upon the hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit.

New.

§§ 631, 632, 633, 634. [Stricken out by L. 1877, c. 416.]

TITLE III.

Attachment of property.

Article 1. Cases where a warrant of attachment may be granted; and proceedings upon granting the same.
2. Executing the warrant, pending the action.
3. Vacating or modifying the warrant; discharging the attachment.
4. Regulations where there are two or more warrants against the same defendant.
5. Proceedings after judgment; rights of parties and duties of the sheriff, after the warrant is vacated or annulled, or the attachment discharged.

ARTICLE FIRST.

Cases where a warrant of attachment may be granted; and proceedings upon granting the same.

Sec. 635. In what actions.
636. What must be shown to procure the warrant.
637. Warrant in action against public officer, etc., for peculation.
638. When and by whom the warrant may be granted.
639. Affidavits to be filed.
640. Security on obtaining warrant.
641. Contents of warrant; to whom directed.
642. Validity of undertaking.

§ 635. [Am'd, 1877, 1894, 1895, 1916.] In what actions.

A warrant of attachment against the property of one or more defendants in an action, may be granted upon the application of the plaintiff, as specified in the next section, where the action is to recover a sum of money only, as damages for one or more of the following causes:

1. Breach of contract, express or implied, other than a contract to marry.

2. Wrongful conversion of personal property.

3. An injury to person or property, in consequence of negligence, fraud or other wrongful act.

4. A wrongful act, neglect or default by which the decedent's death was caused, when the cause of action arose in this state before or after the passage of this act and the action is brought by an executor or administrator against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued as prescribed by section 1902 of this act.

From Co. Proc., §§ 227, 229. Am'd by L. 1877, c. 416; L. 1894, c. 738; L. 1895, c. 578; L. 1916, c. 441 (in effect May 9, 1916).

§ 636. [Am'd, 1877, 1894, 1895, 1899.] What must be shown to procure the warrant.

To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the judge granting the same, as follows:

1. That one of the causes of action specified in the last section exists against the defendant. If the action is to recover damages for breach of contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state; or, if he is a natural person and a resident of the state, that he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed, or is about to remove, property from the state, with intent to defraud his or its creditors; or has assigned, disposed of, or secreted, or is about to assign, dispose of or secrete property with the like intent; or where, for the purpose of procuring credit, or the extension of credit, the defendant has made a false statement in writing, under his own hand or signature, or under the hand or signature of a duly authorized agent, made with his knowledge and acquiescence as to his financial responsibility or standing; or, where the defendant, being an adult and a resident of the state, has been continuously without the state of New York for more than six months next before the granting of the order of publication of the summons against him, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section 430 of this act; or a designation so made no longer remains in force; or service upon the person so designated cannot be made within the state, after diligent effort.

From Co. Proc., §§ 227, 229. Am'd by L. 1877, c. 416; L. 1894, c. 736; L. 1895, c. 578; L. 1899, c. 598 (in effect May 16, 1899).

§ 637. [Am'd, 1877, 1894.] Warrant in action against public officer, etc., for peculation.

A warrant of attachment, against the property of one or more defendants in an action, may also be granted, upon the application of the plaintiff, where the complaint demands judgment for a sum of money only; and it appears, by affidavit, that the action is brought to recover money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a public governmental interest, by a municipal or other public corporation, board, officer, custodian, agency, or agent, of the State, or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of; or in the obtaining, reception, payment, conversion, or disposition of which, without right, he has aided or abetted; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same; or the aiding or abetting thereof; or in an action in favor of a private person or corporation, brought to recover damages for an injury to personal property where the liability arose, in whole or in part, in consequence of the false statements of the defendant as to his responsibility or credit, in writing, under the hand or signature of the defendant or his authorised agent, made with his knowledge and acquiescence. In order to entitle the plaintiff to a warrant of attachment, in the case specified in this section, he must show, by affidavit, to the satisfaction of the judge granting it, that a sufficient cause of action exists against the defendant for a sum stated in the affidavit.

From L. 1875, c. 28, §§ 2, 3. Am'd by L. 1877, c. 416; L. 1894, c. 736.

§ 638. [Am'd, 1877.] When and by whom the warrant may be granted.

The warrant may be granted by a judge of the court, or by any county judge, to accompany the summons, or at any time after the commencement of the action, and before final judgment therein. Personal service of the summons must be made upon the defendant, against whose property the warrant is granted, within thirty days after the granting thereof; or else, before the expiration of the same time, service of the summons by publication must be commenced, or service thereof must be made without the State, pursuant to an order obtained therefor, as prescribed in this act; and if publication has been, or is thereafter commenced, the service must be made complete, by the continuance thereof.

Substitute for Co. Proc., §§ 227, 228. Am'd by L. 1877, c. 416.

§ 639. [Am'd, 1877.] Affidavits to be filed.

The plaintiff procuring the warrant must, within ten days after the granting thereof, cause the affidavits, upon which it was granted, to be filed in the office of the clerk.

From Co. Proc., § 229, last sentence. Am'd by L. 1877, c. 416.

§ 640. Security on obtaining warrant.

The judge, before granting the warrant, must require a written undertaking, on the part of the plaintiff, with sufficient sureties, to the effect, that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs, which may be awarded to the defendant, and all damages, which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred and fifty dollars. But this section does not apply to a case, where the action is brought for a cause specified in section 637 of this act, or where it is specially prescribed by law that security may be dispensed with, or where the security to be given is specially regulated by law.

From Co. Proc., § 230.

§ 641. Contents of warrant; to whom directed.

The warrant must be subscribed by the judge and the plaintiff's attorney, and must briefly recite the ground of the attachment. It may be directed, either to the sheriff of a particular county, or, generally, to the sheriff of any county. It must require the sheriff to attach and safely keep, so much of the property, within his county, which the defendant has, or which he may have, at any time before final judgment in the action, as will satisfy the plaintiff's demand, with costs and expenses. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit. Warrants may be issued at the same time, to sheriffs of different counties.

From Id., § 231.

§ 642. Validity of undertaking.

It is not a defense to an action upon an undertaking, given upon granting a warrant of attachment, that the warrant was granted improperly, for want of jurisdiction, or for any other cause.

New.

ARTICLE SECOND.

Executing the warrant, pending the action.

Sec. 643. [Repealed.]
644. Sheriff must attach property of defendant.
645. What interest in real property may be attached.
646. Attachment of unpaid subscription to foreign corporation.
647. Id.; interest in corporation.
648. Id.; bond, note, etc.
649. How property to be attached.
650. Certificate of defendant's interest to be furnished.
651. Person refusing certificate may be examined.
652. Rights of owner or master of vessel by which goods have been shipped.
653. Foregoing section not to apply in certain cases.
654. Sheriff must make inventory.
655. Sheriff may maintain actions.
656. Perishable goods and animals to be sold.
657. Claim of property; how tried.
658. Proceedings, if claimant succeeds.
659. Finding, not to prejudice right of claimant.
660. Proceedings on claim to domestic vessel.
661. Appraisers to be sworn; valuation to be returned.
662. Undertaking to be given.
663. Vessel; when to be discharged.
664. When undertaking to be sued.
665. Defence in such an action; plaintiff's recovery.
666. Foreign vessel; how valued.
667. Notice thereof.
668. Plaintiff to give undertaking with sureties.
669. Vessel; when to be discharged.
670. Terms on which debtor may claim vessel.
671, 672, 673. When vessel to be sold.
674. Sheriff to keep property.
675. Sheriff may be directed to pay money into court.
676. When he may be directed to release or deliver property.
677. Plaintiff may bring action in name of himself and the sheriff.
678. How leave to bring such action procured.
679. Plaintiff may be joined with sheriff, after action commenced.
680. Judge to direct as to management of such an action, etc.
681. Return of inventory; how enforced.

§ 643. [Stricken out by L. 1877, c. 416.]

§ 644. [Am'd, 1877.] Sheriff must attach property of defendant.

The sheriff must immediately execute the warrant, by levying upon so much of the personal and real property of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses. He must take into his custody all books of account, vouchers, and other papers, relating to the personal property attached, and all evidences of the defendant's title to the real property attached, which he must safely keep, to be disposed of, as prescribed in this title. The sheriff, to whom a warrant of attachment is delivered, may levy, from time to time, and as often as is necessary, until the amount, for which it was issued, has been secured, or final judgment has been rendered in the action, notwithstanding the expiration of his term of office.

From Co. Proc., § 232; 2 R. S. 4 (Part 2, c. 5, tit. 1), § 7. Am'd by L. 1877, c. 416.

§ 645. What interest in real property may be attached.

The real property, which may be levied upon by virtue of a warrant of attachment, includes any interest in real property, either vested or not vested which is capable of being alienated by the defendant.

New.

§ 646. Attachment of unpaid subscription to foreign corporation.

Under a warrant of attachment against a foreign corporation, other than a corporation created by or under the laws of the United States, the sheriff may levy upon the sum remaining unpaid upon a subscription to the capital stock of the corporation, made by a person within the county; or upon one or more shares of stock therein, held by such a person, or transferred by him, for the purpose of avoiding payment thereof.

From L. 1845, c. 234, § 1.

§ 647. [Am'd, 1911.] Id.; interest in shares or bonds.

The rights or shares which the defendant has in the stock of an association or corporation, or in a bond negotiable or otherwise, together with the interest and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges, with respect thereto, which the defendant had when they were so attached.

From Co. Proc., §§ 234, 237. Am'd by L. 1911, c. 419 (in effect Sept. 1, 1911).

§ 648. [Am'd, 1877, 1907.] Id.; bond, note, etc.

The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the state; which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the debt represented thereby. The attachment may also be levied upon a right or interest, present or future, to any of the property or estate of a deceased person which may belong to the defendant and which could be legally assigned by him as legatee or distributee, whether the same exists by reason of the provisions of a last will and testament admitted to probate at the time the attachment is granted, or by operation of the law in case of the intestacy of the deceased. Levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the rights and interests of the defendant at the time of such levy, subject to the rights of the executor, administrator or trustee of such estate to administer the same according to law.

New. Am'd by L. 1877, c. 416; L. 1907, c. 318 (in effect Sept. 1, 1907).

§ 649. [Am'd, 1879, 1889, 1907.] How property to be attached.

A levy under a warrant of attachment must be made as follows:

1. Upon real property, by filing with the clerk of the county, where it is situated a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding the office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect, as a notice of the pendency of an action.

2. Upon the personal property, capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody. He must thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant, and of the affidavits upon which it was granted.

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation, or interests or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or if it consists of a right or interest in

an estate of a deceased person arising under the provisions of a will or under the provisions of law in case of intestacy, with the executor or trustee under the will, or the administrator of the estate.

4. Upon property discovered in any action brought as prescribed in subdivision two of section 655 of this act, by entering in the proper clerk's office, the judgment rendered in said action, and thereafter levying on said property in the manner prescribed in subdivisions one, two and three of this section.

From Co. Proc., §§ 132, 235. Am'd by L. 1879, c. 542; L. 1889, c. 504; L. 1907, c. 318 (in effect Sept. 1, 1907).

§ 650. Certificate of defendant's interest to be furnished.

Upon the application of a sheriff, holding a warrant of attachment, the president or other head of an association or corporation, or the secretary, cashier, or managing agent thereof, or a debtor of the defendant, or a person holding property, including a bond, promissory note, or other instrument for the payment of money, belonging to the defendant, must furnish to the sheriff a certificate, under his hand, specifying the rights or number of shares of the defendant, in the stock of the association or corporation, with all dividends declared or incumbrances thereon; or the amount, nature, and description of the property, held for the benefit of the defendant, or of the defendant's interest in property so held, or of the debt or demand owing to the defendant, as the case requires.

From Co. Proc., § 236.

§ 651. Person refusing certificate may be examined.

If a person, to whom application is made, as prescribed in the last section, refuses to give such a certificate; or if it is made to appear, by affidavit, to the satisfaction of the court, or a judge thereof, or the county judge of the county to which the warrant is issued, that there is reason to suspect that a certificate given by him is untrue, or that it fails fully to set forth the facts, required to be shown thereby; the court or judge may make an order, directing him to attend, at a specified time, and at a place within the county to which the warrant is issued, and submit to an examination under oath, concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee named therein.

From Co. Proc., § 236.

§ 652. [Am'd, 1895.] Rights of owner or master of vessel by which goods have been shipped.

Except as otherwise prescribed in the next section, the owner or master of a vessel, on board of which goods of a defendant, against whom a warrant of attachment is issued, have been shipped for transportation, without reshipment and transshipment in the State, to a port or place without the State, may transport and deliver them according to their destination, notwithstanding the warrant; unless the plaintiff, his agent or attorney, execute to the owner or the master of the vessel, a written undertaking, with sufficient sureties, in a sum specified therein, to pay him all expenses, damages, and charges, which may be incurred by him, or to which he may be subjected, for unlading the goods from the vessel, and for all necessary detention of the vessel, for that purpose. The undertaking must be approved, with respect to its form, the sum specified therein, and the sufficiency of the sureties, by a judge or justice of the court, or the county judge of the county wherein the vessel is situated, or in the city and county of New-York, by a justice of the supreme court.

From L. 1841, c. 242, § 1. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 653. Foregoing section not to apply in certain cases.

The last section does not apply, where the owner or master, before the shipment of the goods, had actual information of the granting of the warrant, or where he has, in any wise, connived at or been privy to, the shipment thereof, for the purpose of screening them from legal process, or of hindering, delaying, or defrauding creditors.

From L. 1841, c. 242, § 2.

§ 654. Sheriff must make inventory.

The sheriff must, immediately after levying under a warrant of attachment, make, with the assistance of two disinterested freeholders, a description of the real property, and a just and true inventory of the personal property, upon which it was levied, and of the books, vouchers, and other papers taken into his custody, stating therein the estimated value of each parcel of real property attached, or of the interest of the defendant therein, and of each article of personal property, enumerating such of the latter as are perishable. The inventory must be signed by the sheriff and the appraisers; and must, within five days after the levy, be filed in the office of the clerk of the county, where the property is attached.

From 2 R. S. 4 (Part 2, c. 5, tit. 1), § 8.

§ 655. [Am'd, 1889.] Sheriff may maintain actions.

The sheriff must, subject to the direction of the court or judge, collect and receive all debts, effects, and things in action, attached by him. He may maintain any action or special proceeding, in his name, or in the name of the defendant, which is necessary, for that purpose, or to reduce to his actual possession an article of personal property, capable of manual delivery, but of which he has been unable to obtain possession. And he may discontinue such an action or special proceeding, at such time and on such terms, as the court or judge directs.

2. Where the summons was served without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act; and where the defendant has not appeared in the action (otherwise than specially) but has made default and before entering final judgment, the sheriff may, in aid of such attachment, maintain an action against the attachment debtor, and any other person or persons, or against any other person or persons, to compel the discovery of any thing in action, or other property belonging to the attachment debtor; and of any money, thing in action, or other property due to him, or held in trust for him, or to prevent the transfer thereof, or the payment or delivery thereof, to him or any other person, and the sheriff may, in aid of such attachment, also maintain any other action against the attachment debtor and any other person or persons, or against any other person or persons, which may now be maintained by a judgment creditor in a court of equity, either before the return of an execution in aid thereof, or after the return of an execution unsatisfied. The judgment in any of the above-mentioned actions must provide and direct that the said property shall be applied by the sheriff, to the satisfaction of any judgment which the plaintiff may obtain in the attachment action.

From Co. Proc., § 232. Am'd by L. 1889, c. 504.

§ 656. [Am'd, 1877.] Perishable goods and animals to be sold.

If property attached, other than a vessel, is perishable, the court or judge may, by an order made with or without notice, as the urgency of the case in its or his opinion requires, direct the sheriff to sell it at public auction, and thereupon the sheriff must sell it accordingly. If it consists of live animals, the same proceedings may be had, but such notice shall be given to the parties to the action, of the application for the order as the court or judge prescribes. The order directing the sale must prescribe the time and place of the sale, and notice thereof must be given in such manner, and for such time as is prescribed in the order. The sheriff must retain in his hands the proceeds of the sale, after deducting his expenses as allowed by the court or judge.

From Co. Proc., § 233; 2 R. S. 4 (Part 2, c. 5, tit. 1), part of § 9. Am'd by L. 1877, c. 416.

§ 657. [Am'd, 1904.] Claim of property; how tried.

If goods or effects, other than a vessel, attached as the property of the defendant, are claimed by or in behalf of another person, as his property, an affidavit may be made and delivered to the sheriff, in behalf of such person, at any time while such goods or effects or the proceeds thereof are in the sheriff's possession, stating that he makes such a claim; specifying in whole or in part the property to which it relates, and in all cases stating the value of the property claimed and the damages, if any, over and above such value, which the claimant will suffer in case such levy is not released. In that case, the sheriff may, in his discretion, empanel a jury to try the validity of the claim.

From 2 R. S. 4 (Part 2, c. 5, tit. 1), § 10. Am'd by L. 1904, c. 541 (in effect Sept. 1, 1904).

§ 658. [Am'd 1877, 1888, 1895, 1904.] Proceedings if claimant succeeds.

If, by their inquisition, the jury finds the property of the goods or effects to have been in the claimant, at the time of the levy, they must also determine its value, and the damages above such value as specified in the last section. Thereupon the officer must forthwith deliver such goods or effects to him or his agent; unless the plaintiff gives an undertaking with at least two sufficient sureties, to the effect that the sureties will indemnify him to the amount therein specified, not less than twice the value of the goods and effects and damages as determined by the jury, and two hundred and fifty dollars in addition thereto, against all damages, costs and expenses, in an action to be brought against him by any person, by the claimant, his assignee, or other representative, by reason of the levy upon, detention, or sale of any of the goods or effects, by virtue of the attachment. If the undertaking is given, the officer must detain the goods or effects, as the property of the defendant. Where an undertaking is given to indemnify the sheriff, he must, within two days after the giving of said undertaking, cause the same to be filed in the office of the court out of which the attachment was issued, and serve upon the claimant or his agent, and the attaching creditor or attorney, whose name is subscribed to the warrant of attachment, a copy of said undertaking, with a notice of the justification of the sureties thereon. The justification must take place before a judge of the court out of which the attachment was issued, at a time to be specified in the notice, which must not be less than two nor more than five days after the serving of the said notice. For the purpose of justi-

fication, each of the sureties upon the undertaking must attend before the judge at the time and place mentioned in the notice, and be examined on oath on the part of the claimant, or his agent or attorney, touching his sufficiency, in such manner as the judge, in his discretion, thinks proper. The examination may be adjourned from day to day until it is completed, but such adjournment must always be to the next judicial day. If required by the claimant, his assignee or other representative, the examination must be reduced to writing and subscribed by the sureties. If the judge finds the sureties sufficient he must annex the examination to the undertaking, endorse his allowance thereon, and cause the said undertaking, together with the examination of the sureties, to be filed with the clerk of the court. Thereupon the sheriff is released and discharged from all liability, by reason of the taking and detention of the property seized. When any such undertaking shall have been approved and filed, as hereinbefore provided, the clerk of the court in which the same shall be filed shall immediately index the same in the general index book in his office under the title of the suit in which the attachment is issued.

From 2 R. S. 4 (Part 2, c. 5, tit. 1), § 11. Am'd by L. 1877, c. 416; L. 1888, c. 98, § 1; L. 1895, c. 662; L. 1904, c. 541 (in effect Sept. 1, 1904).

§ 658a. [Added, 1904.] Discharge of personal property from attachment.

If goods or effects, other than a vessel, attached as the property of the defendant, or any portion thereof, are claimed by or in behalf of another person, such claimant may, within five days after the levy of the attachment, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to the whole or a part of the property attached. Upon such an application the claimant must give to the sheriff an undertaking with at least two sufficient sureties who must justify in double the value of the property claimed, as appraised in the inventory of the property attached. The undertaking must be conditioned to the effect that in an action to be brought on the undertaking, the claimant will establish that he was the owner of such goods or effects at the time of the levy thereon; and that in case of his failure to do so, he will pay to the sheriff the full value of the property so claimed with interest from the date thereof together with the costs of the action. Sections 690 and 691 shall apply to an undertaking given as prescribed in this section. Upon such an undertaking being given and after justification of the sureties if required, the court or judge must make an order discharging the property so claimed from the attachment, upon payment by the claimant of the sheriff's fees and necessary disbursements. Thereupon and upon such payment, the sheriff must discharge the same accordingly, notwithstanding that the plaintiff may have given an undertaking as provided in section 658. The court or judge may, upon the application of the plaintiff or of the claimant at any time before the warrant is vacated or annulled, upon notice to all parties in interest, direct the sheriff to commence an action upon the undertaking, upon such terms and conditions and under such regulations as it or he deems just. In such an action, the claimant may show, in bar of a recovery, that he was the owner of the said property attached. If judgment passes against the claimant the plaintiff is entitled to recover the value of the said property with interest from the date of the undertaking with the costs of the action. Neither the giving of the undertaking as prescribed

in this section, nor the recovery of any judgment thereon, shall affect in any manner, the right, if any, of the defendant in the attachment action in or to the property discharged from the attachment, nor shall this section be construed as affecting or impairing any other right or remedy which any person might otherwise have in respect to the property attached.

Added by L. 1904, c. 293 (In effect Sept. 1, 1904).

§ 659. Finding, not to prejudice right of claimant.

If the property is found to be in the defendant, the finding does not prejudice the right of the claimant to bring an action, to recover the goods or effects, or the value thereof.

New.

§ 660. Proceedings on claim to domestic vessel.

Where a vessel, belonging to a port or place in the United States, or a share or interest therein, is attached, the court or judge, on the application, within thirty days thereafter, of a person claiming title thereto, or of his agent, must appoint three indifferent persons to make a valuation thereof.

From 2 R. S. 5 (Part 2, c. 5, tit. 1), § 13.

§ 661. [Am'd, 1877.] Appraisers to be sworn; valuation to be returned.

A valuation of a vessel, or of a share, or interest therein, made as prescribed in this article, must be in writing, and subscribed by the appraisers; each of whom must take and subscribe an affidavit, annexed thereto, to the effect, that the valuation is, in all respects, just and fair, and that the value of the vessel, share, or interest, is truly stated therein, according to the deponent's belief. The valuation must be immediately returned to the court or judge; and, after an undertaking is given, or after the expiration of the time to give an undertaking, as prescribed in the next section, it must be delivered to the sheriff.

New. Am'd by L. 1877, c. 416.

§ 662. Undertaking to be given.

Within two days after the valuation is returned, the claimant or his agent may execute an undertaking to the sheriff, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect, that, in an action to be brought on the undertaking, the claimant will establish that he was the owner of the vessel, share, or interest, at the time of the levy thereupon; and that, in case of his failure to do so, he will pay the amount of the valuation, with interest from the date of the undertaking, to the sheriff; or, if the warrant is vacated or annulled, to the defendant, or his personal representative.

From 2 R. S. 5, § 14.

§ 663. Vessel; when to be discharged.

Upon such an undertaking being executed and delivered to the sheriff, the court or judge must make an order, directing the vessel or share to be discharged from the attachment. Thereupon the sheriff must discharge the same accordingly.

From Id., § 15.

§ 664. When undertaking to be sued.

The court or judge may, upon the application of either party, at any time before the warrant is vacated or annulled, direct the sheriff to commence an action upon the undertaking, upon such

terms and conditions, and under such regulations, between him and the applicant, as it or he deems just. And if the warrant of attachment is vacated or annulled, the defendant in the attachment, his assignee or personal representative, may commence and maintain an action upon the undertaking, or may be substituted, in place of the sheriff, in an action pending thereupon.

From 2 R. S. 5, § 16.

§ 665. Defence in such an action; plaintiff's recovery.

In such an action, the claimant may show, in bar of a recovery, that he was the owner of the vessel, share, or interest, at the time when it was attached. If judgment passes against him, the plaintiff is entitled to recover the amount of the valuation, with interest from the date of the undertaking.

From Id., § 17.

§ 666. Foreign vessel; how valued.

Where a foreign vessel, or a share or interest therein, is attached, it must be valued, as prescribed in sections 660 and 661 of this act, upon the application of a person, who makes affidavit, to the effect that he is the owner thereof, or that he is the agent of a person, naming him and his residence, whom he believes to be the owner of the vessel, share, or interest attached.

From Id., § 18.

§ 667. [Am'd, 1877.] Notice thereof.

Such notice of the application must be given to the plaintiff, as the court or judge deems reasonable.

From Id., § 19. Am'd by L. 1877, c. 416.

§ 668. Plaintiff to give undertaking with sureties.

Within three days after the valuation is returned, the plaintiff must give, to the person in whose behalf the claim is made, an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect that they will pay such damages as may be recovered for seizing the vessel, share, or interest, in an action brought against the sheriff, or the plaintiff in the attachment, within three months from the approval of the undertaking, if it appears therein that the vessel, share, or interest belonged, at the time of attaching it, to the person in whose behalf the claim is made.

From 2 R. S. 6, § 20.

§ 669. Vessel; when to be discharged.

Unless such an undertaking is given, the court or judge must grant an order discharging the vessel, share, or interest so claimed, from the attachment; whereupon the sheriff must discharge the same accordingly.

From Id., § 21.

§ 670. Terms on which debtor may claim vessel.

If, after such an undertaking is given by the plaintiff, the warrant is vacated or annulled, or the attachment is discharged as to the vessel, share, or interest, the defendant or his agent is entitled to claim the same, or the proceeds thereof, if it has been sold, only upon his showing, to the satisfaction of the court or judge, that the undertaking has been discharged; or giving to the plaintiff an undertaking, with sufficient sureties, approved by the court or judge, who must justify in twice the appraised value, to the effect, that they will indemnify the plaintiff against all charges and expenses, in consequence of the undertaking.

From 2 R. S. 6, § 22.

§ 671. When vessel to be sold.

If the undertaking of the plaintiff is not discharged, or he is not indemnified, as prescribed in this article, within one month after the defendant becomes entitled to claim the vessel, share, or interest, as so prescribed, it may be sold by the sheriff, in whose custody it is, upon an order of the court or judge; and the proceeds of the sale must be paid to the persons who executed the undertaking, for their indemnity.

From Id., § 24.

§ 672. The same.

If a claim is not made, by or in behalf of an owner of a domestic vessel, or of a share or interest therein, within thirty days after it is attached, or if the proper undertaking is not executed by the claimant; or if a claim is not made, within that time, by or in behalf of the owner of a foreign vessel, or of a share or interest therein; the vessel, share, or interest, may be sold by the sheriff, under an order of the court or judge, upon the application of the plaintiff, if, in the opinion of the court or judge, a sale is necessary.

From 2 R. S. 7, § 25.

§ 673. The same.

Where a share or interest in a vessel, foreign or domestic, is attached, if the proper claim to it is not made, by or in behalf of an owner thereof, within thirty days thereafter, it may be sold by the sheriff, under an order of the court or judge, upon the application of a joint owner, or his agent.

From Id., § 26.

§ 674. [Am'd, 1877.] Sheriff to keep property.

The sheriff must keep the property attached by him, or the proceeds of property sold, or of a demand collected by him, to answer any judgment that may be obtained against the defendant in the action.

From Co. Proc., § 232. Am'd by L. 1877, c. 416.

§ 675. Sheriff may be directed to pay money into court.

But the court, upon the application of either party to the action, may direct the sheriff, either before or after the expiration of his term of office, to pay into court the proceeds of a demand collected, or property sold; or to deposit them in a designated bank or trust company, to be drawn out only upon the order of the court.

New.

§ 676. [Am'd, 1877.] When he may be directed to release or deliver property.

Where the proceeds of the property sold, and of the demands collected by the sheriff, exceed the amount of the plaintiff's demand, with the costs and expenses, and of all other warrants of attachment or executions in the sheriff's hands, chargeable upon the same; the court, or the judge who granted the warrant, upon the application of the defendant, or of an assignee of, or purchaser from the defendant, and upon notice to the plaintiff, and the plaintiffs in the other warrants or executions, may, at any time during the pendency of the action, make an order directing the sheriff to pay over the surplus to the applicant, and to release from the attachment the remaining real and personal property attached.

New. Am'd by L. 1877, c. 416.

§ 677. [Am'd, 1889.] Plaintiff may bring action in name of himself and the sheriff.

The plaintiff, by leave of the court or judge, procured as prescribed in the next section, may bring and maintain, in the name of himself and the sheriff jointly, by his own attorney, and at his own expense, any action which, by the provisions of this title, may be brought by the sheriff, to recover property attached, or the value thereof, or a demand attached, or upon an undertaking given as prescribed in this title, by a person other than the plaintiff; the plaintiff, in his own name and the sheriff's jointly, may also bring and maintain any action which, by the provisions of subdivision two of section 655 of article second of this title, may be brought by the sheriff. The sheriff must receive the proceeds of such an action, but he is not liable for the costs or expenses thereof. Costs may be awarded, in such an action, against the plaintiff in the warrant, but not against the sheriff.

From Co. Proc., § 238. Am'd by L. 1889, c. 504.

§ 678. How leave to bring such action procured.

The court or judge must grant leave to bring such an action, where it appears, that due notice of the application therefor has been given to the sheriff; but, before doing so, the court or judge may require that notice of the application be given to the plaintiff, in any other warrant against the same defendant. And such terms, conditions, and regulations may be imposed, in the order granting leave, as the court or judge thinks proper, for the due protection of the rights and interests of all persons, interested in the disposition of the proceeds of the action.

From Co. Proc., § 238.

§ 679. Plaintiff may be joined with sheriff, after action commenced.

Leave may, in like manner and with like effect, be granted to the plaintiff in the warrant, to be joined with the sheriff, in an action brought by the sheriff, in a case where he might have procured leave to bring the action, as prescribed in the last two sections. Upon an application therefor, the court or judge may, in a proper case, require the plaintiff to provide for the expenses in the action, already incurred by the sheriff. The application must be denied, in case of an unreasonable delay in making it; or where an application was made, before the action was brought, and the plaintiff neglected or refused, without a good excuse therefor, to comply with the terms, conditions or regulations, then imposed.

From Id., § 238.

§ 680. Judge to direct as to management of such an action, etc.

The court or judge may, upon the application of the sheriff, or of the defendant in the warrant, during the pendency of an action, brought as prescribed in the last three sections, direct as to the conduct, discontinuance, or settlement of the same, and as to the application or disposition of the money or property recovered therein, as justice requires.

From Id., § 238.

§ 681. Return of inventory; how enforced.

Upon the application of either party, and proof of the neglect of the sheriff, the court or judge may, by order, require the sheriff to return an inventory. Disobedience to such an order may be punished, as a contempt of the court.

From 2 R. S. 18 (Part 2, c. 5, tit. 1), § 66.

ARTICLE THIRD.

Vacating or modifying the warrant; discharging the attachment.

Sec. 682. Motion to vacate or modify warrant, or increase security.
683. How motion must be made; opposing it by new proofs.
684, 685. [Repealed.]
686. When prior motion not to prejudice subsequent motion.
687. Defendant may apply for discharge of attachment.
688. Undertaking to be given.
689. Application by one of several defendants.
690. Sureties to justify if required.
691. Sheriff may retain property until justification.
692. Foregoing provisions applicable to vessels.
693. Partners may apply to discharge attachment.
694. Undertaking to be given.
695. Court or judge may ascertain value.
696. When plaintiff entitled to notice of any application, etc.

§ 682. [Am'd, 1877.] Motion to vacate or modify warrant, or increase security.

The defendant, or a person who has acquired a lien upon, or interest in, his property, after it was attached, may, at any time before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action, apply to vacate or modify the warrant, or to increase the security, given by the plaintiff, or for one or more of those forms of relief, together, or in the alternative.

From Co. Proc., § 241. Am'd by L. 1877, c. 416.

§ 683. How motion must be made; opposing it by new proofs.

An application, specified in the last section, may be founded only upon the papers upon which the warrant was granted; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to the same judge, in court or out of court, and with or without notice, as he deems proper. Or it may be founded upon proof, by affidavit on the part of the defendant; in which case, it must be made to the court, or, if the warrant was granted by a judge out of court, to any judge of the court, upon notice; and it may be opposed by new proof, by affidavit, on the part of the plaintiff, tending to sustain any ground for the attachment, recited in the warrant, and no other, unless the defendant relies upon a discharge in bankruptcy, or upon a discharge or exoneration, granted in insolvent proceedings; in which case, the plaintiff may show any matter, in avoidance thereof, which he might show upon the trial.

Corresponds to § 568, ante.

§§ 684, 685. [Stricken out by L. 1877, c. 416.]

§ 686. [Am'd, 1877.] When prior motion not to prejudice subsequent motion.

The denial of such an application does not prejudice a subsequent application, seasonably made, founded upon the failure of a complaint which had not been filed or served at the time of the former application, to set forth any of the causes of action mentioned in section 635 and section 637 of this act.

See § 568, ante. Am'd by L. 1877, c. 416.

§ 687. [Am'd, 1906.] Defendant may apply for discharge of attachment.

The defendant may, at any time after he has appeared in the

action, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to a whole or a part of the property attached.

From Co. Proc., § 240. Am'd by L. 1906, c. 507 (in effect Sept. 1, 1906).

§ 688. [Am'd, 1877, 1906.] Undertaking to be given.

Upon such an application, the defendant must give an undertaking, with at least two sufficient sureties, to the effect that he will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding a sum specified in the undertaking, with interest. The sum so specified must be, at least equal to the amount of the plaintiff's demand, as specified in his affidavit; or, at the option of the defendant, equal to the appraised value, according to the inventory, of the property attached; or, if the application is to discharge the attachment, as to a part only of the property attached, to the appraised value of that portion. Upon such application being made after final judgment, the defendant must give the security required to perfect an appeal to the court of appeals from a final judgment, of the same amount or to the same effect, and to stay the execution thereof.

From Co. Proc., § 241. Am'd by L. 1877, c. 416; L. 1906, c. 508 (in effect Sept. 1, 1906).

§ 689. Application by one of several defendants.

Where there are two or more defendants, and an application is made, as prescribed in the last two sections, by one or more, but not by all of them, the undertaking must provide for the payment of any judgment, which may be recovered against any of the defendants in the action, unless the applicant makes proof, by affidavit, to the satisfaction of the court or judge, that the property, with respect to which the application is made, belongs to him separately; in which case, the undertaking must provide for the payment of any judgment, which may be recovered in the action against the applicant, either alone, or jointly with any other defendant. Where an application is made, as prescribed in this section, at least two days' notice thereof, with a copy of the affidavit, must be served upon the plaintiff's attorney, who may oppose the application by proof, by affidavit, that one or more of the other defendants own, or have an interest in the property.

New.

§ 690. [Am'd, 1877.] Sureties to justify if required.

An undertaking, given as prescribed in the last two sections, must be forthwith filed with the clerk. A copy thereof, with a notice of the filing, must be forthwith served upon the plaintiff's attorney; who may, within three days thereafter, give notice to the sheriff, that he excepts to the sufficiency of the sureties. Thereupon, the sureties must justify, upon the like notice, and in like manner, as bail upon an arrest; or a new undertaking must be given, with new sureties, who must justify in like manner. If the plaintiff does not except, as prescribed in this section, he is deemed to have waived all objection to the sureties.

From Co. Proc., § 241. Am'd by L. 1877, c. 416.

§ 691. Sheriff may retain property until justification.

The sheriff is responsible for the sufficiency of the sureties; and he may retain possession of the property attached, and the proceeds thereof, until the objection to them is waived, as prescribed in the last section, or they, or the new sureties, justify.

From Id., § 241.

§ 692. Foregoing provisions applicable to vessels.

The last five sections are applicable, where a vessel, or a share or interest therein, is attached. If it is necessary, to enable the

defendant to discharge the attachment, the court or judge may, by order, stay any proceeding specified in article second of this title, or extend the time to do any act therein specified.

New.

§ 693. [Am'd, 1912.] Partners may apply to discharge attachment.

If a warrant of attachment is levied upon the interest of one or more partners, in the property of a partnership, the other partners, or any of them, may, at any time before final judgment, apply to the judge who granted the warrant, or to the court, upon an affidavit showing the facts, for an order to discharge the attachment, as to that interest.

New. Am'd L. 1912, ch. 389 (in effect April 15, 1912.)

§ 694. [Am'd, 1877, 1912.] Undertaking to be given.

Upon such an application, the applicant must give an undertaking, with at least two sufficient sureties, to the effect that they will pay to the sheriff, on demand, if judgment is recovered against the defendant whose interest in a partnership is so levied upon, an amount not exceeding a sum, specified in the undertaking, which must not be less than the value of the interest of the defendant, in the property seized, by virtue of the attachment, as fixed by the court or judge. If the value, in the opinion of the court or judge, is uncertain, the sum shall be such as the court or judge determines.

New. Am'd by L. 1877, c. 416; L. 1912, ch. 389 (in effect April 15, 1912).

§ 695. Court or judge may ascertain value.

For the purpose of fixing the sum, or determining the sufficiency of the sureties, the court or judge may receive affidavits or oral testimony, or may direct a reference.

New.

§ 696. [Am'd, 1877.] When plaintiff entitled to notice of any application, etc.

The court or judge may direct, that the plaintiff have notice of an application for a discharge of property, as prescribed in this article, or of the hearing under an order of reference, made as prescribed in the last section; and if the applicant does not appear, where notice has been given, the application may be dismissed or denied.

New. Am'd by L. 1877, c. 416.

ARTICLE FOURTH.

Regulations where there are two or more warrants against the same defendant.

Sec. 697. Preferences of two or more warrants.
698. Rule as to levy under a junior warrant.
699, 700. [Repealed.]
701. Undertaking by junior attaching creditor to prevent release of foreign vessel.
702. Rule as to subsequent attachment of foreign vessel.
703. Rights of junior plaintiff in action by senior plaintiff and sheriff jointly.
704. Junior plaintiff may be allowed to commence action jointly with sheriff.
705. Rights of third and other subsequent attaching creditors.

§ 697. Preferences of two or more warrants.

Where two or more warrants of attachment, against the same defendant, are delivered to the sheriff of the same county, to be executed, their respective preferences, and the rules, where a levy, or a levy and sale, have been made under a junior warrant, are the same, as where two or more executions, against the property of the same defendant, are delivered to the sheriff of the same county, to be executed.

From 2 R. S. 366 (Part 3, c. 6, tit. 5), §§ 14, 15.

§ 698. Rule as to levy under a junior warrant.

Where a domestic vessel, or share or interest therein, has been attached, and afterwards released, as prescribed in this title; or where the personal property of a partnership, of which the defendant was a member, has been attached, and the attachment afterwards discharged, upon the application of another partner, as prescribed in this title; another warrant, against the same defendant, shall not be levied on the same property, by the sheriff of the same or of any other county, until after the first warrant has been vacated or annulled. But, except as thus prescribed, where a second warrant, against the same defendant, is delivered to the same sheriff, he must execute it, by a levy upon property within his county, and he must thereupon take the same proceedings, as if the levy was made under the first warrant.

New.

§§ 699, 700. [Stricken out by L. 1877, c. 416.]

§ 701. Undertaking by junior attaching creditor to prevent release of foreign vessel.

Where a foreign vessel, or a share or interest therein, has been attached and valued, as prescribed in article second of this title, and the plaintiff, in the first warrant of attachment, fails to give an undertaking to prevent the release thereof, the court or judge may grant to the plaintiff in a second warrant, then in the sheriff's hands for execution, an extension, of not more than three days thereafter, within which to furnish an undertaking, in all respects like the one to be furnished by the first plaintiff. And if he furnishes it, within that time, he has the same rights and privileges, and is subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if his was the first warrant.

New.

§ 702. Rule as to subsequent attachment of foreign vessel.

If a foreign vessel, or a share or interest therein, has been attached, and afterwards released, by reason of the failure of the plaintiff, in the first or the second warrant, to give an undertaking to prevent the release, it shall not be again attached, under a warrant against the same defendant, which has been delivered to the sheriff of the same county, before the expiration of the time within which the undertaking should have been furnished. But it may be again attached, under a subsequent warrant against the same defendant; in which case, the plaintiff therein, and the plaintiff in each warrant subsequently delivered to the sheriff, have the same rights, and privileges, and are subject to the same duties and liabilities, with respect to the vessel and its proceeds, and the subsequent proceedings relating thereto, as if the warrant, under which it was attached, was the first warrant.

New.

§ 703. Rights of junior plaintiff in action by senior plaintiff and sheriff jointly.

Where the plaintiff in a warrant of attachment has commenced an action, in the name of himself and the sheriff jointly, as prescribed in this title, a plaintiff in a junior warrant may apply to the court or judge to direct as to the conduct, discontinuance, or settlement of the same, or to impose terms, conditions, and regulations as to the continuance thereof, in the interest of the applicant; and such order may be made thereupon, as justice requires. If the first warrant is vacated, or the attachment thereunder is released or discharged, without affecting the cause of action prosecuted by the plaintiff therein and the sheriff jointly, the plaintiff in the warrant next in order may, upon his own application, be substituted as joint plaintiff with the sheriff, by an order, made as upon an application for leave to bring such an action.

New. See §§ 677-680, ante.

§ 704. Junior plaintiff may be allowed to commence action jointly with sheriff.

A plaintiff in a second warrant may apply to the court or judge, upon notice to the plaintiff in the first warrant, and to the sheriff, for leave to bring and maintain, in the name of himself and the sheriff jointly, any action, which might be brought in the name of the senior plaintiff and the sheriff. If it appears that the plaintiff in the first warrant neglects or refuses to be joined with the sheriff in such an action, or to comply with the terms, conditions, and regulations, imposed, either upon granting him an order for that purpose, or upon the hearing of an application, made as prescribed in this section, the court or judge may grant to the plaintiff in the second warrant, leave to bring and maintain such an action, in the name of himself and the sheriff jointly, with like effect, as if his was the first warrant.

New.

§ 705. Rights of third and other subsequent attaching creditors.

Where there are more than two warrants of attachment, against the same defendant, the plaintiffs in the third and each subsequent warrant have, according to their respective priorities, the same rights and privileges, as against the plaintiffs in all

senior warrants, which the plaintiff in the second warrant has, as against the plaintiff in the first, and are subject to the same duties and liabilities; except that a second extension of the time, within which to furnish an undertaking to prevent the release of a foreign vessel, or a share or interest therein, shall not be granted. And the plaintiffs in two or more junior warrants of attachment, may, by agreement among themselves, take jointly, and for their common benefit, any proceeding, permitted by this title to be taken, by the plaintiff in a second or subsequent warrant of attachment; provided that it does not interfere with the preferential or other right of an intermediate plaintiff.

New.

ARTICLE FIFTH.

Proceedings after judgment; rights of parties and duties of the sheriff after the warrant is vacated or annulled, or the attachment discharged.

Sec. 706. Execution to issue to sheriff who has levied.
707. When judgment enforceable only against attached property.
708. Judgment in the principal action; how satisfied.
709. When attachment discharged, etc., property to be restored to defendant.
710. Additional provision for his relief.
711. Cancelling notice attaching real property.
712. When sheriff to return warrant and his proceedings.

§ 706. Execution to issue to sheriff who has levied.

Where a levy, under a warrant of attachment in an action, has been made, an execution against property, upon a final judgment in favor of the plaintiff therein, recovered after the expiration of the term of office of the sheriff, who made the levy, must nevertheless be directed to and executed by that sheriff, unless another person is designated by law to complete the unfinished business pertaining to his office; or, in that case, to the person so designated.

New.

§ 707. [Am'd, 1877.] When judgment enforceable only against attached property.

Where a defendant, who has not appeared, is a non-resident of the State, or a foreign corporation, and the summons was served without the State, or by publication, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, the judgment can be enforced only against the property which has been levied upon, by virtue of the warrant of attachment, at the time when the judgment is entered. But this section does not declare the effect of such a judgment, with respect to the application of any statute of limitation.

New. Am'd by L. 1877, c. 416.

§ 708. [Am'd, 1877, 1912.] Judgment in the principal action; how satisfied.

Where an execution against property is issued upon a judgment for the plaintiff, in an action in which a warrant of attachment has been levied, the sheriff must satisfy it, as follows:

1. He must pay over to the plaintiff all money attached by him, and the proceeds of all sales of perishable property, or of any vessel or share of interest therein, or animals, sold by him, or of any debts, or other things in action collected or sold by him; or so much thereof as is necessary to satisfy the judgment.

2. If any balance remains due, he must sell, under the execution, the other personal property attached, or so much thereof as is necessary; including rights or shares in the stock of an association or corporation, or a bond or other instrument for the payment of money, executed and issued, with the interest coupons annexed, if any, by a government, state, county, public officer, or municipal or other corporation, which is in terms negotiable, or otherwise, whether past due, or yet to become due; but not including any other debt or thing in action. If the proceeds of that property are insufficient to satisfy the judgment, and the execution requires

him to satisfy it out of any other personal property of the defendant, he must sell the personal property, upon which he has levied by virtue of the execution. If the proceeds of the personal property, applicable to the execution, are insufficient to satisfy the judgment, the sheriff must sell, under the execution, all the right, title, and interest, which the defendant had in the real property attached, at the time when the notice was filed, or at any time afterwards, before resorting to any other real property.

3. If personal property attached, belonging to the defendant, has passed out of the hands of the sheriff, without having been sold or converted into money, and the attachment has not been discharged as to that property, he must, if practicable, regain possession thereof; and, for that purpose, he has all the authority which he had, to seize the same under the warrant. A person, who wilfully conceals or withholds such property from him, is liable to double damages, at the suit of the party aggrieved.

4. Until the judgment is paid, he may collect the debts and other things in action attached, and prosecute any undertaking, which he has taken in the course of the proceedings, and apply the proceeds thereof to the payment of the judgment.

5. At any time after levying the attachment, the court, upon the petition of the plaintiff, accompanied with an affidavit, specifying fully all the proceedings of the sheriff, since the levy under the warrant, the property attached, and the disposition thereof; and the affidavit of the sheriff, showing that he has used diligence, in endeavoring to collect the debts and other things in action attached, and that a portion thereof remains uncollected; may direct the sheriff to sell the remaining portion, upon such terms, and in such manner, as it thinks proper. Notice of the application must be given to the defendant's attorney, if the defendant appeared in the action. If the summons was not personally served on the defendant, and he did not appear, the court may make such order as to the service of notice, as it thinks proper; or may grant the application without notice.

From Co. Proc., § 237. Am'd by L. 1877, c. 416; L. 1912, c. 40 (in effect Sept. 1, 1912).

§ 709. [Am'd, 1877.] When attachment discharged, etc., property to be restored to defendant.

Where a warrant of attachment is vacated, or annulled, or an attachment is discharged, upon the application of the defendant, the sheriff must, except in a case where it is otherwise specially prescribed by law, deliver over to the defendant, or to the person entitled thereto, upon reasonable demand, and upon payment of all costs, charges, and expenses, legally chargeable by the sheriff, all the attached personal property remaining in his hands, or that portion thereof, as to which the attachment is discharged; or the proceeds thereof, if it has been sold by him.

From Co. Proc., §§ 237, 239, 240. Am'd by L. 1877, c. 416.

§ 710. Additional provision for his relief.

Where the sheriff is required by this title, to deliver attached property, or the proceeds thereof, to the defendant, he must also deliver to him, unless otherwise specially directed by the court or judge, all books of account, vouchers, evidences of debt, muniments of title, or other papers, relating to the property, either real or personal, or to its proceeds; together with all undertakings, relating thereto, which he has taken in the course of the proceedings, and which have not been fully satisfied; except an undertaking, given by the defendant, upon the discharge of property. He must also deliver a written assignment, duly acknowl-

edged, of each undertaking, so delivered, and of each other instrument, to which the defendant is thus entitled, an assignment of which is necessary to perfect or protect the defendant's title thereto. The defendant must also, but upon his own application only, be substituted in place of the sheriff, or the sheriff and the plaintiff jointly, in an action brought as prescribed in this title; but the court or judge may impose, as a condition of granting the order of substitution, such terms as justice requires, with respect to indemnity and payment of expenses. The defendant's rights, with respect to property attached and not disposed of, and an undertaking, or other instrument, to which he is thus entitled, are the same as those of the sheriff, while the warrant was still in force, except where his rights are specially defined or regulated by law.

See Co. Proc., § 239.

§ 711. [Am'd, 1877.] Cancelling notice attaching real property.

At any time after the warrant of attachment has been vacated or annulled, or the attachment has been discharged as to real property attached, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as it deems just, direct, that any notice, filed for the purpose of attaching the property, be cancelled of record, by the clerk of the county where it is filed and recorded. The cancellation must be made by a note, to that effect, on the margin of the record, referring to the order; and, unless the order is entered in the same clerk's office, a certified copy thereof must, at the same time, be filed therein.

From Co. Proc., § 132. Am'd by L. 1877, c. 416.

§ 712. When sheriff to return warrant and his proceedings.

Where a warrant of attachment has been vacated or annulled, the sheriff must forthwith file, in the clerk's office, the warrant, with a return of his proceedings thereon. Upon the application of either party, and proof of the sheriff's neglect, the court may direct him so to do, forthwith, or within a specified time.

From Co. Proc., § 242; 2 R. S. 13 (Part 2, c. 5, tit. 1), § 68.

1882

TITLE IV.

Other provisional remedies; general and miscellaneous provisions.

Article 1. Receivers.
2. Deposit, delivery, or conveyance of property.
3. General and miscellaneous provisions.

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ARTICLE FIRST.

Receivers.

Sec. 713. Receiver; when appointed
714. Appointment of receiver; notice of application.
715. Security.
716. Certain receivers may hold property.

§ 713. [Am'd, 1895.] Receiver; when appointed.

In addition to the cases, where the appointment of a receiver is specially provided for by law, a receiver of property, which is the subject of an action, in the supreme court or a county court, may be appointed by the court, in either of the following cases:

1. Before final judgment, on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party, and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured, or destroyed.

2. By or after the final judgment, to carry the judgment into effect, or to dispose of the property, according to its directions.

3. After final judgment, to preserve the property, during the pendency of an appeal.

The word, "property," as used in this section, includes the rents, profits, or other income, and the increase, of real or personal property.

From Co. Proc., § 244. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 714. [Am'd, 1877, 1879, 1903.] Appointment of receiver; notice of application.

Notice of an application, for the appointment of a receiver in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action, and the time limited for his appearance has expired. But where an order has been made, as prescribed in section 438 of this act, the court may, in its discretion, appoint a temporary receiver, to receive and preserve the property, without notice, or upon a notice given by publication or otherwise, as he thinks proper. But where the action is for the foreclosure of a mortgage, which mortgage provides that a receiver may be appointed without notice, notice shall not be required.

New. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1903, c. 217 (in effect Sept. 1, 1903).

§ 715. [Am'd, 1877, 1896.] Security.

A receiver, appointed in an action or special proceeding, must, before entering upon his duties, execute and file with the proper clerk, a bond to the people, with at least two sufficient sureties, in a penalty fixed by the court, judge, or referee, making the appointment, conditioned for the faithful discharge of his duties as receiver; and the execution of any such bond by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond by two sureties. And the court, or where the order was made out of court, the judge making the order, by or pursuant to which the receiver was appointed, or his successor in office, may, at any

time, remove the receiver, or direct him to give a new bond, with new sureties, with the like condition. But the foregoing provisions of this section do not apply to a case where special provision is made by law, for the security to be given by a receiver, or for increasing the same, or for removing a receiver. A receiver who,[1] having executed and filed a bond as provided for in this section, before presenting his accounts as receiver, must give notice to the surety or sureties on his official bond, of his intention to present his accounts, not less than eight days before the day set for the hearing on said accounting. The same notice must be given to such surety or sureties where the accounting is ordered on the petition of a person or persons other than the receiver, and in no case shall the receiver's accounts be passed, settled or allowed, unless the said notice provided for in this section shall have first been given to the surety or sureties on the official bond of such receiver.

New. Am'd by L. 1877, c. 416; L. 1896, c. 94 (in effect March 11, 1896).

§ 716. [Am'd, 1895, 1909.] Certain receivers may hold real property.

A receiver, appointed by or pursuant to an order or a judgment, in an action in the supreme court or a county court, may take and hold real property, upon such trusts and for such purposes as the court directs, subject to the direction of the court, from time to time, respecting the disposition thereof.

From L. 1845, c. 112, § 1. Am'd by L. 1895, c. 946; L. 1909, c. 65. (See Table, p. iii, ante).

[1] So in the original. The "who" is superfluous.

ARTICLE SECOND.

Deposit, delivery or conveyance of property.

Sec. 717. Court may order a deposit or delivery of property in certain cases.
718. When sheriff may take and convey, etc., property.

§ 717. [Am'd, 1877.] Court may order a deposit or delivery of property in certain cases.

Where it is admitted, by the pleading or examination of a party, that he has, in his possession or under his control, money, or other personal property capable of delivery, which, being the subject of the action or special proceeding, is held by him as trustee for another party, or which belongs or is due to another party, the court may, in its discretion, grant an order, upon notice, that it be paid into, or deposited in court, or delivered to that party, with or without security, subject to the further direction of the court.

From Co. Proc., § 244. Am'd by L. 1877, c. 416.

§ 718. When sheriff may take and convey, etc., property.

Where the court has directed a deposit or delivery, as prescribed in the last section; or where a judgment directs a party to make a deposit or delivery, or to convey real property; if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may, by order, require the sheriff to take, and deposit or deliver the money or other personal property, or to convey the real property, in conformity with the direction of the court.

From Id., § 244, last sentence but one.

ARTICLE THIRD.

General and miscellaneous provisions.

Sec. 719. Arrest, injunction, and attachment; when not to be granted together.
720. Counterclaim, provisional remedies.

§ 719. [Am'd, 1879.] Arrest, injunction, and attachment; when not to be granted together.

Where application for an order of arrest, an injunction, and a warrant of attachment, or two of them, is made, in the same action, against the same defendant; and it satisfactorily appears that, under the particular circumstances of the case, two or all of them are not necessary for the plaintiff's security, the court or judge may, in its or his discretion, require the plaintiff to elect between them. Where an application is made to obtain, vacate, modify, or set aside an order of arrest, injunction order, or warrant of attachment, the court or judge must finally decide the same, within twenty days after it is submitted for decision.

New. Am'd by L. 1879, c. 542.

§ 720. [Am'd, 1879.] Counterclaim, provisional remedies.

Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, his right to a provisional remedy is the same as in an action brought by him against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment. And for the purpose of applying to such a case the provisions of this act, the defendant is deemed the plaintiff, the plaintiff is deemed the defendant, and the counterclaim so set forth in the answer is deemed the complaint.

New. Am'd by L. 1879, c. 542.

CHAPTER VIII.

Miscellaneous Interlocutory Proceedings, and Regulations of Practice.

TITLE I.— Mistakes, Omissions, Defects, and Irregularities.
TITLE II.— Tender, and other Offers and Requests to the Adverse Party.
TITLE III.— Payment of Money into Court, and Care and Disposition Thereof.
TITLE IV.— Proceedings upon the Death or Disability of a Party, or the Transfer of his Interest.
TITLE V.— Motions and Orders Generally.
TITLE VI.— Miscellaneous Practice Regulations.

TITLE I.

Mistakes, omissions, defects, and irregularities.

Sec. 721. Defects cured by verdict, etc., and by judgment.
722. Such defects to be supplied.
723. Amendments by the court; disregarding immaterial errors, etc.
724. Relief against omissions, etc.; amendments to conform proceedings.
725. Returns by officers, etc.
726. Papers lost or withheld; how supplied.
727. Order of court; when necessary to amend.
728. Disregarding defects in affidavits.
729. Certain bonds, etc., when sufficient.
730. Amending defects in bonds, etc.

§ 721. [Am'd, 1879.] Defects cured by verdict, etc., and by judgment.

In a court of record, where a verdict, report or decision has been rendered, the judgment shall not be stayed, nor shall any judgment of a court of record be impaired or affected by reason of either of the following imperfections, omissions, defects, matters, or things, in the process, pleadings or other proceedings:

1. For want of a summons, or other writ.
2. For any fault or defect in process; or for misconceiving a process, or awarding it to a wrong officer.
3. For an imperfect or insufficient return of a sheriff or other officer; or because an officer has not subscribed a return, actually made by him.
4. For a variance between the summons and complaint.
5. For a mispleading, insufficient pleading, or jeofail.
6. For want of a warrant of attorney by either party.
7. For the appearance, by attorney, of an infant party, if the verdict, report, or decision, or the judgment, is in his favor.
8. For omitting to allege any matter, without proof of which the verdict, report, or decision ought not to have been rendered.
9. For a mistake in the name of a party or other person; or in a sum of money; or in the description of property; or in reciting or stating a day, month, or year; where the correct name, sum, description, or date has been once rightly stated, in any of the pleadings or other proceedings.
10. For a mistake in the name of a juror or officer.
11. For an informality in entering judgment, or making up the judgment-roll.

12. For an omission on the part of a referee to be sworn; or for any other default or negligence of the clerk, or any other officer of the court, or of a party, his attorney or counsel, by which the adverse party has not been prejudiced.

From 2 R. S. 424, 425 (Part 3, c. 7, tit. 5), § 7. Am'd by L. 1879, c. 542.

§ 722. Such defects to be supplied.

Each of the omissions, imperfections, defects, and variances, specified in the last section, and any other of like nature, not being against the right and justice of the matter, and not altering the issue between the parties, or the trial, must, when necessary, be supplied, and the proceeding amended, by the court wherein the judgment is rendered, or by an appellate court.

From 2 R. S. 425, § 8.

§ 723. [Am'd, 1877, 1900.] Amendments by the court; disregarding immaterial errors, etc.

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amended or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial.

From Co. Proc., §§ 173, 176. Am'd by L. 1900, c. 591 (in effect Sept. 1, 1900).

§ 724. Relief against omissions, etc.; amendments to conform proceedings.

The court may likewise, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding. Where a proceeding, taken by a party, fails to conform to a provision of this act, the court may, in like manner, and upon like terms, permit an amendment thereof, to conform it to the provision.

From Co. Proc., § 174.

§ 725. Returns by officers, etc.

A court, to which a return is made by a sheriff or other officer, or by a subordinate court or other tribunal, may, in its discretion, direct the return to be amended, in matter of form, either before or after judgment.

From 2 R. S. 424 (Part 3, c. 7, tit. 5), § 5.

§ 726. Papers lost or withheld; how supplied.

Where an original pleading or paper is lost, or withheld by any person, the court may authorize a copy to be filed and used, instead of the original.

From Co. Proc., § 422.

§ 727. Order of court; when necessary to amend.

A process, pleading, or record, shall not be altered, by the clerk or any other officer of the court, or by any other person, without the direction of the court, or of another court of competent authority; except in a case where a party, or his attorney, is specially authorized by law to amend a pleading.

From 2 R. S. 425 (Part 3, c. 7, tit. 5), § 9.

§ 728. Disregarding defects in affidavits.

The want of a title, or a defect in the title, of an affidavit, does not impair it, if it intelligibly refers to the action or special proceeding, in which it is made.

From Co. Proc., § 421.

§ 729. Certain bonds, etc., when sufficient.

A bond or undertaking, required by statute to be given by a person, to entitle him to a right or privilege, or to take a proceeding, is sufficient, if it conforms substantially to the form therefor, prescribed by the statute, and does not vary therefrom, to the prejudice of the rights of the party, to whom, or for whose benefit, it is given.

From 2 R. S. 556 (Part 3, c. 8, tit. 17), § 33.

§ 730. Amending defects in bonds, etc.

Where such a bond or undertaking is defective, the court, officer, or body, that would be authorized to receive it, or to entertain a proceeding in consequence thereof, if it was perfect, may, on the application of the persons who executed it, amend it accordingly; and it shall thereupon be valid, from the time of its execution.

From Id., § 34.

TITLE II. Rev ark v CW Practice

Tender, and other offers and requests to the adverse party.

Sec. 731. Tender after suit.
732. Amount to be paid into court.
733. Effect of sufficient tender.
734. When to be deducted from recovery, etc.
735. Requiring admission of genuineness of paper.
736. Offer to liquidate damages conditionally.
737. Effect of refusal of offer.
738. Defendant's offer to compromise; proceedings thereon.
739. Plaintiff's offer to compromise counterclaim; proceedings thereon.
740. Offer and acceptance, by whom subscribed.
741, 742. [Repealed.]

§ 731. Tender after suit.

Where the complaint demands judgment for a sum of money only; and the action is brought to recover a sum certain, or which may be reduced to certainty by calculation; or to recover damages for a casual or involuntary personal injury, or a like injury to property; the defendant, or his attorney, may, at any time before the trial, tender to the plaintiff, or his attorney, such a sum of money, as he conceives to be sufficient to make amends for the injury, or to pay the plaintiff's demand; together with the costs of the action, to that time.

From 2 R. S. 553 (Part 3, c. 8, tit. 17), § 20.

§ 732. [Am'd, 1877.] Amount to be paid into court.

A tender, made as prescribed in the last section, does not avail the defendant, unless the money is accepted, or is paid into court, and notice thereof in writing served upon the plaintiff's attorney before the trial and within ten days after the tender. If the plaintiff takes out the amount paid in, he accepts the tender.

New. Am'd by L. 1877, c. 419.

§ 733. Effect of sufficient tender.

If it appears, upon the trial, that the sum so tendered was sufficient to pay the plaintiff's demand, or to make amends for the injury, and also to pay the costs of the action, to the time of the tender, the plaintiff cannot recover costs or interest, from the time of the tender, but must pay the defendant's costs from that time.

From 2 R. S. 554 (Part 3, c. 8, tit. 17), §§ 21, 22.

§ 734. When to be deducted from recovery, etc.

If the plaintiff proceeds in the action, after accepting the tender, the sum accepted must be deducted from the recovery, and judgment rendered for the residue, if any; and, if the tender and acceptance do not appear in the pleadings, a memorandum thereof must be annexed to the judgment-roll. The plaintiff's right to recover costs, and his liability to pay costs to the defendant, are determined by the amount of the residue.

From Id., § 23.

§ 735. Requiring admission of genuineness of paper.

The attorney for a party may, at any time before the trial, exhibit to the attorney for the adverse party, a paper, material to the action, and request a written admission of its genuineness. If the admission is not given, within four days after the

request, and the paper is proved or admitted on the trial, the expenses, incurred by the party exhibiting it, in order to prove its genuineness, must be ascertained at the trial, and paid by the party refusing the admission; unless it appears, to the satisfaction of the court, that there was a good reason for the refusal.

From Co. Proc., § 388.

§ 736. Offer to liquidate damages conditionally.

In an action to recover damages for breach of a contract, the defendant's attorney may, with the answer, serve upon the plaintiff's attorney, a written offer, that, if the defendant fails in his defence, the damages may be assessed at a specified sum. If the plaintiff serves notice, that he accepts the offer, with or before the notice of trial, and damages are awarded to him on the trial, they must be assessed accordingly.

From Id., § 386.

§ 737. [Am'd, 1877.] Effect of refusal of offer.

If the plaintiff does not accept the offer, he cannot prove it, upon the trial. But if the damages, awarded to him, do not exceed the sum offered, the defendant is entitled to recover the expenses, necessarily incurred by him in preparing for the trial of the question of damages. The expenses must be ascertained, and the amount thereof determined by the judge, or the referee, by or before whom the cause is tried.

From Id., § 387. Am'd by L. 1877, c. 416.

§ 738. [Am'd, 1877.] Defendant's offer to compromise; proceedings thereon.

The defendant may, before the trial, serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney, a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

From Co. Proc., § 385. Am'd by L. 1877, c. 416.

§ 739. [Am'd, 1877.] Plaintiff's offer to compromise counterclaim; proceedings thereon.

Where the defendant sets up a counterclaim, to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, the plaintiff may serve, upon the defendant's attorney, a written offer, to allow judgment to be taken against him, for a specified sum, with costs, or against the defendant for a specified sum, and against the plaintiff for costs. If the defendant, within ten days thereafter, serves, upon the plaintiff's attorney, notice that he accepts the offer, either party may file the summons, complaint, answer, and offer, or copies thereof, and proof of acceptance; and thereupon the clerk must enter judgment accordingly. If notice of acceptance is not thus given, the offer cannot be given in evi-

dence, upon the trial; but, if the recovery is not more favorable to the defendant than that so offered, he will not be entitled to recover costs from the time of the offer, but must pay costs from that time.

From Co. Proc., § 385. Am'd by L. 1877, c. 416.

§ 740. Offer and acceptance, by whom subscribed.

Unless an offer or an acceptance, made as prescribed in either of the last four sections, is subscribed by the party making it, his attorney must subscribe it, and annex thereto his affidavit, to the effect, that he is duly authorized to make it, in behalf of the party.

New.

§§ 741, 742. [Stricken out by L. 1877, c. 416.]

TITLE III. Re art 10 civ Prac. act. C. 61 &c

Payment of money into court, and care and disposition thereof.

Sec. 743. Party bringing money into court is discharged.
744. Comptroller of New-York to supervise court funds.
744a. Comptroller may examine books of a bank, etc.
745. Money to be paid to county treasurer, and securities taken in his name.
746. Funds; where and how deposited or invested.
747. Power of each court to direct payment or reinvestment of its funds.
748. Application of preceding section.
749. Powers of certain officers, touching securities, etc.
750. Provision relating to death, removal, etc., of officer.
751. No money to be paid except on certified copy order.
752. Custodian's books of account.
753. Annual report by custodian of funds.
754. These provisions applicable in New-York to the chamberlain.

§ 743. Party bringing money into court is discharged.

A party bringing money into court, pursuant to the direction of the court, is discharged thereby from all further liability, to the extent of the money so paid in.

From 2 R. S. 171 (Part 3, c. 1, tit. 2), § 21.

§ 744. [Omitted; see Table, p. iii.] Comptroller of New-York to supervise court funds.

The comptroller of the state of New-York shall supervise the administration of all funds paid into any court of record, or ordered to be so paid by a judgment, order or decree of any such court of record. He shall have power and authority to institute proceedings to enforce obedience to the judgments, orders, or decrees of the said courts for the deposit of moneys and securities into court, and shall prescribe regulations and rules for the care and disposition thereof, which shall be observed by all parties interested therein; unless the court having jurisdiction over the same, shall make different directions, by special order duly entered in accordance with section 747 of this act; and the comptroller may at any time require any county clerk or clerk of any court of record, to file with any county treasurer an officially certified copy of any record, document or paper, or extracts therefrom, which he may deem necessary for the use of said county treasurer in the administration of such funds; the fees of said clerk for making and certifying such copy or copies shall be a charge upon the county where such records, documents or papers are recorded or filed.

From Id., § 22. Am'd by L. 1892, c. 651; L. 1896, c. 269; L. 1908, c. 181 (in effect Sept. 1, 1908).

§ 744a. [Added, 1908; am'd, 1916.] Comptroller may examine books of a bank, etc.

The comptroller may examine the books, accounts and vouchers of every bank and trust company or other depository or of any public official in the state, in anywise relating to moneys and securities paid into court, under an order of any court of record or directed to be paid into court by statute; and where the same has not been paid to the chamberlain of the city of New York or to any county treasurer of the state, the comptroller upon application duly made shall be entitled to an order directing the payment and transfer of all such money and securities, from any such bank, trust company, depository or public official to the treasurer of the proper county, and in the city of New York to the city chamberlain.

Added by L. 1908, c. 182. Am'd by L. 1916, c. 442 (in effect May 9, 1916).

§ 745. [Am'd, 1908.] Money to be paid to county treasurer, and securities taken in his name.

All moneys and securities paid, transferred, or deposited into court, must be paid or transferred, either directly, or by the officer who is required by law first to receive it, to the county treasurer of the county, where the action is triable, or to such other county treasurer as the court specially directs. Where money is paid or a security is delivered to an officer, other than the county treasurer, he must pay or transfer it to the county treasurer, within two days after he receives it. In the city of New-York, he must pay it to the chamberlain, within two days after he receives it. A bond, mortgage, or other security, or a certificate or transfer of stock, taken upon the investment of money paid into court, must be taken to the county treasurer of the county where the fund belongs, in his name of office; or to such other county treasurer, as the court specially directs.

From L. 1848, c. 277, § 1, and Rule 82 of 1874 (now Rule 68 of General Rules of Practice). See also 2 R. S. 171, 172 (Part 3, c. 1, tit. 2), §§ 17, 18, 24; also L. 1847, c. 280, § 71. Am'd by L. 1908, c. 183 (in effect Sept. 1, 1908).

§ 746. [Am'd, 1892, 1909.] Funds, where and how deposited or invested.

All funds or moneys paid into court shall be deposited in such savings bank, trust company, bank, banking association or with such banker, as shall be designated by the comptroller, as soon as received by the custodian thereof. But the money must be deposited in the county where the fund belongs, where it can be done conveniently and safely and with advantage to the parties interested.

From 2 R. S. 171 (Part 3, c. 1, tit. 2), §§ 17, 18, 21; L. 1847, c. 280, § 88. Am'd by L. 1892, c. 651; L. 1909, c. 65. (See Table, p. iii, ante.)

§ 747. [Am'd, 1892, 1908, 1916.] Power of each court to direct payment or reinvestment of its funds.

Each court may direct that money paid into that court in any action or proceeding brought therein, or any bond, mortgage or other security which represents property belonging to any suit or party interested therein, may, after having been deposited with the county treasurer or city chamberlain as required by section 745 of this act, be paid out, transferred, invested or reinvested in any manner or form that appears to it best for the interests of the owners thereof. But such directions must be embodied in an order or decree of said court, founded upon proper and sufficient evidence satisfactory to the court that such disposition of the property is best for the interests of the owners thereof or parties interested therein.

From L. 1848, c. 277, § 8. Am'd by L. 1892, c. 651; L. 1908, c. 183; L. 1916, c. 443 (in effect May 9, 1916).

§ 748. [Am'd, 1892.] Application of preceding section.

The provisions of the last preceding section shall apply to all courts of record of the state.

From L. 1848, c. 277, § 1. Am'd by L. 1892, c. 651.

§ 749. [Am'd, 1877.] Powers of certain officers, touching securities, etc.

A county treasurer, or other officer, or a guardian, committee, or other trustee, in whose name is taken a bond, mortgage, or other security, or public stock, representing money, paid into court, in an action; or to whom stock or a security, or an account, deed, voucher, receipt, or other paper, representing or relating to such money, is transferred, delivered, made, or given, pursuant to law, is vested with title for the purposes of the trust, and may bring an action upon or in relation to the same, in his official or representative character.

From L. 1848, c. 277, § 4. Am'd by L. 1877, c. 416.

§ 750. Provision relating to death, removal, etc., of officer.

On the expiration of the official term of a county treasurer, or where a vacancy occurs in his office, by death or otherwise,

all public stock, bonds, mortgages, and other securities held by him, as prescribed in this title, vest in his successor in office; and all money deposited, as prescribed in this title, in a bank, trust company or other depository, to his credit, vests in, and must be carried to, the account of his successor in office.

From 2 R. S. 172 (Part 3, c. 1, tit. 2), §§ 26, 27.

§ 751. [Am'd, 1892.] No money to be paid except on certified copy order.

No money, security or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court, in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition. Each order must be countersigned by the presiding judge by whose direction it is made.

From Id., § 23. Am'd by L. 1892, c. 651.

§ 752. [Am'd, 1892, 1909.] Custodian's books of account.

Every officer having charge of moneys, securities or other property in the custody of the court, shall keep a book or books in which he shall make an exact account thereof. Such book or books shall state the name of the court, the title of the case, the date of receipt, from whom received, the amount of money, if any, and a description of the securities or other property received, if any, and each addition of interest; also the date and description of each order for payment and the dates and amounts of payments thereunder and to whom paid; also an account of each change of investment, if any.

From Rule 83 of 1874 (of Supreme Court Rules). Am'd by L. 1892, c. 651; L. 1909, c. 65. (See Table, p. iii, ante.)

§ 753. [Am'd, 1877, 1892.] Annual report by custodian of funds.

Every treasurer or financial officer who has in his charge or possession or under his control, money, bonds, stocks, mortgages or any other securities or property as prescribed in this title, must, once in each year, make a report to the comptroller at the time and in the form and manner which he may prescribe, containing a true statement of his accounts for the preceding year or from the time of the last report. This report must be verified by the oath of such officer, and must be accompanied by the certificate of the proper officer of each bank or trust company, stating the exact amount on deposit with such corporation to the credit of each case separately. Such officer or bank or trust company shall furnish any additional report to the comptroller or to the court at such time and in such detail as may be required.

From Rule 83 of 1874 (of Supreme Court Rules). Am'd by L. 1877, c. 416; L. 1892, c. 651.

§ 754. These provisions applicable in New York to the chamberlain.

Each provision of this title, relating to a county treasurer, applies to the chamberlain of the city of New York, with respect to money paid into court, in an action triable in the city and county of New York, or with respect to money, or a bond, mortgage or other security, or public stock, representing money paid into court; except where special provision, with respect to the same, is otherwise made by law.

New.

TITLE IV.

Proceedings upon the death or disability of a party or the transfer of his interest.

Sec. 755. Action; when not to abate.
756. Proceedings upon transfer of interest, or devolution of liability.
757. Id.; when sole party dies and action survives.
758. Id.; when one of several parties dies.
759, 760. Id.; when part of cause of action survives.
761. When court may order action abated.
762. Special cases excepted.
763. Death of party after verdict, etc.
764. Abatement of actions; seduction; action for wrong not to abate after verdict, etc.
765. No verdict, etc., can be taken after a party's death.
766. Death, etc., of public officer or trustee.

§ 755. [Am'd, 1891.] Action; when not to abate.

An action does not abate by any event, if the cause of action survives or continues. A special proceeding does not abate by any event, if the right to the relief sought in such special proceeding survives or continues, but this provision as to a special proceeding applies only to cases where a party dies after this act takes effect.

From Co. Proc., § 121, first sentence. Am'd by L. 1891, c. 284 (in effect Sept. 1, 1891). The amendment of 1891 added the last sentence of this section.

§ 756. Proceedings upon transfer of interest, or devolution of liability.

In case of a transfer of interest, or devolution of liability, the action may be continued, by or against the original party; unless the court directs the person, to whom the interest is transferred, or upon whom the liability is devolved, to be substituted in the action, or joined with the original party, as the case requires.

From Co. Proc., § 121, third sentence.

§ 757. [Am'd, 1877, 1879, 1891.] Id.; when sole party dies and action survives.

In case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative or successor in interest. In case of the death of a sole party to a special proceeding after this act takes effect, if the right to the relief sought in such proceeding survives or continues, the court must, upon a motion, allow or compel such proceeding to be continued by or against his representative or successor in interest. This provision as to a special proceeding does not apply where provision for such continuance has been otherwise made by law.

From Co. Proc., § 121, second sentence. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1891, c. 284. The amendment of 1891 added the last two sentences of this section.

§ 758. [Am'd, 1877.] Id.; when one of several parties dies.

In case of the death of one of two or more plaintiffs, or one of two or more defendants, if the entire cause of action survives to or against the others, the action may proceed in favor of or against the survivors. But the estate of a person or party jointly liable upon contract with others shall not be discharged by his death, and the court may make an order to bring in the proper representative of the decedent, when it is necessary so to do, for the proper disposition of the matter; and, where the

liability is several as well as joint, may order a severance of the action so that it may proceed separately against the representative of the decedent, and against the surviving defendant or defendants.

From 2 R. S. 38d (Part 3, c. 7, tit. 1), § 1. Am'd by L. 1877, c. 416.

§ 759. Id.; when part of cause of action survives.

In case of the death of one of two or more plaintiffs, or one of two or more defendants, if part only of the cause of action, or part or some of two or more distinct causes of action, survives to or against the others, the action may proceed, without bringing in the successor to the rights or liabilities of the deceased party; and the judgment shall not affect him, or his interest in the subject of the action. But where it appears proper so to do, the court may require or compel the successor, or a person who claims to be the successor, to be brought in as a party, upon his own application or upon the application of a party to the action.

From 2 R. S. 184, 185 (Part 3, c. 1, tit. 2), §§ 108, 109, 115, 117, 120, 121.

§ 760. [Am'd, 1879.] The same.

In a case specified in the foregoing sections of this title, where such a person applies in his own behalf, the court may direct that he be made a party, by amendment of the pleadings, or otherwise as the case requires. Where an application is made by the plaintiff, to bring in such a person as defendant, the court may direct that a supplemental summons issue, and that supplemental pleadings be made. Where an application is made by a defendant to bring in such a person, the court may, and where the protection of the applicant's rights requires it, must, permit the defendant to commence a cross action for that purpose. The cross action must be brought in the same court, unless the order otherwise specially directs. If it directs that the action be commenced in another court, the latter court may, by order at any time after the cross action is commenced, remove to itself the original action, with like effect as if it had been brought therein. Unless the court otherwise directs, the original action and the cross action must be tried, and judgment rendered therein, as if they were one action.

From Id. Am'd by L. 1879, c. 542.

§ 761. [Am'd, 1877.] When court may order action abated.

At any time after the death of the plaintiff, or after the marriage of the plaintiff, where it affects the rights of either party, the court may, in its discretion, upon notice to such persons as it directs, and upon the application of the adverse party, or of a person whose interest is affected, direct that the action abate, unless it is continued by the proper parties, within a time specified in the order, not less than six months, nor more than one year, after the granting thereof.

From Co. Proc., § 121, fifth sentence. Am'd by L. 1877, c. 416.

§ 762. Special cases excepted.

The foregoing provisions of this title do not apply to a case, where special provision is otherwise made by law.

New.

§ 763. Death of party after verdict, etc.

If either party to an action dies, after an accepted offer to allow judgment to be taken, or after a verdict, report, or decision, or an interlocutory judgment, but before final judgment is entered, the court must enter final judgment, in the names of the original parties; unless the offer, verdict, report, or decision, or the interlocutory judgment, is set aside.

From 2 R. S. 387 (Part 3, c. 7, tit. 1), § 4.

§ 764. [Am'd, 1881, 1890, 1904.] Abatement of actions; seduction; action for wrong not to abate after verdict, etc.

An action commenced by a father to recover damages for the seduction of his minor daughter does not abate by his death, but survives to the mother of such daughter, who may recover both actual and exemplary damages therein to the same extent as though the original party plaintiff had lived. After verdict, report or decision in an action to recover damages for a personal injury, the action does not abate by the death of a party, but the subsequent proceedings are the same as in a case where the cause of action survives. And in case said verdict, report or decision is reversed upon questions of law only, said action does not abate by the death of the party against whom the same was rendered.

From Co. Proc., § 121, fourth sentence. Am'd by L. 1881, c. 277; L. 1890, c. 379; L. 1904, c. 379 (in effect Sept. 1, 1904).

§ 765. No verdict, etc., can be taken after a party's death.

This title does not authorize the entry of a judgment against a party, who dies before a verdict, report, or decision is actually rendered against him. In that case, the verdict, report, or decision is absolutely void.

From 2 R. S. 387 (Part 3, c. 7, tit. 1), § 5.

§ 766. Death, etc., of public officer or trustee.

Where an action or special proceeding is authorized or directed by law, to be brought by or in the name of a public officer, or by a receiver, or other trustee, appointed by virtue of a statute, his death or removal does not abate the action or special proceeding; but the same may be continued by his successor, who must, upon his application, or that of a party interested, be substituted for that purpose, by the order of the court, a copy of which must be annexed to the judgment-roll.

From 2 R. S. 388, § 14; L. 1882, c. 205, § 3.

TITLE V.

Motions and orders generally.

Sec. 767. Definition and form of an order.
768. Id.; of a motion.
769. Motions in supreme court; where to be heard.
770. Motions in New-York city.
771. In absence of judge, motion may be transferred to another judge.
772, 773. What judges may make orders out of court, without notice.
774. Review of order made by a judge of another court.
775. When stay of proceedings not to exceed twenty days.
776. Subsequent application for order after denial, etc., of prior application.
777. Id.; as to application for judgment.
778. Penalty for violating last two sections.
779. Costs of a motion; how collected.

§ 767. [Am'd, 1911, 1912.] Definition and form of an order.

A direction of a court or judge, made, as prescribed in this act, in an action or special proceeding, must be in writing, unless otherwise specified in the particular case. Such a direction, unless it is contained in a judgment, is an order. In determining a motion, the court shall cause its determination, together with a recital of the papers read on the motion on either side to be indorsed on or appended to the back of the motion papers and shall sign the same and such indorsement and signature shall constitute the order of the court; but nothing herein contained shall prevent the court, upon the application of either party, from resettling such order in the form of the written order heretofore in use. Upon such resettlement of the order, where the right to appeal depends upon whether or not such order was made in the exercise of discretion, or whether or not the decision upon which it is based involves a question of law, such order shall so state the ground upon which it was made.

From Co. Proc., § 400. Am'd by L. 1911, c. 368; L. 1912, c. 66 (in effect Sept. 1, 1912).

§ 768. [Am'd, 1900, 1911.] Id.; of a motion.

An application for an order is a motion. Such application or motion must be made to a court, or to a judge or justice thereof. When the defendants have made default in appearing in an action or proceeding, any application or motion therein may be made to the court or to a judge or justice thereof out of court. Where any of the defendants in an action or proceedings have appeared, all motions or applications thereafter made in such action, or proceedings, except a motion made for an extension of time on two days' notice under rule twenty-four of the general rules of practice which may be made to a judge, and except where it is otherwise authorized by law, must be made to the court, unless such defendants consent to the making of such motion or application to a judge or justice out of court. Except in the first judicial department an order which is authorized by statute to be made at chambers may be made by the court. Any proceeding which is required by statute to be instituted by petition may also be instituted by an affidavit setting forth the matter which it is required that the petition shall contain, accompanying a notice of

an application for the relief which would properly be prayed for in the petition; and in like manner a proceeding which is required by statute to be instituted by affidavit may be instituted by petition. The party making a motion may, in the notice thereof, specify one or more kinds of relief in the alternative or otherwise, and the adverse party must, where at least eight days' notice of the motion shall be given, at least one day prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party copies of the affidavits and papers which he expects to read in opposition to the motion; he may, at least three days prior to the time at which the motion is noticed to be heard, serve upon the attorney for the moving party a notice, with or without affidavits or other papers in support thereof, specifying any kind or kinds of relief in the alternative or otherwise to which he claims to be entitled in the action whether the relief so asked for be responsive or not to the relief asked for by the moving party. Upon the hearing of a motion relief shall not be denied to any party because of defects or insufficiencies in the moving papers which can be cured upon the hearing or before the entry of the order thereon, but the court or judge shall direct that such defects or insufficiencies be cured or supplied forthwith, and shall proceed to hear and consider the motion, or may direct the motion to stand over to be heard at a subsequent time or place. In either case it may award against the party in whose moving papers or application such defect or insufficiency appears, costs in favor of the adverse party. Whenever a motion is made to set aside or vacate an order, judgment or decree or any paper filed or proceeding taken, because of technical defects therein, or because of defects or insufficiencies in the papers or proceedings upon which it was made or entered and such defects or insufficiencies can, without prejudice to intervening rights, be cured or supplied, it shall be the duty of the court to direct upon the hearing of such motion, that such defects or insufficiencies in the order, judgment or decree, or in the papers or proceedings, be cured or supplied nunc pro tunc, awarding against the party in whose order, judgment or decree, or in whose papers or proceedings such defects or insufficiencies appear, costs in favor of the adverse party. The pleadings in an action shall at all times when a motion is made therein be deemed to be before the court although not specifically referred to in the notice of motion.

From Id., § 401, subd. 1. Am'd by L. 1900, c. 147; L. 1911, c. 763 (in effect Sept. 1, 1911).

§ 769. [Am'd, 1879.] Motions in supreme court; where to be heard.

A motion, upon notice, in an action in the supreme court must be made within the judicial district in which the action is triable, or in a county adjoining that in which it is triable; except that where it is triable in the first judicial district, the motion must be made in that district; and a motion, upon notice, cannot be made in that district in an action triable elsewhere. But this section does not apply to a case where it is specially prescribed by law that a motion may be made in the county, where the applicant, or other person to be affected thereby, or the attorney, resides.

From Co. Proc., § 401, subd. 4. Am'd by L. 1879, c. 542.

§ 770. Motions in New-York city.

In the first judicial district, a motion which elsewhere must be made in court, may be made to a judge out of court, except for a new trial on the merits.

From Co. Proc., § 401, subd. 2.

§ 771. In absence of judge, motion may be transferred to another judge. All new Rule 67

Where notice of a motion is given, or an order to show cause is returnable, before a judge, out of court, who, at the time fixed for the motion, is or will be absent, or unable, for any other cause, to hear it, the motion may be transferred, by his order, made before or at that time, or by the written stipulation of the attorneys for the parties, to another judge, before whom it might have been originally made.

From Co. Proc., § 404.

§ 772. [Am'd, 1895.] What judges may make orders out of court, without notice.

Where an order, in an action, may be made by a judge of the court, out of court, and without notice, and the particular judge is not specially designated by law, it may be made by any judge of the court, in any part of the State; or, except to stay proceedings after verdict, report, or decision, by a justice of the supreme court, or by the county judge of the county where the action is triable, or in which the attorney for the applicant resides. Where such an order grants a provisional remedy, it can be vacated only in the mode specially prescribed by law; in any other case, it may be vacated or modified, without notice, by the judge who made it, or, upon notice, by him, or by the court.

From Id., § 401 (subd. 3) and § 324. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 773. The same.

The limitation, contained in the last section, of the county judges who may make an order, does not apply to a case where it is prescribed in this act, in general words, that a particular order may be made by a county judge, or by any county judge.

New.

§ 774. [Am'd, 1877.] Review of order made by a judge of another court.

An order, made by a judge of a court, other than the court in which the action is pending, may be reviewed in the same manner, as if it was made by a judge of the court, in which the action is pending.

From Co. Proc., § 403, last clause. Am'd by L. 1877, c. 416.

§ 775. [Am'd, 1877.] When stay of proceedings not to exceed twenty days.

An order to stay proceedings in an action, for a longer time than twenty days, shall not be made by a judge, out of court, except to stay proceedings under an order or judgment appealed from, or where it is made upon notice of the application, to the adverse party, or in cases where special provision is otherwise made by law.

From Co. Proc., § 401, subd. 6. Am'd by L. 1877, c. 416.

§ 776. Subsequent application for order after denial, etc., of prior application.

If an application for an order, made to a judge of the court, or to a county judge, is wholly or partly refused, or granted conditionally, or on terms; a subsequent application, in reference to the same matter, and in the same stage of the proceedings, shall be made only to the same judge, or to the court. If it is made to another judge, out of court, an order granted thereupon must be vacated by the judge who made it; or, if he is absent, or otherwise unable to hear the application, by any judge of the court, upon proof, by affidavit, of the facts.

From 2 R. S. 281 (Part 3, c. 3, tit. 2), § 27; Id., 173 (Part 3, c. 1, tit. 2), §§ 32, 33, 34.

§ 777. Id.; as to application for judgment.

Where an application is made to the court for judgment, it cannot be withdrawn, without the express permission of the court; and a subsequent application for judgment shall not be made, at a term held by another judge, except where the first application is so withdrawn; or where the directions, given thereupon, require an act to be done, before judgment can be rendered; or where the fact of the former application is stated, and the proceedings thereupon, and subsequent thereto, are fully set forth, in the papers upon which the application is made.

New.

§ 778. Penalty for violating last two sections.

A person making an application, forbidden by the last two sections, with knowledge of the previous application, shall be punished by the court, for a contempt.

From 2 R. S. 281 (Part 3, c. 3, tit. 2), § 28.

§ 779. [Am'd, 1877, 1879, 1882, 1884.] Costs of a motion; how collected.

Where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, or, if no time is so fixed, within ten days after the service of a copy of the order, an execution against the personal property only of the party required to pay the same, may be issued by any party or person to whom the said costs or sum of money is made payable by said order, or in case permission of the court shall be first obtained, by any party or person having an interest in compelling payment thereof, which execution shall be in the same form, as nearly as may be, as an execution upon a judgment, omitting the recitals and directions relating to real property; and all proceedings on the part of the party required to pay the same, except to review or vacate the order, are stayed without further direction of the court, until the payment thereof. But the adverse party may, at his election, waive the stay of proceedings. Where the order directs that the costs of a motion abide the event of the action, or where costs of a motion, awarded by an order, have not been collected when final judgment is entered, they may be taxed as part of the costs of the action or set off against costs awarded to the

adverse party, as the case requires. But nothing herein contained shall be so construed as to relieve a party or person from punishment as for contempt of court for disobedience to an order in any case when the remedy of enforcement by such proceedings now exists.[1]

From L. 1847, c. 390, § 3; L. 1876, c. 431, § 12. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1882, c. 397; L. 1884, c. 181.

[1] This last sentence was added by the amendment of 1884 (L. 1884, c. 181, in effect April 22, 1884). This date becomes important by reason of the words "now exists" with which the sentence ends. (See § 14, subd. 3, ante).

TITLE VI.

Miscellaneous practice regulations.

Article 1. General regulations respecting time.
2. Preferred and deferred causes.
3. Service of papers.
4. Discovery of books and papers.
5. General regulations respecting bonds and undertakings.
6. Other matters.

ARTICLE FIRST.

General regulations respecting time.

Sec. 780. Notice of motion, to be eight days.
781. How time enlarged, before its expiration.
782. Copy of affidavit must be served.
783. Relief, after time has expired.
784. When time cannot be extended.
785. Qualification of last section.
786. Orders in certain actions; how published.
787. Time for publication of notice; how computed.
788. [Repealed.]

§ 780. [Am'd, 1880.] Notice of motion, to be eight days.

Where special provision is not otherwise made by law, or by the general rules of practice, if notice of a motion, or of any other proceeding in an action, before a court or a judge, is necessary, it must, if personally served, be served at least eight days before the time appointed for the hearing; unless the court or a judge thereof, or a county judge of the county where the action is triable or in which the attorney for the applicant resides, upon an affidavit showing grounds therefor, makes an order to show cause, why the application should not be granted; and, in the order, directs that service thereof, less than eight days before it is returnable, be sufficient.

From Co. Proc., §§ 402, 403. Am'd by L. 1880, c. 219.

§ 781. How time enlarged, before its expiration.

Where the time, within which a proceeding in an action, after its commencement, must be taken, has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action.

From Co. Proc., § 405.

§ 782. Copy of affidavit must be served.

In a case specified in the last two sections, the affidavit, upon which the order was granted, or a copy thereof, must be served with a copy of the order; otherwise, the order may be disregarded.

From Id.

§ 783. Relief, after time has expired.

After the expiration of the time, within which a pleading must be made, or any other proceeding in an action, after its commencement, must be taken, the court, upon good cause shown, may, in its discretion, and upon such terms as justice requires, relieve the party from the consequences of an omission to do the act, and allow it to be done; except as otherwise specially prescribed by law.

From Co. Proc., § 174.

§ 784. When time cannot be extended.

A court, or a judge, is not authorized to extend the time, fixed by law, within which to commence an action; or to take an appeal; or to apply to continue an action, where a party thereto has died, or has incurred a disability; or the time fixed by the court, within which a supplemental complaint must be made, in order to continue an action; or an action is to abate, unless it is continued by the proper parties. A court, or a judge, cannot allow either of those acts to be done, after the expiration of the time fixed by law, or by the order, as the case may be, for doing it; except in a case specified in the next section.

From Co. Proc., § 405.

§ 785. [Am'd, 1877.] Qualification of last section.

Where a party entitled to appeal from a judgment or order, or to move to set aside a final judgment for error in fact, dies either before or after this chapter takes effect, and before the expiration of the time within which the appeal may be taken, or the motion made, the court may allow the appeal to be taken, or the motion to be made, by the heir, devisee, or personal representative of the decedent, at any time within four months after his death.

New. Am'd by L. 1877, c. 416.

§ 786. Orders in certain actions; how published.

Where an action is brought for the collective benefit of the creditors of a person, or of an estate, or for the benefit of a person or persons, other than the plaintiff, who will come in and contribute to the expense of the action, notice of a direction of the court, contained in a judgment or order, requiring the creditors, or other person or persons to exhibit their demands, or otherwise to come in, must be published, once in each week, for at least three successive weeks, and as much longer as the court directs, in the newspaper, published at Albany, in which legal notices are required to be published, and in a newspaper, published in the county where the act is required to be done.

From 2 R. S. 183 (Part 3, c. 1, tit. 2), § 106.

§ 787. Time for publication of notice; how computed.

The period of publication of a legal notice, in an action or special proceeding, brought in a court, either of record or not of record, or before a judge of such a court, must be computed, so as to exclude the first day of publication, and include the day, on which the act or event, of which notice is given, is to happen, or which completes the full period of publication.

From Co. Proc., § 425.

§ 788. Time for doing any act; how computed.[1] [Repealed by Statutory Construction Law, L. 1892, c. 677.]

[1] Substantially the same provisions that were formerly included in § 788 are now embodied in § 20 of the General Construction Law. See this law in Appendix I, post.

ARTICLE SECOND.

Preferred and deferred causes.

Sec. 789. Preference of certain actions by the people.
790. Id.; of criminal actions.
791. Id.; among civil actions.
792. Id.; in mandamus or prohibition.
793. Where an order is necessary.
794, 795. [Repealed.]

§ 789. Preference of certain actions by the people.

A trial, motion, appeal, or hearing, in an action by the people to recover money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise, for, or in behalf of, a public or governmental interest, by a municipal or other public corporation, or by a board, officer, custodian, agency or agent of the State, or of a city, county, town, village, or other division, subdivision, department, or portion of the State, which the defendant has, without right, obtained, received, converted, or disposed of; or to recover damages, or other compensation, for so obtaining, receiving, paying, converting, or disposing of the same; or the aiding or abetting thereof; is entitled, on the application of the attorney-general, to a preference over any other business, at a term or sitting of any court of the State, irrespective of its place upon the calendar.

From L. 1875, c. 49, § 5.

§ 790. Id.; of criminal actions.

A criminal action, including an appeal or other proceeding in a criminal cause, is entitled, under the direction of the court, to preference in the trial or hearing thereof, over all civil actions and special proceedings, except as prescribed in the last section.

New.

§ 791. [Am'd, 1877, 1879, 1882, 1883, 1884, 1887, 1895, 1898, 1899, 1900, 1902, 1906.] Id.; among civil actions.

Civil causes are entitled to preference among themselves, in the trial or hearing thereof, in the following order, next after the causes specified in the last section but one:

1. [Am'd, 1879, 1898, 1906.] An action or special proceeding brought by or against the people of the state, or brought by the people of the state on the relation of a party, or brought by or against any state officer or board of state officers as such; where the attorney of the said people, state officer or board of state officers, or attorney for the plaintiffs in such action or special proceeding has given notice, at the time of the service of the notice of trial or argument, of the particular day in the term at which he will move it. If the action or special proceeding is not moved by said attorney for trial or argument on that day, or as soon thereafter in the same term as the court can hear it, the other party may then move the trial or argument; otherwise it shall not be moved out of its order at that term except by the special order of the court.

2. [Am'd, 1882, 1898.] An action or special proceeding in which the City of New York, or a board of officers, exercising powers conferred by a statute for the protection of public health or public or private property, or for the prevention or punishment of violations of a statute relating to either of those subjects, or the commissioners of pilots in the City of New York, are parties; where a notice, similar to the notice prescribed in the last subdivision, has been served by their attorney, at the time of service of the notice of trial or argument. The provisions of the

last subdivision, relating to moving the trial or argument, apply to a cause within this subdivision.

3. In the court of appeals or the supreme court, an appeal taken by either party, in an action or special proceeding other than as specified in subdivision first of this section, where the people of the State, or a board of State officers, are sole parties, or a State officer is sole party, plaintiff or defendant.

3a. [Added, 1899.] In the court of appeals or the supreme court, an appeal taken by either party in an action or special proceeding from a judgment or order declaring a legislative enactment unconstitutional, is entitled on motion of the appellant, to a preference over any business irrespective of its place on the calendar, except as to preferences provided for in sections 789, 790, and the preceding subdivisions of this section.

4. In the court of appeals an action, a party to which has died pending the action, where the pendency of the action prevents a final settlement of the estate of the deceased party.

5. [Am'd, 1882, 1883, 1884, 1895, 1899, 1900, 1906.] In any court, an action or special proceeding in which an executor or an administrator, or testamentary trustee, or an infant, or a trustee of a fund for the support and maintenance of an infant, or a receiver appointed by the court, or by the comptroller of the currency of the United States, or a trustee in bankruptcy, or a general assignee for the benefit of creditors, or the committee of a lunatic or an idiot, or a creditor of a deceased insolvent debtor suing for the benefit of himself and other creditors interested in the estate or property of such deceased debtor where a right of action is given by express provision of law, is the sole plaintiff or sole defendant; an action or special proceeding for the construction of, or an adjudication upon or to determine the validity of the probate of a will, in which the administrator, with the will annexed, or the executor of the will is joined, as plaintiff or defendant, with one or more other parties, and an appeal from the judgments or decision in any of the foregoing actions or proceedings and in the court of appeals or the supreme court, an appeal from the decree or decision of a surrogate's court, determining a will to be valid and admitting it to probate, or determining an instrument offered for probate as a will to be invalid or not entitled to probate as such, or granting general letters of administration or directing the distribution of a fund or payment of money by an executor or an administrator in pursuance of an order or decree made on an intermediate, final or judicial accounting or otherwise by an administrator or an executor.

6. [Am'd, 1895.] An action for dower where the plaintiff makes proof by affidavit, to the satisfaction of the court, or a judge thereof, that she has no sufficient means of support aside from the estate in controversy; an action for the partition of real property.

7. [Am'd, 1882.] An action against a corporation or joint-stock association, issuing bank notes or any kind of paper credits, to circulate as money; or by or against a receiver of such corporation or association; an action in which a county or town is sole plaintiff or defendant.

8. [Am'd, 1879, 1887.] An action against a corporation, founded upon a note or other evidence of debt for the absolute payment of money. An action upon an undertaking given upon an appeal to the court of appeals or to stay the execution on an appeal to the court of appeals.

9. [Am'd, 1887.] An action against a sheriff, in his official capacity, or an action by a sheriff or late sheriff, to recover for a breach of the obligation of a bond or bonds, or an instrument

or instruments of indemnity, or an undertaking or undertakings given to him in his official capacity.

10. A cause entitled to preference, by the general rules of practice, or by the special order of the court, in the particular case.

11. [Added, 1898.] In any court an action for libel or slander.

12. [Added, 1899.] In the court of appeals, all appeals from judgments of affirmance rendered by the appellate division of the supreme court in cases enumerated in subdivision two of section 191 of this act, where the decision of the appellate division has been unanimous and an appeal has been taken or allowed as in said subdivision of said section provided.

13. [Added, 1902.] An action for absolute divorce in which an order has been made granting temporary alimony.

Where an issue of law and an issue of fact, or two or more other questions of different natures, come before the same term of the court for trial or hearing, the preference given by this section affects only the order in which the issues or questions of the same nature are to be disposed of.

New. Am'd by L. 1877, c. 416; L. 1879, c. 163 and c. 542; L. 1882, c. 397; L. 1883, c. 391; L. 1884, c. 402; L. 1887, c. 120; L. 1895, c. 289 and c. 795; L. 1898, c. 136; L. 1899, c. 355 and c. 585; L. 1900, c. 144; L. 1902, c. 357; L. 1906, c. 51 and c. 6 (in effect Sept. 1, 1906).

§ 792. [Am'd, 1895.] Id.; in mandamus or prohibition.

Where a writ of mandamus or of prohibition has been issued from the appellate division of the supreme court to a special term, or a judge of the same court, the cause may, in the discretion of the court, or, where an appeal is taken therein to the court of appeals, in the discretion of that court, be preferred over any of the causes specified in the last section.

From L. 1873, c. 70, §§ 1, 2. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 793. [Am'd, 1879, 1888, 1895, 1896, 1900, 1904, 1915.] Where an order is necessary.

Where the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court, or a judge thereof, upon notice to the adverse party. A copy of the order must be served with or before the notice of trial or argument. Such an order is not appealable, but it may be vacated by the judge or judges holding the term at which the preferred cause is noticed for trial or hearing, or by such other justice, or at such other term of court, or at such other time as shall be prescribed by the general or special rules of practice. But a preliminary order is not requisite in a case embraced within subdivision first or second of the last section but one, and the order in a case embraced within subdivision six thereof may be made ex parte, and is conclusive. Where no order is required, a claim for preference, specifying the provision of law under which the claim is made, may be inserted in the note of issue to be filed with the clerk, and it shall then be the duty of such clerk to place such cause in its proper place among the preferred causes at the head of the calendar; except that in the counties of New York, Bronx, Kings, Queens and Erie, and the seventh judicial district, no action or special proceeding shall be placed as a preferred cause upon the calendar of any circuit court or trial term or special term of any court as herein provided, but the party desiring a preference of any cause shall serve upon the opposite party, with his notice of trial, a notice that an application will be made to the court at the opening thereof, or to such justice or other term of court or at such other time as shall be prescribed by the general or special rules of practice, for leave to move the same as a preferred cause, and if the right to a prefer-

ence depends upon facts which do not appear in the pleadings or other papers upon which the case is to be tried the notice must be accompanied by an affidavit showing such facts. In said counties of New York, Bronx, Kings, Queens and Erie and in the seventh judicial district, the application for a preference shall be made at the opening of the court, or to such justices or other term of court, or at such other time as shall be prescribed by the general or special rules of practice, and if it shall appear that the cause is entitled to a preference and is intended to be moved for trial at or for the term for which the application is made, the court or justice must designate a day certain, during that term, on which day the said cause shall then be heard; if there be two or more causes so designated for trial for the same day, the said causes shall be heard in the order of their date of issue.

New. Am'd by L. 1879, c. 542; L. 1888, c. 497; L. 1895, c. 410 and c. 946; L. 1896, c. 140; L. 1900, c. 172; L. 1904, c. 173; L. 1915, c. 633 (in effect May 14, 1915.)

§§ 794, 795. [Repealed by L. 1895, c. 946 (in effect Jan. 1, 1896.]

ARTICLE THIRD.

Service of papers.

Sec. 796. Paper may be served personally.
797. Other modes of service.
798. Additional time when service made through post-office.
799. When paper to be served on attorney; when service not required.
800. When service may be made on clerk, for non-resident.
801. Service through branch post-office in New York city.
801a. Service in certain actions when name of deceased person is stated as defendant.
802. This article not applicable to service of summons, etc.

§ 796. [Am'd, 1888.] Paper may be served personally.

A notice or other paper in an action may be served on a party or an attorney, either by delivering it to him personally, or in the manner prescribed in the next section. All papers so served or required to be filed in an action, shall be plainly and legibly written or printed in black ink upon durable paper of good material, and, if imprinted by type-writer, such paper shall be of linen quality, equal in weight to sixteen pounds to the double cap ream, of seventeen by twenty-eight inches in size, and service or filing of papers printed or written upon such paper with such ink shall be deemed a compliance with the terms of this section. The transcribed minutes of a stenographer, taken in any civil or criminal action, or in any hearing or special proceeding, civil or criminal, shall be written or type-written on paper of the size hereinafter specified; and all cases, briefs, points or other papers required or used on an appeal from any judgment, determination or order of any court or board shall be printed (when required to be printed by the rules of any court) on paper of a uniform size, as follows: The paper must be ten and one-half inches by eight inches, and bound on the edge of the greatest length.

From Co. Proc., § 408. Am'd by L. 1888, c. 496.

§ 797. [Am'd, 1879, 1897.] Other modes of service.

Where the service is not personal, it may be made as follows:

1. Upon a party or an attorney, through the post-office, by depositing the paper, properly inclosed in a post-paid wrapper, in the post-office, or in any post-office box regularly maintained by the government of the United States and under the care of the post-office, of the party, or the attorney serving it, directed to the person to be served at the address, within the state, designated by him for that purpose, upon the preceding papers in the action; or, where he has not made such a designation, at his place of residence, or the place where he keeps an office, according to the best information which can conveniently be obtained concerning the same.

2. Upon an attorney, during his absence from his office, by leaving the paper with his partner or clerk therein, or with a person having charge thereof.

3. Upon an attorney, if there is no person in charge of his office, and the service is made between six o'clock in the morning and nine o'clock in the evening, either by leaving it, in a conspicuous place in his office, or by depositing it, inclosed in a sealed wrapper, directed to him, in his office letter-box; or, if the office is not open, so as to admit of leaving the paper therein, and there is no office letter-box, by leaving it at his residence, within the state, with a person of suitable age and discretion.

4 Upon a party, by leaving the paper at his residence within state, between six o'clock in the morning and nine o'clock in the even with a person of suitable age and discretion.

From Co. Proc., §§ 409, 410, 411. Am'd by L. 1879, c. 542; L. 1897, c. 4 effect Sept. 1, 1897).

§ 798. [Am'd, 1909, 1910,] Additional time when service made thr post-office.

Where it is prescribed in this act, or in the general rules of prac that a notice must be given, or a paper must be served, within a spec time, before an act is to be done; or that the adverse party has a spec time, after notice or service, within which to do an act; if service is n through the post-office, three days shall be added to the time speci except that service of notice of trial may be made, through the p office, not less than sixteen days before the day of trial, including day of service.

From Co. Proc., § 412. Am'd by L. 1909, c. 423; L. 1910, c. 577 (in effect Se 1910).

§ 799. When paper to be served on attorney; when service not requi

Where a party has appeared, a notice or other paper, required t served in an action, must be served upon his attorney. If a defen has not appeared, service of a notice or other paper, in the ordinary ceedings in the action, need not be made upon him, unless he is act confined in jail, for want of bail.

From id., §§ 414, 417.

§ 800. When service may be made on clerk, for non-resident.

Where a party to an action, who has appeared in person, re without the State, or his residence cannot, with reasonable diligenc ascertained, and he has not designated an address, within the S upon the preceding papers, service of a paper upon him may be m by serving it on the clerk.

From Id., § 415.

§ 801. Service through branch post-office in New York city.

In the city of New York, where a paper is served, or a return is m through the post-office, the deposit of the package in a branch p office has the same effect, as a deposit in the general or principal p office of that city. New.

§ 801a. [Added, 1909.] Service in certain actions when name of dece person is stated as defendant.

In case any action or proceeding shall be brought, founded in who in part upon any transaction growing out of a business conducte provided by subdivision 3 of section 20 and section 21 of the Part ship Law,[1] and the name of the deceased person is stated as a defend the process and papers therein may be served on any person or per using such name with like effect as though such person or persons been named as defendant by his or their own respective names, and the same effect as though all such persons were served with process, the process and all papers may be amended by substituting the nam names of the person or persons using the name of such deceased, an action or proceeding shall fail, abate or be in any manner hindere the name of such deceased being so used.

From L. 1880, c. 561, § 5. Added by L. 1909, c. 65 (in effect Feb. 17, 190

§ 802. [Am'd, 1909.] This article not applicable to service of summons

This article, except the last section, does not apply to the service summons, or other process; or of a paper to bring a party into conte or to a case where the mode of service is specially prescribed by law.

From Co. Proc., §§ 408, 418. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1

[1] Section 20, subd. 3, of the Partnership Law is as follows: Where any res of this State dies, who at the time of his death and for at least five years i distely prior thereto, conducted and carried on in his sole name any busine this State, or who at the time of his death, so conducted and carried on any ness having relation with other States or foreign countries, the right to us name of such person, for the purpose of continuing and carrying on such bus shall survive and pass and be disposed of and accounted for as part of the per estate of such deceased person, and such business may be continued and ca on under such name by any person who comes into the legal possession th

ARTICLE FOURTH.

Discovery of books and papers.

Sec. 803. Court may direct discovery of books, etc.
804. Rules to prescribe the cases, etc.
805. Petition for discovery, and order thereupon.
806. Order, when and by whom vacated.
807. Proceedings upon the return of the order.
808. Penalty for disobedience.
809. Effect of papers, etc., produced.

§ 803. [Am'd, 1909, 1913.] Court may direct discovery of books, etc.

A court of record, other than a justices' court in a city, has power to compel a party to an action pending therein, to produce and discover, or to give to the other party, an inspection and copy, or permission to take a copy or photograph, of a book, document, or other paper, or to make discovery of any article or property, in his possession or under his control, relating to the merits of the action, or of the defence therein.

From 2 R. S. 199 (Part 3, c. 1, tit. 3), § 21; Co. Proc., § 388; L. 1841, c. 38. Am'd by L. 1909, c. 173; L. 1913, c. 86 (in effect Sept. 1, 1913).

§ 804. Rules to prescribe the cases, etc.

The general rules of practice must prescribe the cases in which a discovery or inspection may be so compelled, and the proceedings for that purpose, where the same are not prescribed in this act.

From 2 R. S. 199, § 22.

§ 805. Petition for discovery, and order thereupon.

To entitle a party to procure such a discovery or inspection, he must present a petition, praying therefor, and verified by affidavit, to the court, or to a judge, authorized to make an order in the action; upon which an order may be made, directing the party, against whom the discovery or inspection is sought, to allow it, or, in default thereof, to show cause before the court, at a time and place, and upon a notice, therein specified, why the prayer of the petition should not be granted; and, if necessary or proper, that his proceedings be stayed until the hearing of the application, although the stay exceeds twenty days.

From Id., §§ 23, 25.

§ 806. Order, when and by whom vacated.

An order, made as prescribed in the last section, may be vacated, by the judge who granted it, or by the court, upon satisfactory proof, by affidavit:

1. That it ought not to have been granted, or that it has been complied with; or,

2. That the party required to make the discovery, or permit the inspection, has not the possession or control of the book, document, or other paper, directed to be produced or inspected.

From Id., § 24.

§ 807. Proceedings upon the return of the order.

Upon the return of the order to show cause, the court may make such an order, with respect to the discovery or inspection prayed for, as justice requires. Where either is directed, a referee may be appointed by the order, to direct and superintend it; whose certificate, unless set aside by the court, is presumptive, and, except in proceedings for contempt, conclusive evidence of compliance or non-compliance with the terms of the order. A

fixed sum, not exceeding twenty dollars, may be added to the costs of the motion, for the fees of the referee.

From 2 R. S. 200 (Part 3, c. 1, tit. 3), § 26; Co. Proc., § 388.

§ 808. Penalty for disobedience.

Where an order, made as prescribed in the last section, directs a discovery or inspection, the party in whose behalf it was made, may, upon proof, by affidavit, that the adverse party has failed to obey it, and upon notice to him, apply to the court, for an order to punish him for the failure. Upon the hearing of the application, the court may, upon the payment of such a sum, for the expenses of the applicant, as the court fixes, and upon compliance with such other terms, as it deems just to impose, permit the party in default to comply with the order for a discovery and inspection; and, for that purpose, it may direct that the application to punish him stand over to a future time. Upon the final hearing of the application to punish the party in default, the court, in a proper case, may direct that his complaint be dismissed, or his answer or reply be stricken out, and that judgment be rendered accordingly; or it may make an order, striking out one or more causes of action, defences, counterclaims or replies, interposed by him; or that he be debarred from maintaining a particular claim or defence, in relation to which the discovery or inspection was sought. Where the party has failed to obey an order, allowing an inspection by the adverse party, and requiring him to furnish a copy, or permit a copy to be taken, the court may also direct that the book, document, or other paper, be excluded from being given in evidence; or it may punish the party for a contempt; or both.

From Id.

§ 809. Effect of papers, etc., produced.

A book, document, or other paper, produced under an order made as prescribed in this article, has the same effect, when used by the party requiring it, as if it was produced upon notice, according to the practice of the court.

From Id., § 27.

ARTICLE FIFTH.

General regulations respecting bonds and undertakings.

Sec. 810. Bonds, undertakings, etc., must be acknowledged.
811. Party need not join with his sureties; when one surety is sufficient.
812. Form of bond or undertaking; affidavit of sureties; approval by court or judge.
813. When several sureties may justify each in a smaller sum.
813a. Further protection for undertakings in certain cases.
814. Bonds, etc., to the people or a public officer for the benefit of a suitor.
815. Bonds, etc., not affected by change of parties.
816. Id.; to be filed.

§ 810. [Am'd, 1877.] Bonds, undertakings, etc., must be acknowledged.

A bond or undertaking, given in an action or special proceeding, as prescribed in this act, must be acknowledged or proved, and certified, in like manner as a deed to be recorded.

New. Am'd by L. 1877, c. 416.

§ 811. [Am'd, 1884, 1895.] Party need not join with his sureties; when one surety is sufficient.

Where a provision of this act requires a bond or undertaking, with sureties, to be given by, or in behalf of, a party or other person, he need not join with the sureties in the execution thereof, unless the

provision requires him to execute the same; and the execution thereof by one surety is sufficient, although the word "sureties" is used, unless the provision expressly requires two or more sureties; and the execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this State to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties, and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking.

New. Am'd by L. 1886, c. 416; L. 1895, c. 510.

§ 812. [Am'd, 1892, 1895, 1899, 1901.] Form of bond or undertaking; affidavit of sureties; approval by court or judge.

A bond or undertaking, executed by a surety or sureties, as prescribed in this act, must where two or more persons execute it, be joint and several in form; and, except when executed by a fidelity or surety company, or when otherwise expressly prescribed by law, it must be accompanied with the affidavit of each surety, subjoined thereto, to the effect that he is a resident of and a householder or a freeholder within the state, and is worth the penalty of the bond, or twice the sum specified in the undertaking, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. A bond or undertaking given by a party without a surety must be accompanied by his affidavit to the same effect. The bond or undertaking, except as otherwise expressly prescribed by law, must be approved by the court before which the proceeding is taken, or a judge thereof, or the judge before whom the proceeding is taken. The approval must be endorsed upon the bond or undertaking. The surety or sureties or the representatives of any surety or sureties upon the bond heretofore or hereafter executed, of any trustee, committee, guardian, assignee, receiver, executor, administrator or other fiduciary, shall be entitled as a matter of right to be, and shall be, discharged from liability as hereinafter provided, and to that end may on notice to the principal named in such bond apply to the court that accepted such bond or to the court of which the judge that accepted such bond was a member or to any judge thereof, praying to be relieved from liability as such surety or sureties for the act or omission of such principal occurring after the date of the order relieving such surety or sureties hereinafter provided for and that such principal be required to account and give new sureties. Such notice of such application may be served on said principal personally within or without the state, or, not less than five days prior to the date on which such application is to be made, unless it satisfactorily appears to the court, or a judge thereof, that personal notice cannot be given with due diligence within the state, in which case notice may be given in such manner as the court or a judge thereof directs. Pending the hearing of such application the court or judge may restrain such principal from acting except to preserve the trust estate until further order. Upon the hearing of such application if the principal does not file a

new bond in the usual form to the satisfaction of the court or judge, the court or judge must make an order requiring the principal to file a new bond within such reasonable time not exceeding five days as the court or judge in such order fixes. If such new bond shall be filed upon such hearing or within the time fixed by said order, the court or judge must thereupon make a decree or order requiring the principal to account for all his acts and proceedings to and including the date of such order and to file such account within a time fixed, not exceeding twenty days, and releasing the surety or sureties making such application from liability upon the bond for any act or default of the principal subsequent to the date of such decree or order. If the principal fail so to file such new bond within the time specified, a decree or order must be made revoking the appointment of such principal or removing him and requiring him to so account and file such account within twenty days. If the principal fail to file his account as in this section provided, such surety or sureties, or representatives thereof, may make and file such account with like force and effect as though made and filed by such principal, and upon the settlement thereof credit shall be given for all commissions, costs, disbursements, and allowances to which the principal would be entitled were he accounting, and allowance shall be made to such surety or sureties or representative for the expense incurred in so filing such account and procuring the settlement thereof. And after the filing of an account as required, or permitted, in this section, the court or judge must upon the petition of the principal or surety or sureties or the representatives of any such surety or sureties, issue an order requiring all persons interested in the estate or trust funds to attend a settlement of such account at a time and place therein specified and upon the trust fund or estate being found or made good and paid over or properly secured, the surety or sureties shall be discharged from any and all further liability and the court or judge shall settle, determine and enforce the rights and liabilities of all parties to the proceedings in like manner and to the same extent as in actions for an accounting in the supreme court. And upon demand made in writing by the principal, such surety or sureties, or representatives thereof, shall return any compensation that has been paid for the unexpired portion of such suretyship.

New. Am'd by L. 1892, c. 568; L. 1895, c. 511; L. 1899, c. 726; L. 1901, c. 524 (in effect Sept. 1, 1901).

§ 813. [Am'd, 1885, 1894.] When several sureties may justify, each in a smaller sum.

But where the penalty of the bond, or twice the sum specified in the undertaking is five thousand dollars or upwards, the court or judge may, in its or his discretion, allow the sum in which a surety is required to justify to be made up by the justification of two or more sureties each in a smaller sum. But in that case a surety cannot justify, in a sum less than five thousand dollars, and when two or more sureties are required by law to justify, the same person cannot so contribute to make up the sum for more than one of them. It shall be lawful for any party of whom a bond or undertaking is required to agree with his sureties for the deposit of any or all moneys for which such sureties are or may be held responsible with a trust company authorized by law to receive deposits, if such deposit is

otherwise proper, and for the safe-keeping of any or all other depositable assets for which such sureties may be held responsible, with a safe-deposit company authorized by law to do business as such, in such a manner as to prevent the withdrawal of such moneys and assets, or any part thereof, except with the written consent of such sureties, or an order of the court made on such notice to them, as it may direct.

New. Am'd by L. 1885, c. 521; L. 1894, c. 200.

§ 813a. [Added, 1913.] Further protection for undertakings in certain cases.

Where an undertaking has been or shall be given in any action or proceeding the court may in its discretion, if justice so requires, order further or other security to be given in addition to such security. Upon cause shown the court may permit an examination or re-examination of any surety upon any such undertaking. Upon such examination or re-examination, if justice so requires, the court may require a new surety or sureties to be furnished or further or other security to be given in addition to the security already given. The court may enforce such order by any disposition of the action or proceeding that may be proper.

Added by L. 1913, c. 85 (in effect Sept. 1, 1913).

§ 814. [Am'd, 1895.] Bonds, etc., to the people or a public officer for the benefit of a suitor.

Where a bond or undertaking has been given, as prescribed by law, in the course of an action or a special proceeding, to the people or to a public officer, for the benefit of a party or other person interested, and provision is not specially made by law for the prosecution thereof; the party or other person so interested may maintain an action in his own name for a breach of the condition of the bond, or of the terms of the undertaking; upon procuring an order granting him leave so to do. The order may be made by the court in which the action is or was pending; the city court of the city of New York, or a county court, if the bond or undertaking was given in a special proceeding, pending before a judge of that court; or in any other case, by the supreme court. Notice of the application therefor must be given, as directed by the court or judge, to the persons interested in the disposition of the proceeds.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 815. Bonds, etc., not affected by change of parties.

A bond or undertaking, given in an action or special proceeding, as prescribed in this act, continues in force, after the substitution of a new party in place of an original party, or any other change of parties; and has thereafter the same force and effect, as if then given anew, in conformity to the change of parties.

New.

§ 816. Id.; to be filed.

A bond or undertaking, required to be given by this act, must be filed with the clerk of the court; except where, in a special case, a different disposition thereof is directed by the court, or prescribed in this act.

From Co. Proc., § 423.

ARTICLE SIXTH.

Other matters.

Sec. 817. Consolidating causes in same court.
818. Id.; in different courts.
819. Id.; by plaintiff.
820. Interpleader by order in certain cases.
820a. Interpleader in actions on contract.
821. Dismissal of complaint for neglect to serve summons.
822. Id.; for neglect to proceed.
823. Feigned issues abolished, and order for trial substituted.
824. Summons and pleadings, to be filed within ten days after service.
825. Papers in special proceedings; where to be filed.
826. Publication, where no newspaper, etc., in county.
827. Special references in certain cases.

§ 817. Consolidating causes in same court.

Where two or more actions, in favor of the same plaintiff against the same defendant, for causes of action which may be joined, are pending in the same court, the court may, in its discretion, by order, consolidate any or all of them, into one action.

From 2 R. S. 383 (Part 3, c. 6, tit. 6), § 36.

§ 818. Id.; in different courts.

Where one of the actions is pending in the supreme court, and another is pending in another court, the supreme court may, by order, remove to itself the action in the other court, and consolidate it with that in the supreme court.

From Id., § 37.

§ 819. Id.; by plaintiff.

Where separate actions are commenced against two or more joint and several debtors, in the same court, and for the same cause of action, the plaintiff may, in any stage of the proceedings, consolidate them into one action.

From Id., § 38.

§ 820. [Am'd, 1877, 1894.] Interpleader by order in certain cases.

A defendant against whom an action to recover upon a contract, or an action of ejectment, or an action to recover a chattel, is pending, may, at any time before answer, upon proof, by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value, to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession of the property, or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action.

From Co. Proc., § 122, last sentence. Am'd by L. 1877, c. 416; L. 1894, c. 246.

§ 820a. [Added, 1908.] Interpleader in actions on contract.

When any sum of money shall be due and payable under or on account of a contract, and the whole, or any part thereof, exceeding fifty dollars in amount, shall be claimed or demanded by adverse claimants thereto, the debtor may bring suit in any court having jurisdiction thereof, and of the parties, demanding judgment of interpleader, and that the debtor be permitted to pay the amount of the debt into court, and that such debtor upon such payment into court be discharged from any further liability to any of the parties to the action. When service of the summons and complaint shall have been made upon all such claimants, the plaintiff may make application, by petition or upon affidavits for an order permitting and directing the plaintiff to pay the amount of the debt into court, and that the plaintiff, upon the payment into court of the amount of the debt as required by the order, be discharged from any further liability to any of the defendants in such action, and the court, upon satisfactory proof by affidavit or otherwise, as the court may require, of the facts alleged in the complaint, and that the whole or part of the debt is claimed adversely by the defendants without any collusion on the part of the plaintiff, and that the amount thereof is not in dispute may make such an order, upon such terms as to costs and disbursements payable out of the money so adversely claimed as to the court may seem just, and upon the payment into court of the amount of such debt, and complying with the terms of such order, the plaintiff shall stand discharged from any further liability to any of the defendants in said action upon account of such debt and contract. Notice of such application, together with copies of the papers upon which the same is made, shall be personally served on each of the defendants, at least five, and not more than fifteen days before the return day thereof.

Added by L. 1908, c. 285 (in effect Sept. 1, 1908).

§ 821. [Am'd, 1877.] Dismissal of complaint for neglect to serve summons.

Where, in an action against two or more defendants, the plaintiff unreasonably neglects to serve the summons upon one or more of them, without whose presence a complete determination of the controversy cannot be had, the court may, in its discretion, upon the application of a defendant, who has appeared in the action, dismiss the complaint as against him, and render judgment accordingly.

From Co. Proc., § 274. Am'd by L. 1877, c. 416.

§ 822. [Am'd, 1879.] Dismissal of complaint for neglect to proceed.

Where the plaintiff unreasonably neglects to proceed in the action against the defendant, or one or more defendants against whom a separate judgment may be taken, the court may in its discretion, upon the application of the defendant or defendants, or any of them, against whom he so neglects to proceed, dismiss the complaint as against the moving party or parties, and render judgment accordingly.

From Co. Proc., § 274. Am'd by L. 1879, c. 542.

§ 823. Feigned issues abolished, and order for trial substituted.

Feigned issues have been abolished. In a case where neither party can, as of right, require a trial by jury of an issue of fact

arising upon the pleadings, or where a question of fact, not in issue upon the pleadings, is to be tried, an order for the trial thereof by a jury may be made, stating, distinctly and plainly, the questions of fact to be tried. Such an order is the only authority necessary for the trial.

From Co. Proc., § 72. See § 970, post.

§ 824. Summons and pleadings, to be filed within ten days after service.

The summons, and each pleading in an action must be filed with the clerk, by the party in whose behalf it is served, within ten days after the service thereof. If the party fails so to file it, the adverse party, on proof of the failure, is entitled, without notice, to an order from a judge, that it be filed within a time specified in the order, or be deemed abandoned.

From Co. Proc., § 416.

§ 825. Papers in special proceedings; where to be filed.

A return or other paper in a special proceeding, where no other disposition thereof is prescribed by law, must be filed, and an order therein must be entered, with the clerk of the county in which the special proceeding is taken, if it is before a county officer, or a judge of a court established in a city; if before a justice of the supreme court, with the clerk of a county designated by the justice; or, if no designation is made by him, of a county where one of the parties resides.

From L. 1847, c. 470, § 20.

§ 826. [Am'd, 1877.] Publication, where no newspaper, etc., in county.

Where a notice, or other proceeding, is required by law to be published in a newspaper published in a county, and no newspaper is published therein, or to be published oftener than any newspaper is regularly published therein, the publication may be made in a newspaper of an adjoining county, except where special provision is otherwise made by law.

From 2 R. S. 552 (Part 3, c. 8, tit. 17), § 10. Am'd by L. 1877, c. 416.

§ 827. [Am'd, 1877.] Special references in certain cases.

Where a provision of this act authorizes the court to approve an undertaking, or the sureties thereto; or to make an examination or inquiry; or to appoint an appraiser, receiver, or trustee; it may direct a reference to one or more persons designated in the order, either to make the approval, examination, inquiry or appointment, or to report the facts to the court, for its action thereupon. And where, according to the practice of the court of chancery, on the 31st day of December, 1846, a matter was referable to the clerk, or to a master in chancery, a court having authority to act thereupon, may direct a reference to one or more persons, designated in the order, with the powers which were possessed by the clerk, or the master in chancery, except where it is otherwise specially prescribed by law.

From L. 1847, c. 280, § 77. Am'd by L. 1877, c. 416.

CHAPTER IX.

Evidence.

TITLE I.— General Regulations respecting Evidence, and the Competency and Mode of Examination of a Witness.
TITLE II.— Compelling the Attendance and Testimony of a Witness.
TITLE III.— Depositions.
TITLE IV.— Documentary Evidence.
TITLE V.— Miscellaneous Provisions.

TITLE I.

General regulations respecting evidence, and the competency and mode of examination of a witness.

Article 1. Competency of a witness; evidence in particular cases.
2. Administration of an oath or affirmation.

ARTICLE FIRST.

Competency of a witness; evidence in particular cases.

Sec. 828. No witness to be excluded by reason of interest, etc.
829. When party, etc., cannot be examined.
830. Testimony of party or witness since deceased or insane or who, being a nonresident, has departed from the state, together with all exhibits or documents proved during such testimony.
831. When husband and wife not competent witnesses. When competent.
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836. Application of the last three sections.
837. When witness not excused from testifying.
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840. Seal, presumptive evidence of consideration.
841. Presumption of death in certain cases.
841a. Testimony of surveyor and proof of standard of measurement.
841b. Trial and burden of proof of contributory negligence.
841c. Recitals as to heirship in deeds.

§ 828. No witness to be excluded by reason of interest, etc.

Except as otherwise specially prescribed in this title, a person shall not be excluded or excused from being a witness, by reason of his or her interest in the event of an action or special proceeding; or because he or she is a party thereto; or the husband or wife of a party thereto, or of a person in whose behalf an action or special proceeding is brought, prosecuted, opposed, or defended.

From Co. Proc., § 398; L. 1867, c. 887, § 1.

§ 829. [Am'd, 1877, 1881.] When party, etc., cannot be examined.

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness, in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his

title or interest from, through or under a deceased person or lunatic, by assignment or otherwise; concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee, or person so deriving title or interest, is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.

From Co. Proc., § 399. Am'd by L. 1877, c. 416; L. 1881, c. 703.

§ 830. [Added, 1879; am'd, 1882, 1896, 1899, 1911.] Testimony of party or witness since deceased or insane or who, being a nonresident, has departed from the state, together with all exhibits or documents proved during such testimony.

Where a party or witness has died or become insane or, being a nonresident of this state, has departed from the state since or during the trial of an action now or hereafter pending, or since or during the hearing upon the merits of a special proceeding now or hereafter pending, the testimony of the decedent or insane person or of such nonresident who has departed from the state, or of any person who is rendered incompetent by the provisions of the last section, taken or read in evidence at the former trial or hearing, or at the same trial or hearing, either in court or before the same or a new referee, together with all exhibits and documents read in evidence in connection with, or as a part of the giving of such testimony, may be given or read in evidence at a new trial or hearing or at a continuation of the same trial or hearing either in court or before the same or a new referee, or upon any subsequent trial or hearing, either in court or before the same or a new referee, of the same subject-matter in the same or another action or special proceeding between the same parties to such former trial or hearing or their legal representatives, by either party to such new trial or hearing, or to such continuation of the same trial or hearing either in court or before the same or a new referee, or to such subsequent action or special proceeding either in court or before the same or a new referee, subject to any other legal objection to the competency of the witness, or to any other legal objection to his testimony or any question put to him, or to any other legal objection to such exhibits and documents. Such testimony, exhibits and documents proven by oath to have been so previously taken or read in evidence may be so given or read in evidence; or the original stenographic notes of such testimony taken by a stenographer who has since died or become incompetent may be so read in evidence by any person whose competency to read the same accurately is established to the satisfaction of the court or officer presiding at the trial of such action or special proceeding.

Added by L. 1879, c. 542. Am'd by L. 1893, c. 595; L. 1896, c. 563; L. 1899, c. 352; L. 1911, c. 764 (in effect Sept. 1, 1911).

§ 831. [Am'd, 1877, 1879, 1880, 1887, 1915.] When husband and wife not competent witnesses; when competent.

A husband or wife is not competent to testify against the other upon the trial of an action, or the hearing upon the merits of a special proceeding founded upon an allegation of adultery, except to prove the marriage, or disprove the allegation of adultery. However, if upon such trial or such hearing the party against whom the allegation of adultery is made produces evidence tending to prove any of the defenses thereto mentioned in section 1758 of this act, the other party is competent to testify in disproof of any such defense. A husband or wife shall not be compelled, or without consent of the other, if living, allowed to disclose a confidential communication, made by one to the other during

marriage. In an action for criminal conversation, the plaintiff's wife is not a competent witness for the plaintiff, but she is a competent witness for the defendant, as to any matter in controversy; except that she cannot, without the plaintiff's consent, disclose any confidential communication had or made between herself and the plaintiff.

From L. 1867, c. 887, §§ 2, 3; L. 1876, c. 426. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1880, c. 149; L. 1887, c. 103; L. 1915, c. 181 (in effect April 3, 1915).

§ 832. [Am'd, 1879.] Conviction for crime not to exclude witness; how conviction proved.

A person, who has been convicted of a crime or misdemeanor is, notwithstanding, a competent witness in a civil or criminal action or special proceeding; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any question, relevant to that inquiry; and the party cross-examining him is not concluded, by his answer to such a question.

New. Am'd by L. 1879, c. 542.

§ 833. Clergymen, etc., not to disclose confessions.

A clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body, to which he belongs.

From 2 R. S. 406 (Part 3, c. 7, tit. 3), § 72.

§ 834. [Am'd, 1904, 1905.] Physicians or professional or registered nurses not to disclose professional information.

A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity; unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurses may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry.

From Id., § 73. Am'd by L. 1904, c. 331; L. 1905, c. 331 (in effect Sept. 1, 1905). This last amendment provides that "nothing in this act contained shall affect any actions or proceedings now pending."

§ 835. [Am'd, 1896.] Attorneys and counsellors not to disclose communications.

An attorney or counsellor at law shall not be allowed to disclose a communication, made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person employed by such attorney or counsellor be allowed to disclose any such communication or advice given thereon.

New. Am'd by L. 1896, c. 564 (in effect Sept. 1, 1896).

§ 836. [Am'd, 1877, 1891, 1892, 1893, 1899, 1904.] Application of the last three sections.

The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. But a physician or surgeon or a professional or registered nurse, may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient,

when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow or any heir-at-law or any of the next of kin, of such deceased, or any other party in interest. But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto. In an action for the recovery of damages for a personal injury the testimony of a physician or surgeon, or of a professional or registered nurse attached to any hospital, dispensary or other charitable institution as to information which he acquired in attending a patient in a professional capacity, at such hospital, dispensary, or other charitable institution shall be taken before a referee appointed by a judge of the court in which such action is pending; provided, however, that any judge of such court at any time in his discretion may, notwithstanding such deposition, order that a subpœna issue for the attendance and examination of such physician or surgeon or professional or registered nurse, upon the trial of the action. In such case a copy of the order shall be served, together with the subpœna. Sections 872, 873, 874, 875, 876, 879, 880, 884 and 886 of this code apply to the examination of a physician or surgeon or a professional or registered nurse, as prescribed in this section. The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, may prior to the trial, stipulate for such waiver, and the same shall be sufficient therefor.

New. Am'd by L. 1877, c. 416; L. 1891, c. 381; L. 1892, c. 514; L. 1893, c. 295; L. 1899, c. 53; L. 1904, c. 331 (in effect Sept. 1, 1904).

§ 837. When witness not excused from testifying.

A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish the fact, that he owes a debt, or is otherwise subject to a civil suit. But this provision does not require a witness to give an answer, which will tend to accuse himself of a crime or misdemeanor or to expose him to a penalty or forfeiture; nor does it vary any other rule, respecting the examination of a witness.

From 2 R. S. 405 (Part 3, c. 7, tit. 3), § 71.

§ 838. Evidence of party may be rebutted.

The testimony of a party, taken at the instance of the adverse party, orally or by deposition, may be rebutted by other evidence.

From Co. Proc., § 393.

§ 839. [Am'd, 1903.] Admission by member of corporation.

The admission of a member of an aggregate corporation, who is not a party, shall not be received as evidence against the corporation unless it was made concerning and while engaged in a transaction in which he was the authorized agent of the corporation; or unless it was made while a member of such corporation and testifying as a witness concerning a transaction of the corporation, when the official record of such testimony shall be received.

From 2 R. S. 407 (Part 3, c. 7, tit. 3), § 80. Am'd by L. 1903, c. 384 (in effect May 6, 1903).

§ 840. [Am'd, 1877.] Seal, presumptive evidence of consideration.

A seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed.

From 2 R. S. 406 (Part 3, c. 7, tit. 3), § 77.

§ 841. [Am'd, 1889, 1891.] Presumption of death in certain cases.

A person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time. And where in any action of partition in this state any portion of the proceeds of the sale of real property is or has been paid into court, or paid to the treasurer of any county for any unknown heirs, and has remained unclaimed for twenty-five years, after such payment by any person entitled thereto, the lapse of twenty-five years after such payment raises the presumption of the death of such unknown heirs at the time of the sale of such real property and before such payment, and after the lapse of twenty-five years after such payment it shall be presumed that there were no such unknown heirs living at the time of such sale or payment, and in any action or proceeding taken for the purpose of distributing and paying over such proceeds, all such unknown heirs are presumed and they shall be presumed to have been dead at the time of such sale and before such payment into court, or to the treasurer of any county.

From 1 R. S. 749 (Part 2, c. 1, tit. 5), § 6. Am'd by L. 1889, c. 40; L. 1891, c. 364.

§ 841a. [Added, 1909.] Testimony of surveyor and proof of standard of measurement.

No surveyor shall give evidence in any cause depending in any of the courts of this state, or before arbitrators, respecting the survey or measurement of lands which he may have made, unless if required, either such surveyor shall make oath, or it shall otherwise be shown that the chain or measure used by him was conformable to the standards of the state which were the standards of the state at the time such survey was made. An official certificate of any state, county, city, village or town sealer elected or appointed pursuant to the laws of this state, or the oath of such surveyor, that such chain or measure conformed to the state standard which shall have been furnished any such sealer pursuant to the provisions of the laws of this state, shall be prima facie evidence of such conformity, and an official certificate made by any such sealer that the implement used in measuring such chain or other measure was the one provided under such laws for such purposes, shall be prima facie evidence of that fact.

From L. 1851, c. 134, § 33, as am'd by L. 1893, c. 101, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 841b. [Added, 1913.] Trial and burden of proof of contributory negligence.

On the trial of any action to recover damages for causing death the contributory negligence of the person killed shall be a defense, to be pleaded and proven by the defendant.

Added by L. 1913, c. 228 (in effect Sept. 1, 1913).

§ 841c. [Added, 1913.] Recitals as to heirship in deeds.

Hereafter, in any proceeding, suit or action pending or hereafter brought, in any of the courts of this state, any deed, mortgage, lease, release, power of attorney, or other instrument more than thirty years old, executed for the purpose of transferring the title to or interest in

lands, tenements or hereditaments situated within this state, which contains recitals that the grantors, grantees, or either, or both, are the heirs-at-law of a prior owner of the title or interest described in said instrument, shall be presumptive evidence of said heirship as therein recited, if such instrument be duly acknowledged or witnessed and proved in any manner required or permitted at the date of the execution thereof, and be duly recorded in any county where any part of the lands described therein shall be located, or duly recorded in the office of the secretary of state of the state of New York.

Added by L. 1913, c. 395 (in effect Sept. 1, 1913).

ARTICLE SECOND.

Administration of an oath or affirmation.

Sec. 842. Before whom oaths and affidavits may be taken.
843. Id.; in special cases.
844. Id.; without the State.
845. General mode of swearing.
846. When laying of the hand upon the gospels dispensed with.
847. When affirmation to be made.
848. Other modes of swearing.
849. Swearing persons not Christians.
850. Court may examine witness.
851. Swearing falsely in any form, perjury.

§ 842. [Am'd, 1911, 1915.] Before whom oaths and affidavits may be taken.

An oath or affidavit, required or authorized by law, except an oath to a juror or a witness upon a trial, an oath of office, and an oath or acknowledgment required by law to be taken before a particular officer, may be taken before a judge, clerk, deputy-clerk, or special deputy-clerk, of a court, a notary public, mayor, justice of the peace, a city magistrate of any of the cities of this State, or police justice thereof, surrogate, special county judge, special surrogate, county clerk, deputy county clerk, special deputy county clerk, or commissioner of deeds, within the district in which the officer is authorized to act, except that a justice of the peace may take such oath or affidavit anywhere in the county containing the town or city in which he is authorized to act; and when certified by the officer, to have been taken before him, may be used in any court, or before any officer or other person.

From 2 R. S. 284 (Part 3, c. 3, tit. 2), § 49. Am'd by L. 1911, c. 670; L. 1915, c. 146 (in effect September 1, 1915).

§ 843. [Am'd, 1877.] Id.; in special cases.

Where an officer, person, board, or committee, has been heretofore, or is hereafter authorized by law, to take or hear testimony or to hear or receive an affidavit, or to take a deposition, in relation to a matter, concerning which he or it has a duty to perform, the officer or person, or a member of the board or committee, may administer an oath, for that purpose. Where an officer, person, board, or committee, to whom or to which application is made to do an act in an official capacity, requires information or proof, to enable him or it to decide upon the propriety of doing the act, he or it may receive an affidavit for that purpose.

From 2 R. S. 552 (Part 3, c. 8, tit. 17), § 11. Am'd by L. 1877, c. 416.

§ 844. [Am'd, 1877.] Id.; without the State.

An oath or affidavit required, or which may be received, in an action, special proceeding, or other matter, may be taken, without the State, except where it is otherwise specially prescribed by law, before an officer authorized by the laws of the State, to take and certify the acknowledgment and proof of deeds, to be recorded in the State; and, when certified by him to have been taken before him, and accompanied

with the like certificates, as to his official character and the genuineness of his signature, as are required to entitle a deed acknowledged before him to be recorded within the State, may be used, as if taken and certified in this State, by an officer authorized by law to take and certify the same.

New. Am'd by L. 1877, c. 416.

§ 845. [Am'd, 1880.] General mode of swearing.

Except as otherwise specially prescribed in this article, when an oath is administered, the witness shall lay his hand on the gospels and express assent to the oath, and it shall be according to the present practice except that the witness need not kiss the gospels.

From 2 R. S. 407 (Part 3, c. 7, tit. 3), § 82. Am'd by L. 1899, c. 340 (in effect Sept. 1, 1899).

§ 846. [Am'd, 1880.] When laying of the hand upon the gospels dispensed with.

The oath must be administered in the following form, to a person who so desires, the laying of the hand upon the gospels being omitted: "You do swear, in the presence of the ever-living God." While so swearing, he may or may not hold up his hand, at his option.

From Id., § 83. Am'd by L. 1899, c. 340 (in effect Sept. 1, 1899).

§ 847. When affirmation to be made.

A solemn declaration or affirmation, in the following form, must be administered to a person who declares that he has conscientious scruples against taking an oath, or swearing in any form: "You do solemnly, sincerely, and truly, declare and affirm."

From Id., § 84.

§ 848. [Am'd, 1877, 1880.] Other modes of swearing.

If the court or officer, before which or whom a person is offered as a witness, is satisfied, that any peculiar mode of swearing, in lieu of, or in addition to laying the hand upon the gospels, is, in his opinion, more solemn and obligatory, the court or officer may, in its or his discretion, adopt that mode of swearing the witness.

From Id., § 85. Am'd by L. 1877, c. 416; L. 1899, c. 340 (in effect Sept. 1, 1899).

§ 849. [Am'd, 1877.] Swearing persons not Christians.

A person believing in a religion, other than the Christian, may be sworn according to the peculiar ceremonies, if any, of his religion, instead of as prescribed in section 845 or section 846 of this act.

From 2 R. S. 408, § 86. Am'd by L. 1877, c. 416.

§ 850. Court may examine witness.

The court or officer may examine an infant, or a person apparently of weak intellect, produced before it or him, as a witness, to ascertain his capacity and the extent of his knowledge; and may inquire of a person, produced as a witness, what peculiar ceremonies in swearing he deems most obligatory.

From 2 R. S. 408, § 89.

§ 851. [Omitted; see Table, p. iii.] Swearing falsely in any form, perjury.

A person swearing, affirming, or declaring, in any form, where an oath is authorized by law, is lawfully sworn, and is guilty of perjury, in a case where he would be guilty of the same crime, if he had sworn by laying his hand upon the gospels.

From Id., § 90. Am'd by L. 1899, c. 340 (in effect Sept. 1, 1899).

TITLE II.

Compelling the attendance and testimony of a witness.

Sec. 852. Mode of serving subpoena issued out of a court.
853. Penalty for disobedience.
854. Subpoena to be issued by judge, etc.
855. Penalty for disobeying subpoena. Warrant for witness.
856. When witness to be imprisoned.
857. Contents of warrant.
858. To whom directed; how executed.
859. Qualification of preceding sections.
860. Witness exempt from arrest.
861. When to be discharged from arrest.
862. By whom witnesses may be discharged.
863. Arrest, when void; penalty.
864. Sheriff not to be liable unless affidavit is made.
865. Application of foregoing provisions to judgments.
866. Records not to be removed by virtue of subpoena.
867. Production, etc., of book of account.
867a. Subpoena duces tecum relating to hospital records.
868. Books, etc., of corporation, how produced.
869. When personal attendance not required by subpoena duces tecum.

§ 852. Mode of serving subpoena issued out of a court.

A subpoena, issued out of the court, to compel the attendance of a witness, and, where the subpoena so requires, to compel him to bring with him a book or paper, must be served as follows:

1. The original subpoena must be exhibited to the witness.

2. A copy of the subpoena, or a ticket containing its substance, must be delivered to him.

3. The fees, allowed by law, for traveling to, and returning from, the place where he is required to attend, and for one day's attendance, must be paid or tendered to him.

From 2 R. S. 400 (Part 3, c. 7, tit. 3), § 42.

§ 853. Penalty for disobedience.

A person so subpoenaed, who fails, without reasonable excuse, to obey the subpoena, or a person who fails, without reasonable excuse, to obey an order, duly served upon him, made by the court, or a judge, in an action, before or after final judgment therein, requiring him to attend, and be examined, or so to attend, and bring with him a book or paper, is liable, in addition to punishment for contempt, for the damages sustained by the party aggrieved in consequence of the failure, and fifty dollars in addition thereto. Those sums may be recovered in one action, or in separate actions. If he is a party to the action in which he was subpoenaed, the court may, as an additional punishment, strike out his pleading.

From Id., § 43.

§ 854. [Am'd, 1877, 1900.] Subpoena to be issued by judge, etc.

When a judge, or an arbitrator, referee, or other person, or a board or committee, or a committee of either house of the legislature, or a joint committee thereof, duly empowered by resolution or act to sit and take testimony during the session thereof, or after the adjournment thereof, has been heretofore or is hereafter expressly authorized by law to hear, try, or determine a matter, or to do any other act in an official capacity, in relation to which proof may be taken, or the attendance of a person as a witness may be required; or to require a person to attend, either before him or it, or before another judge, or

officer, or a person designated in a commission issued by a court of another State or country, to give testimony, or to have his deposition taken, or to be examined; a subpoena may be issued, by and under the hand of the judge, arbitrator, referee, or other person, or the chairman or a majority of the board or committee, requiring the person to attend; and also, in a proper case, to bring with him a book or a paper. The subpoena must be served, as prescribed in section 852 of this act. This section does not apply to a matter arising, or an act to be done, in an action in a court of record.

From 2 R. S. 401, § 44. Am'd by L. 1877, c. 416; L. 1900, c. 587 (in effect April 23, 1900).

§ 855. [Am'd, 1877, 1879.] Penalty for disobeying subpoena. Warrant for witness.

A person who is duly subpoenaed, as prescribed in the last section, must obey the subpoena. If he fails so to do, without a reasonable excuse, he is liable, in addition to any other punishment which may be lawfully inflicted therefor, for the damages sustained by the person aggrieved, in consequence of the failure, and fifty dollars in addition thereto, to be recovered as prescribed in section 853 of this act. If he fails to attend the person issuing the subpoena, if he is a judge of a court of record or not of record, or if not, then any judge of such a court, upon proof by affidavit of the failure to attend, must issue a warrant to the sheriff of the county commanding him to apprehend the defaulting witness, and bring him before the officer, person, or body, before whom or which his attendance was required.

From 2 R. S. 401, §§ 45, 46. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 856. [Am'd, 1879.] When witness to be imprisoned.

If the person subpoenaed and attending or brought as prescribed in the last section, before an officer or other person or a body refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book or paper, which he was directed to bring by the terms of the subpoena, or to subscribe his deposition after it has been correctly reduced to writing, the person issuing the subpoena, if he is a judge of a court of record, or not of record, may forthwith, or if he is not, then any judge of such court may upon proof by affidavit of the facts by warrant commit the offender to jail, there to remain, until he submits to do the act which he was so required to do or is discharged according to law.

From 2 R. S. 401, § 47. Am'd by L. 1879, c. 542.

§ 857. Contents of warrant.

A warrant of commitment, issued as prescribed in the last section, must specify particularly the cause of the commitment; and, if the witness is committed for refusing to answer a question, the question must be inserted in the warrant.

From 2 R. S. 401, § 48.

§ 858. To whom directed; how executed.

A warrant to apprehend or commit a person, issued as prescribed in this title, must be directed to the sheriff of the county where the person is, and must be executed by him, in the same manner, as a similar mandate issued by a court of record, in an action.

From 2 R. S. 402, § 49.

§ 859. Qualification of preceding sections.

The foregoing sections of this title do not apply to a subpœna issued by a justice of the peace; or to a witness subpœnaed to attend a court held by a justice of the peace; or to a case where special provision is otherwise made by law, for compelling the attendance of a witness.

From 2 R. S. 402, § 50.

§ 860. [Omitted; see Table, p. iii.] Witness exempt from arrest.

A person duly and in good faith subpœnaed or ordered to attend, for the purpose of being examined, in a case where his attendance may lawfully be enforced by attachment, or by commitment, is privileged from arrest in a civil action or special proceeding, while going to, remaining at, and returning from, the place where he is required to attend.

From Id., § 51.

§ 861. [Am'd, 1909.] When to be discharged from arrest.

The court, from which a subpœna, served in good faith, was issued, or by which an order was made, requiring a person to attend, for the purpose of being examined; or a judge thereof, upon proof, by affidavit, of the facts, must make an order, directing the discharge of a witness or other person, from an arrest made in violation of section 26 of the Civil Rights Law.[1]

From Id., § 52. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 862. [Am'd, 1895, 1909.] By whom witnesses may be discharged.

A justice of the supreme court, in any part of the state, or a county judge, has the like authority as a judge of the court, to make an order for a discharge, in a case specified in the last section. Upon satisfactory proof, by affidavit, of the facts, he must also make an order, directing the discharge of a person arrested, in violation of section 26 of the Civil Rights Law,[1] where a subpœna, served in good faith upon the person arrested, was issued as prescribed in section 854 of this act.

From Id., § 53. Am'd by L. 1895, c. 946; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 863. [Omitted; see Table, p. iii.] Arrest, when void; penalty.

An arrest, made contrary to the foregoing provisions of this title, is absolutely void, and is a contempt of the court, if any, from which the subpœna was issued, or by which the witness was directed to attend. An action may be maintained, by the person arrested, against the officer or other person making such arrest, in which the plaintiff is entitled to recover treble damages. A similar action may also be maintained, in a like case, by the party in whose behalf the witness was subpœnaed, or the order procured, to recover the damages sustained by him, in consequence of the arrest.

From 2 R. S. 402, § 54.

§ 864. [Omitted; see Table, p. iii.] Sheriff not to be liable unless affidavit is made.

But a sheriff or other officer, or person, is not so liable, unless the person claiming an exemption from arrest, makes, if required by the sheriff or officer, an affidavit, to the effect that he was legally subpœnaed or ordered to attend, and that he was not so subpœnaed or ordered by his own procurement, with the intent of avoiding arrest.

[1] Section 26 of the Civil Rights Law is the same as former §§ 863, 864 of this Code (excepting the first sentence of § 863), which, for convenience sake, have been retained in this edition. These two former sections have now been consolidated into one section in the Civil Rights Law.

In his affidavit, he must specify the court or officer, the place of attendance, and the cause in which he was so subpœnaed or ordered. The affidavit may be taken before the officer arresting him, and exonerates the officer from liability for not making the arrest.

From 2 R. S. 402, § 55. Am'd by L. 1877, c. 416.

§ 865. Application of foregoing provisions to judgments.

The foregoing provisions of this title, relating to a person required, by an order of a court, to attend, apply, where such an attendance is required by the terms of a judgment.

New.

§ 866. [Am'd, 1895, 1904.] Records not to be removed by virtue of subpœna.

The record of a conveyance of real property, or any other record or document, whereof a transcript duly certified may by law be read in evidence, shall not be removed, by virtue of a subpœna duces tecum, from the office in which it is kept, except temporarily, by the clerk having it in custody, to a term or a sitting of the court of which he is clerk, or by the officer, having it in custody, to a term or sitting of a court, or a trial before a referee, held in the city or town where the office is situated; but the records kept by the register of the county of New York and the register of the county of Kings shall not be removed except by an order of court made as in this section provided. Where any such record is required at any other place, or any record kept by the register of the county of New York or the register of the county of Kings, is required at a term or sitting of a court or a trial before a referee, it may be removed, by order of the supreme court, or a county court, made in court, and entered in the minutes; specifying that the production of the original instead of the transcript, is necessary.

From L. 1838, c. 129. Am'd by L. 1895, c. 946; L. 1904, c. 84 (in effect March 18, 1904).

§ 867. [Am'd, 1877, 1879.] Production, etc., of book of account.

A person shall not be compelled to produce, upon a trial or hearing, a book of account, otherwise than by an order requiring him to produce it, or a subpœna duces tecum. Such a subpœna must be served at least five days before the day when he is required to attend. At any time after service of such a subpœna or order, the witness may obtain, upon such a notice as the judge, referee, or other officer prescribes, an order relieving him wholly or partly from the obligations imposed upon him by the subpœna or the order for production, upon such terms as justice requires touching the inspection of the book or any portion thereof, or taking a copy thereof or extracts therefrom, or otherwise. An order may be made, as prescribed in this section, by a judge of the court, or in a special proceeding pending out of court before an officer, by the officer, or, in either case, by a referee duly appointed in the cause, and authorized to hear testimony. A justice of the peace, or other judge of a court not of record, may make such an order in an action brought in his court, at any time after the commencement thereof.

New. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 867-a. [Added, 1915.] Subpœna duces tecum relating to hospital records.

Where a subpœna duces tecum shall be served upon a

public hospital, or superintendent or officer thereof, requiring the production of any books of such hospital, showing certain entries or records therein, or any other record or data relating to the physical condition or treatment of a patient, a transcript of such entries or records or data duly certified by the superintendent of such hospital or his assistant and delivered to the court or tribunal requiring it shall be deemed sufficient compliance with such subpœna, unless otherwise ordered by the court, and any such transcript authenticated and produced as herein provided, shall be deemed evidence as if the original of such books, entries or records were produced.

Added by L. 1915, c. 325 (in effect September 1, 1915).

§ 868. Books, etc., of corporation, how produced.

The production, upon a trial, of a book or paper, belonging to or under the control of a corporation, may be compelled, in like manner as if it was in the hands, or under the control, of a natural person. For that purpose, a subpœna duces tecum, or an order, made as prescribed in the last section, as the case requires, must be directed to the president, or other head of the corporation, or to the officer thereof, in whose custody the book or paper is.

New.

§ 869. When personal attendance not required by subpœna duces tecum.

In a case specified in the last section, or where a subpœna duces tecum, or an order, made as prescribed in section 866 or section 867 of this act, requires a public officer to attend, and bring a book or paper under his control, the subpœna or order is deemed to be sufficiently obeyed, if the book or paper is produced by a subordinate officer or employee of the corporation, or in the public office, who possesses the requisite knowledge to identify it, and to testify respecting the purposes for which it is used. If the personal attendance of a particular officer of the corporation or public officer is required, a subpœna, without a duces tecum clause, must also be served upon him.

New.

TITLE III.

Depositions.

Article 1. Depositions, taken and to be used within the State.
2. Depositions, taken without the State, for use within the State.
3. Depositions, taken within the State, for use without the State.

ARTICLE FIRST.

Depositions, taken and to be used within the State.

Sec. 870. Deposition of a party, etc.
871. Deposition of a witness not a party.
872. Application; contents of affidavit.
873. Order for examination.
874. Punishment for disobeying order.
875. Service of order, etc.
876. Examination of adverse party.
877. Party confined in prison.
878. [Repealed.]
879. Deposition by consent.
880. Rules for examination of party or expected party. Manner of taking and returning depositions. Refusal of person examined to answer.
881. When to be read in evidence.
882. Proof of witness's inability to attend.
883. Effect of deposition.
884. Original affidavits, evidence.
885. Deposition to be used on motion.
886. Where witness may be compelled to attend.

§ 870. [Am'd, 1877, 1878, 1904, 1909.] Deposition of a party, etc.

The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court, may be taken at his own instance or at the instance of an adverse party, or by a co-plaintiff or co-defendant at any time before or during the trial as prescribed in this article.

From Co. Proc., §§ 390, 391, 392, 397. Am'd by L. 1877, c. 416; L. 1878, c. 299; L. 1904, c. 696; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 871. [Am'd, 1877, 1909.] Deposition of a witness not a party.

The deposition of a person not a party, whose testimony is material and necessary to a party to an action, pending in a court of record, or to a person who expects to be a party to an action, about to be brought in such a court, by a person other than the person to be examined, may also be taken, as prescribed in this article.

From 2 R. S. 391, 398 (Part 3, c. 7, tit. 3), portions of §§ 1, 2, 33, 34. Am'd by L. 1877, c. 416; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 872. [Am'd, 1877, 1879, 1880, 1892, 1895, 1911, 1913.] Application; contents of affidavit.

The person desiring to take a deposition as prescribed in this article, may present to a judge of the court in which the action is pending; or, if it is pending in the supreme court, to a county judge; or, if an action is not pending, but is expected to be

brought, to a judge of the supreme court, or to a county judge; an affidavit, setting forth as follows:

1. The names and residences of all the parties to the action, and whether or not they have appeared, and if either of them has appeared by attorney, the name, and the residence or office address of the attorney; or, if no action is pending, the names and residences of the expected parties thereto.

2. If an action is pending, the nature of the action, and the substance of the judgment demanded, and if the application is made by the defendant before answer, or by either party after answer, the nature of the defense.

3. If no action is pending, the nature of the controversy which is expected to be the subject thereof.

4. The name and residence of the person to be examined, and that the testimony of such person is material and necessary for the party making such application or the prosecution or defence of such action, and if the action is to recover damages for personal injuries, that the defendant is ignorant of the nature and extent of such personal injuries; and, at the option of the applicant, the place where he is sojourning, or where he regularly transacts business.

5. If an action is pending, that the person to be examined is about to depart from the State, or that he is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial; or that any other special circumstances exist which render it proper that he should be examined as prescribed in this article. But this subdivision does not apply to a case where the person to be examined is a party to the action.

6. If no action is pending, that the person expected to be the adverse party is of full age and a resident of the State, or sojourning within the State; or that he has an office within the State where he regularly transacts business in person, specifying the place, and, if it is in a city, the street and street number or other designation of the particular locality; or, if two or more persons are expected to be adverse parties, that each is of full age and so resident or sojourning or has an office; also the circumstances which render it necessary for the protection of the applicant's rights, that the witness's testimony should be perpetuated

7. Any other fact necessary to show that the case comes within one of the two last sections. And if the party sought to be examined is a corporation, joint-stock or other unincorporated association, the affidavit shall state the name of the officers, directors, or managing agents thereof, or any of them whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired, and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers, and on such examination the books or papers, or any part or parts thereof may be offered and received in evidence in addition to the use thereof by the witness to refresh his memory.

From 2 R. S. 391, 398 (Part 3, c. 7, tit. 3), §§ 2, 34. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1880, c. 536; L. 1893, c. 721; L. 1895, c. 946; L. 1911, c. 781; L. 1913, c. 278 (In effect Sept. 1, 1913).

§ 873. [Am'd, 1877, 1879, 1894, 1893, 1894.] Order for examination.

The judge to whom such an affidavit is presented must grant an order for the examination, if an action is pending; if no action is pending he must grant it if there be reasonable ground to believe that an action will be brought, as stated in the affidavit, and that the application is made in good faith to preserve the expected testimony; otherwise he must dismiss the application.

Where the person to be examined is a party to a pending action, or is expected to be a party to an action to be brought, the order may, in the discretion of the judge, designate and limit the particular matters as to which he shall be examined. In every action to recover damages for personal injuries, the court or judge, in granting an order for the examination of the plaintiff before trial may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons, to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. In any action brought to recover damages for personal injuries, where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination be made; and if the party to be examined shall be a female she shall be entitled to have such examination before physicians or surgeons of her own sex. The order must require the party or persons to be examined to appear before the judge, or before a referee named in the order, for the purpose of taking the examination, at a time and place therein specified. The order must also direct the time of service of a copy thereof; which must be made within the State, not more than twenty, nor less than five days, before the time fixed for the examination, unless special circumstances, making a different time of service necessary, are shown in the affidavit, and that fact is recited in the order.

From 2 R. S. 392, 398, §§ 3, 34. Am'd by L. 1877, c. 416: L. 1879, c. 542: L. 1884, c. 399; L. 1893, c. 721; L. 1894, c. 428.

§ 874. [Am'd, 1877, 1883.] Punishment for disobeying order.

Witnesses' fees, at the rate prescribed by law in an action in the supreme court, must be paid or tendered when the order is served upon the party or other person required to attend. If the party or person so served fails to obey the order, his attendance may be compelled, and he may be punished in like manner, and the proceedings thereon are the same, as if he failed to obey a subpœna, issued from the court, in which the action is pending; or, if no action is pending, from the court of which the judge is a member.

From 2 R. S. 393, § 10. Am'd by L. 1877, c. 416; L. 1882, c. 397.

§ 875. [Am'd, 1879.] Service of order, etc.

A copy of the order, and of the affidavit upon which it was granted, must be served upon the attorney for each party to the action, in like manner as a paper in the action; or, if a party has not appeared in the action, they must be served upon him, as directed by the order. If no action is pending, they must be personally served upon each of the persons, named therein as expected adverse parties.

New. Am'd by L. 1879, c. 542.

§ 876. [Am'd, 1879.] Deposition, when and where to be taken. Examination of adverse party.

Upon proof, by affidavit, that service of a copy of the order and of the affidavit has been duly made, as directed in the order, the judge or the referee must proceed to take the deposition of the witness, at the time and place specified in the order. He may, from time to time, adjourn the examination to another day, and to another place, within the same county. Sections

856, 857 and 858 of this act apply to the examination of a party or a person expected to be an adverse party, taken as prescribed in this article.

From 2 R. S. 392, 399 (Part 3, c. 7, tit. 3), §§ 5, 36. Am'd by L. 1879, c. 542.

§ 877. [Added, 1882.] Examination of persons confined in jail, etc.

Where the party or other person to be examined is confined in a prison or jail within the State, under a sentence for a felony, that fact must be stated in the affidavit, and his deposition may be taken as prescribed in the foregoing sections, as if he was not so confined, except that in such a case, the granting or refusing the order, and, if granted, the appointment of a referee to take the testimony, is always in the discretion of the judge. The order must require the production of the prisoner by the person in charge of the prison or jail at the prison or jail; but it may prescribe such regulations and restrictions with respect thereto as the judge deems proper.

Added by L. 1882, c. 397. The original § 877 was repealed by L. 1877, c. 416.

§ 878. [Stricken out by L. 1877, c. 416.]

§ 879. [Am'd, 1882.] Deposition by consent.

The parties to an action may stipulate, in writing, that the deposition of a competent witness, to be used therein, may be taken before a judge or referee, at a time and place specified in the stipulation, either orally, or upon interrogatories, to be agreed upon in like manner. The witness may be subpœnaed to attend the examination, as upon a trial; and the judge or referee may take his deposition, as if an order had been made by the court, directing it to be so taken. But this section does not apply to a case specified in section 877 of this act.

From L. 1847, c. 280, §§ 78, 79. Am'd by L. 1882, c. 397.

§ 880. [Am'd, 1879.] Rules for examination of party or expected party. Manner of taking and returning depositions. Refusal of person examined to answer.

The examination of a party, or an expected party, is subject to the same rules as if he was examined upon the trial. The judge or referee, upon every other examination taken as prescribed in this article, must insert therein every answer or declaration of the person examined, which either party requires to be inserted. The deposition, when completed, must be carefully read to and subscribed by the person examined; must be certified by the judge or referee taking it; and, within ten days thereafter, must be filed in the office of the clerk; or, if no action is pending, in the office of the clerk of the county in which it was taken; together with the stipulation or order, under which it was taken; the affidavit upon which the order was granted; and proof of the service of a copy of the order and of the affidavit. If, upon an examination before a referee, the person examined refused to answer any question, the referee must report the fact to the court or judge, who must determine whether the question is relevant, and whether the witness is bound to answer it.

From 2 R. S. 392 (Part 3, c. 7, tit. 3), §§ 5, 6; Id. 399, § 37. Am'd by L. 1879, c. 542.

§ 881. [Am'd, 1911.] When to be read in evidence.

The deposition, or a certified copy thereof, may be read in evidence by either party, at the trial of, or upon the assessment of

damages, by writ of inquiry, or upon a reference, or otherwise, in the action or in any special proceeding specified in the original affidavit or stipulation, or in any other action or special proceeding thereafter brought between the same parties, or between any parties claiming under them or either of them, or, if no action or special proceeding is then pending, in an action or special proceeding thereafter brought between the persons named in the original affidavit as expected parties, or between persons claiming under them or either of them, including the case where one of the parties is the executor of the will or administrator of the estate of the witness and is given a cause of action by reason of section 1902 of this act. And except in the cases prescribed to the contrary in section 882 of this act, the said deposition, or a certified copy thereof, may be read in evidence by either party to the action or special proceeding in which it is taken, and as between the defendant in said action and the legal representatives and privies in interest and estate of the plaintiff, and as between the plaintiff and the legal representatives and privies in interest and estate of the defendant, and as between the legal representatives and privies in interest and estate of the defendant and the legal representatives and privies in interest and estate of the plaintiff.

From 2 R. S. 392, 399, parts of §§ 7, 39. Am'd by L. 1911, c. 859 (in effect Sept. 1, 1911).

§ 883. [Am'd, 1882.] Proof of witness's inability to attend.

But such a deposition, except that of a party, taken at the instance of an adverse party, or a deposition taken in pursuance of a stipulation, as prescribed in this article, shall not be so read in evidence until it has been satisfactorily proved that the witness is dead, or is unable personally to attend by reason of his insanity, sickness or other infirmity, or that he is confined in a prison or jail; or that he has been and is absent from the State, so that his attendance could not, with reasonable diligence, be compelled by subpoena.

From 2 R. S. 392, 399, remainder of §§ 7, 39. Am'd by L. 1882, c. 397.

§ 883. Effect of deposition.

A deposition, so read in evidence has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness; or to the relevancy or substantial competency of a question put to him, or of an answer given by him; may be made as if the witness was then personally examined and without being noted upon the deposition.

From 2 R. S. 393, 399, §§ 9, 40.

§ 884. Original affidavits, evidence.

The original affidavits, filed with such a deposition, or certified copies thereof, are presumptive evidence of the facts therein contained, to show a compliance with the provisions of this article.

From 2 R. S. 399, § 38.

§ 885. [Am'd, 1877, 1901, 1909.] Deposition to be used on motion.

Where a party intends to make or oppose a motion in a court of record, and it is necessary for him to have the affidavit or deposition of a person not a party, to use upon the motion, the court or a judge authorized to make an order in the case may in its or his discretion make an order appointing a referee to take the deposition of that person. The order must be founded upon proof

by affidavit that the applicant intends to make the motion, or that notice of a motion has been given which the applicant intends to oppose. The affidavit must specify the nature of the action and must show that the affidavit or deposition is necessary thereon and that such person has refused to make an affidavit of the facts which the applicant verily believes are within his knowledge. If the defendant has appeared in the action and the application is made on the part of the plaintiff, at least one day's notice of such application must be given to the attorney of the defendant, and if the application is made on the part of the defendant, similar notice must be given to the attorney of the plaintiff. The person to be examined may be subpœnaed and compelled to attend as upon the trial and may be cross-examined by the party on whose attorney the notice has been served. The deposition must be taken by question and answer and be subscribed by the witness, and must be delivered to the attorney for the party who procured the order, unless such order provides for a different disposition thereof.

From Co. Proc., § 401, subd. 7. Am'd by L. 1877, c. 416; L. 1901, c. 526; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 886. Where witness may be compelled to attend.

Where a person to be examined, as prescribed in this article, is a resident of the State, he shall not be required to attend in any county, other than that in which he resides, or where he has an office for the regular transaction of business, in person. Where he is not a resident, he shall not be required to attend in any other county, than that wherein he is served with a subpœna, unless, for special reasons, stated in the affidavit, the order otherwise directs.

From Co. Proc., § 391, last clause.

ARTICLE SECOND.

Depositions, taken without the State, for use within the State.

Sec. 887, 888. When commission to issue.
889. How and upon what terms granted.
890. Order made by judge.
891. Interrogatories; how settled.
892. Id.; to be annexed; directions for return.
893. Commission to examine wholly or partly upon oral questions.
894. When open commission may issue or depositions may be taken.
895. Depositions where adverse party is an infant or committee.
896. Notice of examination upon oral questions.
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898. Order directing depositions to be taken.
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911. Deposition, etc., evidence.
912. When interrogatories and deposition may be in a foreign language.
913. Letters rogatory.

§ 887. [Am'd, 1879.] When commission to issue.

In a case specified in the next section, where it appears, by affidavit, on the application of either party, that the testimony of one or more witnesses, not within the State, is material to the applicant; a commission may be issued, to one or more competent persons, named therein; authorizing them, or any one of them, to examine the witness or witnesses named therein, under oath, upon the interrogatories annexed to the commission; to take and certify the deposition of each witness; and to return the same, and the commission, according to the directions given in or with the commission. The applicant, or any other party to the action, may be thus examined.

From L. 1862, c. 375, § 1. Am'd by L. 1879, c. 542.

§ 888. [Am'd, 1894, 1895.] The same.

Such a commission may be issued in either of the following cases:

1. Where a party to an action, brought in a court of record, is in default for want of an appearance or pleading, and the testimony is required upon the assessment of damages, by a writ of inquiry, or upon a reference; or otherwise, to enable the court to render the proper final judgment.

2. Where final judgment has been rendered against the adverse party in an action brought in a court of record; and the testimony is required in order to carry the judgment into effect.

3. Where an appeal from a final judgment, rendered in the supreme court, the city court of the city of New York, or a county court, or a motion for a new trial in either of those courts, is pending, and the testimony will be material and necessary to the applicant in the prosecution or defence of the action, if a new trial is granted.

4. Where the application is made before the joinder of issue, in an action brought in either of the courts specified in the last subdivision; and there is reason to apprehend that before issue

is joined, and an application for a commission can thereafter be made, the witness will die, or become unable to give his testimony, or remove, so that his testimony cannot be taken.

5. Where an issue of fact has been joined, in an action pending in a court of record, and the testimony is material to the applicant, in the prosecution or defence thereof.

6. In special proceedings.

From L. 1862, c. 375, § 1. Am'd by L. 1894, c. 308; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 889. How and upon what terms granted.

In a case specified in subdivision third of the last section, if the appeal has been taken to another court, the application must be made to the court in which the judgment was rendered; and an order, directing the commission to be issued, may be granted or refused, in the discretion of that court. In a case specified in either of the other subdivisions of that section, the application may be made to the court, or a judge thereof, or, in the supreme court, to the county judge of the county, where the action is triable; and it must be granted, upon satisfactory proof of the facts authorizing it, unless the court or judge has reason to believe, that the application is not made in good faith, or unless an order for an open commission, or for taking depositions, is made as prescribed in this article. Notice of the application must be given to the adverse party, unless he is in default for want of an appearance. Upon granting the order, the court or judge may, in any case, impose such terms as justice requires.

From L. 1862, c. 375, § 1; 2 R. S. 393 (Part 3, c. 7, tit. 3), §§ 11, 12. See also L. 1847, c. 470, § 15.

§ 890. Order made by judge. Rules, Rule 125

Where the order is made by a judge, out of court, it must be entered in the office of the clerk. It shall be granted, only in a case, where the court would grant it, and upon the same terms; and it is subject to the control of the court.

From 2 R. S. 394, § 13.

§ 891. Interrogatories; how settled.

Unless the interrogatories, to be annexed to the commission, are settled by consent of the parties, they must be settled, upon notice, by a judge of the court, or, in the supreme court, by the county judge of the county, where the action is triable, as prescribed in the general rules of practice.

From 2 R. S. 394, § 14; L. 1875, c. 420.

§ 892. Id.; to be annexed; directions for return.

The interrogatories, when settled, must be annexed to the commission. Either party must be allowed to insert therein any question, pertinent to the issue, which he proposes. Unless the parties stipulate in writing, or the order granting the commission prescribes, how it shall be returned, the judge must indorse, upon the commission, the proper direction for that purpose. Unless the court or judge thinks proper to direct it to be returned by an agent, it must be returned through the post-office.

From 2 R. S. 394, § 15.

§ 893. [Am'd, 1877, 1895.] Commission to examine wholly or partly upon oral questions.

Where an issue of fact, joined in an action, is pending in the supreme court, the city court of the city of New York, or a

county court, the parties may stipulate, in writing, or the court to which, or the judge to whom an application for a commission is made, may in its or his discretion, direct, in the order, that a commission issue without written interrogatories, and that the depositions be taken upon oral questions; or that a commission issue, to take the deposition of one or more witnesses, designated in the order, partly upon oral questions and partly upon written interrogatories, or to take the deposition of one or more witnesses, designated in the order, upon oral questions, and one or more witnesses, designated in the order, upon written interrogatories.

New. Am'd by L. 1877, c. 416; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 894. When open commission may issue, or depositions may be taken.

Where an issue of fact, joined in an action, is pending in either of the courts specified in the last section, the parties may stipulate, in writing, or the court, or a judge thereof, or, in the supreme court, the county judge of the county where the action is triable, may, in its or his discretion upon the application of either party, and upon satisfactory proof, by affidavit, that one or more witnesses, not within the State, are material and necessary in the prosecution or defence of the action, make an order, upon such terms as it or he deems proper, directing that an open commission issue, or that depositions be taken, as prescribed in the following sections of this article.

New.

§ 895. [Am'd, 1879, 1897.] Depositions where adverse party is an infant or committee.

The last two sections are not applicable, where the adverse party is an infant, or the committee of a person judicially declared to be incapable of managing his affairs, by reason of lunacy, idiocy or habitual drunkenness. Nor can the applicant be examined in his own behalf, as prescribed in those sections, except by consent of the parties.

New. Am'd by L. 1879, c. 542; L. 1897, c. 606 (in effect May 19, 1897).

§ 896. Notice of examination upon oral questions.

Where a commission is issued, to take testimony without written interrogatories, as prescribed in section 893 or section 894 of this act, notice of the time and place of the examination of a witness, by virtue thereof, naming the witness, must be served as prescribed in section 899 of this act.

New.

§ 897. Open commission.

An open commission must be directed to one or more persons, named therein, and must authorize them, or any one of them, to examine any witness who may be produced by either party, on or before a day specified therein, upon oral questions to be put to the witness, when he is produced; to take and certify the deposition of each witness so examined; and to return the same, and the commission, immediately after the expiration of the time limited for the production of witnesses, according to the directions, given in or with the commission.

New.

§ 898. Order directing depositions to be taken.

An order, directing that depositions be taken, must specify the time within which they must be taken, and the manner in which

they must be returned. It may also contain such additional directions, not inconsistent with the next section, with respect to the time and manner of giving notice, as the court or judge deems proper. The order must be entered in the clerk's office; and a certified copy thereof must be annexed to each deposition, or set of depositions, returned as prescribed in the following sections of this article.

From L. 1853, c. 387, § 4.

§ 899. Before whom depositions may be taken; notice of taking.

A deposition may be taken, pursuant to such an order, before a person mutually agreed upon by the parties, or a chancellor, or a judge of a court of record, or the mayor or other chief magistrate of a city, or a justice of the peace of the state or territory, where the witness is; who is not counsel or attorney for either party, and would not be disqualified, by reason of affinity or consanguinity to a party, or interest in the event, from serving as a juror upon the trial of the action, within the State. Written notice of the time and place of taking a deposition, specifying the name of the witness, and the person before whom it will be taken, must be served by the party, at whose instance it is taken, upon the attorney for the adverse party. The time for serving such a notice must be, at least, five judicial days before the deposition is taken; and one judicial day, in addition, for each fifty miles, by the usual route of travel, between the residence of the attorney for the adverse party, and the place where the deposition is to be taken.

From L. 1853, c. 387, §§ 4, 5.

§ 900. How depositions taken.

Upon the examination of a witness, without written interrogatories, by virtue of a commission, or of an order to take depositions, the commissioner, or the person before whom the deposition is taken, must take down, or cause to be taken down, as prescribed in the next section, the substance of the witness's testimony; unless he is directed, in the commission or the order, or required by the person appearing for either party, to insert in the deposition any or all of the questions or answers, word for word. Unless the commission or order otherwise directs, the person appearing for either party may ask any question, which he deems proper, and the witness's answer must be taken accordingly, the objections thereto being reserved, without being specified at the time of examination. A copy of this section must be annexed to each commission to take testimony without written interrogatories, and to each certified copy of an order to take a deposition.

New.

§ 901. Commission or order to take depositions; how executed and returned.

The person, to whom a commission is directed, or before whom a deposition is taken, unless otherwise expressly directed in the commission, or in the order for taking the depositions, must execute the commission, or the order, as follows:

1. He must publicly administer, to each witness examined, an oath or affirmation to testify the truth, the whole truth, and nothing but the truth, as to the matters respecting which the witness is to be examined.

2. He must reduce the examination of each witness to writing, or cause it to be reduced to writing, by a disinterested person. After it has been carefully read, to or by the witness, it must be subscribed by the witness.

3. If an exhibit is produced and proved, the exhibit, or, if the witness, or other person having it in his custody, does not surrender it, a copy thereof, must be annexed to the deposition to which it relates, subscribed by the witness proving it, and numbered or otherwise identified, in writing thereupon, by the commissioner, or person taking the deposition, who must subscribe his name thereto.

4. The commissioner, or person taking the deposition, must subscribe his name to each half sheet of the deposition; he must annex all the depositions and exhibits to the commission, or to a certified copy of the order for taking the deposition, with the certificate specified in the next section; and he must close them up under his seal, and address the packet to the clerk of the court, at his official residence.

5. If there is a direction, on the commission, or in the order, to return the same through the post-office, he must immediately deposit the packet, so addressed, in the post-office, and pay the postage thereon.

6. If there is a direction on the commission, or in the order, to return the same by an agent of the party, at whose instance it was issued or granted, the packet so addressed must be delivered to the agent.

7. Where a commission is directed to two or more persons, one or more of them may execute it, as prescribed in this and the next section.

A copy of this and of the next section must be annexed to each commission, or order to take depositions, authorized by this article.

From 2 R. S. 394, § 16; L. 1853, c. 387, §§ 6, 7, 8.

§ 902. Certificate of execution.

The commissioner or other person, before whom one or more depositions are taken, must subscribe, and annex to each deposition, a certificate, substantially in the following form, the blanks being properly filled up:

"State" (or "territory") "of ....." } ss.:
"County" (or "parish") "of ....."

"I, ..., do certify that ....., the witness, personally appeared before me on the .... day of ....., at ..... o'clock in the .....noon, at the ....., in the state" (or "territory") "of ....., and after being sworn" (or "affirmed," as the case may be), "to testify the truth, the whole truth, and nothing but the truth, did depose to the matters contained in the foregoing deposition, and did, in my presence, subscribe the same, and indorse the exhibits annexed thereto. And I further certify that I have subscribed my name to each half-sheet thereof, and to each exhibit. And I further certify that ..... appeared in behalf of the ....., and that ..... appeared in behalf of the ....."

From L. 1853, c. 387, § 7.

§ 903. Certificate, a sufficient return.

The certificate specified in the last section, is a sufficient return to a commission.

New.

§ 904. Return by agent.

If the packet, specified in section 901 of this act, is delivered to an agent, he must deliver it to the clerk, to whom it is addressed, or to a judge of the court, either of whom must receive and open it, upon the agent making affidavit, that he received it from the hands of the commissioner, or the person who took the deposition, and that it has not been opened or altered, since he so received it.

From 2 R. S. 395 (Part 3, c. 7, tit. 3), § 17.

§ 905. If agent is sick or dead.

If the agent is dead, or, from sickness or other casualty, is unable to deliver the packet personally, as prescribed in the last section, it must be received, by the clerk or judge, from the hands of any other person, upon the latter making an affidavit, that he received it from the agent; that the agent is dead, or otherwise unable to deliver it; that it has not been opened or altered since he received it; and that he believes that it has not been opened or altered, since it came from the hands of the commissioner, or the person who took the deposition.

From Id., § 18.

§ 906. Filing deposition, etc., so returned.

The clerk or judge, who receives and opens the packet, as prescribed in the last two sections, must indorse thereupon, and sign, a note of the time of the receipt and opening thereof, and immediately file it in the office of the clerk; together with the affidavit of the person, who delivered it to him.

From Id., § 19.

§ 907. The same.

If the packet is transmitted through the post-office, the clerk, to whom it is addressed, must receive it from the post-office, open it, indorse thereupon, and sign, a like note of the time of the receipt and opening thereof, and immediately file it in his office.

From Id., § 20.

§ 908. Commission, etc., by consent.

A commission may issue, or an order to take depositions may be made, by consent, in a case where either may be directed by the court or a judge, as prescribed in this article. On filing a stipulation to that effect, signed by the attorneys for the parties, the clerk must enter an order accordingly; and thereupon the attorney for the party, procuring the order, may insert in the commission, or indorse upon or annex to it, or the order, the necessary directions for the execution and return thereof, according to the stipulation.

From Id., § 21.

§ 909. Where return to be kept; parties may inspect it, etc.

A commission, or copy of an order to take depositions, with the certificates, returns, depositions, and exhibits thereto annexed, must remain on file in the office of the clerk, unless otherwise provided by the stipulation of the parties, or unless the court, by a special order, directs them to be filed in the office of another clerk. They are always open to the inspection of the parties,

either of whom is entitled to a copy of them, or of any part thereof, on payment of the fees allowed by law.

From 2 R. S. 396, § 22.

§ 910. When deposition may be suppressed.

Where it appears, by affidavit that a deposition has been improperly or irregularly taken or returned; or that the personal attendance of the witness, upon the trial, could have been procured, with due diligence, by a subpoena; or that the attorney for either party has practiced any fraud, or unfair or overreaching conduct, to the prejudice of the adverse party, in the course of the proceedings; an order, for the suppression of the deposition, may be made by the court, upon the application of the party aggrieved, upon notice to the adverse party.

From L. 1853, c. 387, § 14.

§ 911. Deposition, etc., evidence.

A deposition, taken and returned as prescribed in this article, or an exemplified copy thereof, if the original is filed in another county, may, unless it is suppressed as prescribed in the last section, be read in evidence by either party. It has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy, or substantial competency, of a question put to him, or of an answer given by him, may be made, as if the witness was then personally examined, and without being noted upon the deposition.

From id., § 18; 2 R. S. 396, § 23.

§ 912. [Am'd, 1895.] When interrogatories and deposition may be in a foreign language.

Upon an application, made in the supreme court, the city court of the city of New-York, or a county court, for a commission to be issued to a foreign country, if it satisfactorily appears, by affidavit, that the witness does not understand the English language, the order for the commission may, in the discretion of the court or judge, direct that written interrogatories annexed thereto, by way of direct or cross-examination be framed in the English language, and also in a foreign language; that only the interrogatories framed in the foreign language be put to the witness; and that his answers be taken, and the certificates be made out, in the same language. Where such an order is made, it must provide for the payment, by the applicant, to the adverse party, of a reasonable sum, fixed therein, for the expense of procuring the interrogatories, in his behalf, to be translated. The judge, who settles the interrogatories, must settle them in the foreign language, and in the English language; and, for that purpose, he may call in the assistance of one or more experts, whose compensation must be fixed by the judge, and paid by the applicant. When the deposition is read in evidence, it, and the interrogatories, must be interpreted into the English language, as if the witness, being unable to speak the English language, was personally present and testifying.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 913. Letters rogatory.

Letters rogatory may be issued from either of the courts specified in the last section, in its discretion, in a case where a commission may be issued, as prescribed in this article, upon satis-

factory proof, by affidavit, that there is good reason to believe, that the ends of justice will be better promoted thereby, than by the issuing of a commission, notwithstanding that a commission can be executed, in the country to which they are sent. Letters rogatory can be issued only to examine one or more witnesses, upon written interrogatories, annexed thereto; which must be framed and settled, and the depositions must be returned, as prescribed in this article, with respect to the interrogatories annexed to a commission, and the depositions taken thereunder.

New.

ARTICLE THIRD.

Depositions, taken within the State for use without the State.

Sec. 914. In what cases deposition may be taken.
915. Proceedings to obtain testimony.
916, 917, 918. [Repealed.]
919. Taking and return of deposition.
920. [Repealed.]

Sec. 310-1.31 Inc.

§ 914. [Am'd, 1899.] In what cases deposition may be taken.

A party to an action, suit, or special proceeding, civil or criminal, pending in a court without the State, either in the United States, or in a foreign country, may obtain, by the special proceeding prescribed in this article, the testimony of a witness, and, in connection therewith, the production of books and papers, within the State, to be used in the action, suit or special proceeding.

From 2 R. S. 397 (Part 3, c. 7, tit. 3), § 29; L. 1867, c. 68, § 1. Am'd by L. 1899, c. 502 (in effect Sept. 1, 1899).

§ 915. [Am'd, 1899.] Proceedings to obtain testimony.

Where a commission to take testimony, within the State, has been issued from the court in which the action, suit, or special proceeding is pending; or where a notice has been given, or any other proceeding has been taken, for the purpose of taking the testimony, within the State, pursuant to the laws of the state or country, wherein the court is located, or pursuant to the laws of the United States, if it is a court of the United States, the supreme court, or the county court, or a judge of either court, shall, in a proper case, on the presentation of a verified petition issue a subpoena to the witness, commanding him to appear before the commissioner, named in the commission; or before a commissioner, within the State, for the state, territory, or foreign country, in which the notice was given, or the proceeding taken; or before the officer designated in the commission, notice, or other paper, by his title of office; at a time and place specified in the subpoena, to testify, in the action, suit, or special proceeding. If the witness shall fail to obey the subpoena, or refuse to have an oath administered, or to testify, or to produce a book or paper pursuant to a subpoena, or to subscribe his deposition, the court or judge issuing the subpoena shall, if it is determined that a contempt has been committed, prescribe the punishment as in the case of a recalcitrant witness in the supreme court. The general rules of practice must prescribe rules for such proceedings.

From 2 R. S. 397, §§ 30, 31; L. 1867, c. 68, § 1. Am'd by L. 1899, c. 502 (in effect Sept. 1, 1899).

§§ 916, 917, 918. [Repealed by L. 1899, c. 502 (in effect Sept. 1, 1899).]

§ 919. [Am'd, 1899.] Taking and return of deposition.

The officer, or commissioner, before whom a witness appears, in a case specified in this article, must take down his testimony, in writing, and must annex thereto copies of all books and papers produced or such parts thereof as shall be required, and must certify and transmit it to the court in which the action, suit, or special proceeding is pending, as the practice of that court requires.

From L. 1831, c. 191, § 1. Am'd by L. 1899, c. 502 (in effect Sept. 1, 1899).

§ 920. [Repealed by L. 1899, c. 502 (in effect Sept. 1, 1899).]

TITLE IV.

Documentary evidence.

Article 1. Documentary evidence, as a substitute for oral testimony.
2. Proof of a document, executed or remaining within the State.
3. Proof of a document, remaining in a court or public office of the United States, or executed or remaining without the State.

ARTICLE FIRST.

Documentary evidence, as a substitute for oral testimony

Sec. 921. Certain official certificates, evidence.
922. Certificate, etc., on file, evidence.
923. Notary's certificate, evidence.
924. Notary's protest and memorandum; when evidence.
925. Proof of presentment, etc., of foreign bills.
926. Affidavit of printer, etc., evidence.
927. Affidavit of service of notice.
928. Marriage certificate, evidence.
929. Book of foreign corporation; when evidence.
930. When a copy thereof is evidence.
931. How copy to be verified.
931a. Copy of designation of person upon whom to make service, as evidence.
931b. Recital in order, resolution or record of public officers, board or body, presumptive evidence of certain facts.

§ 921. Certain official certificates, evidence.

Where the officer, to whom the legal custody of a paper belongs, certifies, under his hand and official seal, that he has made diligent examination, in his office, for the paper, and that it cannot be found, the certificate is presumptive evidence of the facts so certified, as if the officer personally testified to the same.

From 2 R. S. 552 (Part 3, c. 8, tit. 17), § 12.

§ 922. Certificate, etc., on file, evidence.

Where a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit, touching an act performed by him, or to a fact ascertained by him, in the course of his official duty; and to file or deposit it in a public office of the State; the certificate or affidavit, so filed or deposited, or an exemplified copy thereof, is presumptive evidence of the facts therein alleged, except where the effect thereof is declared or regulated, by special provision of law.

New.

§ 923. [Am'd, 1877.] Notary's certificate, evidence.

The certificate of a notary public of the State, under his hand and seal of office, of the presentment by him, for acceptance or payment, or of the protest, for non-acceptance or non-payment, of a promissory note or bill of exchange, or of the service of notice thereof on a party to the note or bill; specifying the mode of giving the notice, the reputed place of residence of the party to whom it was given, and the post-office nearest thereto; is presumptive evidence of the facts certified, unless the party, against whom it is offered, has served upon the adverse party, with his pleading, or within ten days after joinder of an issue of fact, an original affidavit, to the effect, that he has not received notice of non-acceptance, or of non-payment of the note or bill. A verified answer is not sufficient as an affidavit, within the meaning of this section.

From L. 1833, c. 271, § 8. Am'd by L. 1877, c. 416.

§ 924. Notary's protest and memorandum; when evidence.

In case of the death or insanity of a notary public of the State, or of his absence or removal, so that his personal attendance, or his testimony, cannot be procured, in any mode prescribed by law, his original protest, under his hand and official seal, the genuineness thereof being first duly proved, is presumptive evidence of a demand of acceptance, or of payment, therein stated; and a note or memorandum, personally made or signed by him, at the foot of a protest, or in a regular register of official acts, kept by him, is presumptive evidence that a notice of non-acceptance or non-payment was sent or delivered, at the time, and in the manner, stated in the note or memorandum.

From 2 R. S. 283, 284 (Part 3, c. 3, tit. 2), §§ 46, 47.

§ 925. Proof of presentment, etc., of foreign bills.

Proof of the presentment, for acceptance or payment, of a promissory note or bill of exchange, payable in another state, or in a territory, or foreign country, or of a protest of the note or bill, for non-acceptance or non-payment, or of the service of notice thereof, on a party to the note or bill, may be made, in any manner authorized by the laws of the state, territory, or country where it was payable.

From L. 1865, c. 309.

§ 926. [Am'd, 1877.] Affidavit of printer, etc., evidence.

The affidavit of the printer or publisher of a newspaper, published within the State, or of his foreman or principal clerk, showing the publication of a notice or other advertisement, authorized or required, by a law of the State, to be published in that newspaper, annexed to a printed copy of the notice or other advertisement, may be read in evidence; and is presumptive evidence of the publication, and, also, of the matters stated therein, showing that the deponent is authorized to make the affidavit. But this section does not apply to a case, where the affidavit is required by law to be filed, unless it has been duly filed; or to a case, where the mode of proving a publication is otherwise specially prescribed by law.

From L. 1835, c. 159, § 1. Am'd by L. 1877, c. 416.

§ 927. [Am'd, 1902.] Affidavit of service of notice.

Where it is necessary upon the trial of an action, to prove the service, posting or affixing, of a notice, an affidavit, showing the service, posting or affixing, to have been made by the person making the affidavit, is presumptive evidence of the service, posting or affixing, upon first proving that he is dead or insane, or that his personal attendance cannot be compelled, with due diligence.

From L. 1858, c. 244, § 1. Am'd by L. 1902, c. 93 (in effect Sept. 1, 1902).

§ 928. [Am'd, 1879.] Marriage certificate, evidence.

An original certificate of a marriage, within the State, made by the minister or magistrate by whom it was solemnized; the original entry thereof made, pursuant to law, in the office of the clerk of a city or a town, within the State; or a copy of the certificate, or of the entry, duly certified, is presumptive evidence of the marriage.

From 2 R. S. 141 (Part 2, c. 8, tit. 1), § 17. Am'd by L. 1879, c. 542.

§ 929. Book of foreign corporation; when evidence.

Where a party wishes to prove an act or transaction of a foreign corporation, the book or books of the corporation may be used for that purpose, as presumptive evidence, whether any or all of the parties are or are not members of the corporation.

From L. 1863, c. 206, as am'd by L. 1869, c. 589.

§ 930. When a copy thereof is evidence.

If an original book is not produced at the trial, as prescribed in the last section, a copy thereof, or of an entry therein, verified as prescribed in the next section, may be used, with like effect as the original book; provided that the party, intending to use the copy, gives the adverse party at least ten days' notice of his intention, specifying briefly the nature of the evidence proposed to be given. But this and the next section do not apply, where the foreign corporation is a party to the action, and seeks to prove its own act or transaction, in its own behalf.

From L. 1863, c. 206, parts of §§ 1, 2.

§ 931. How copy to be verified.

The copy must be verified by the deposition, taken as prescribed by law, or the oral testimony, taken at the trial, of the person who made it, or of a person who has examined and compared it with the original book, or the entry therein. The witness must testify that the copy produced is correct; that he made it, or compared it with the original; and that he then knew that the original book so copied, or containing the entry, was the book of the corporation; or that it was then acknowledged to him to be such, by an officer or receiver of the corporation, or a person having the custody thereof, naming the person who made the acknowledgment; and he must specify where, and in whose custody, the original was then kept.

From Id., part of § 1.

§ 931a. [Added, 1909.] Copy of designation of person upon whom to make service, as evidence.

An exemplified copy of a designation of a person upon whom to make service filed by a foreign corporation as provided in section 16 of the General Corporation Law accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

From Code Civ. Proc., § 432, subd. 2, pt. Added here by L. 1909, c. 65 (in effect Feb. 17, 1909). (For remainder of section see Code Civ. Proc., § 432, and Gen. Corp'n Law, § 16).

§ 931b. [Added, 1909.] Recital in order, resolution or record of public officers, board or body, presumptive evidence of certain facts.

A recital in any order, resolution or other record of any proceeding of a meeting referred to in section 41 of the General Construction Law that such meeting had been held or adjourned as provided in said section or that it had been held upon notice to the members as therein provided, shall be presumptive evidence thereof.

From Stat'ry Constr'n Law, § 19 pt. Added here by L. 1909, c. 65 (in effect Feb. 17, 1909). (For remainder of section see Gen. Constr'n Law, § 41).

§ 931c. [Added, 1909.] Extracts from books and records of comptroller's office as evidence.

The state comptroller is hereby authorized to furnish extracts from the books and records of his office in reference to any lot, piece or parcel of land, certifying that such extract contains all that is stated in such book or record relating to such lot, piece or parcel of land, and such certified extract may be read in evidence in all courts and proceedings with the same effect as the original book or record.

Added by L. 1909, c. 425 (in effect May 21, 1909).

ARTICLE SECOND.

Proof of a document, executed or remaining within the state.

Sec. 932. Statutes, etc.; how proved.
933. Copies of records and papers in certain offices, presumptive evidence.
934. Id.; of papers filed with town clerk.
935. Conveyance, when acknowledged, or record, or transcript of record, evidence.
936. Such evidence may be rebutted.
937. What instruments may be acknowledged.
938. Justice's docket and transcript, evidence before him.
939. Transcript from justice's docket, evidence generally.
940. Other proof of proceedings before justice.
941. Ordinances, etc., of cities, villages, etc.
941a. Proof of colonial statutes.

§ 932. [Am'd, 1877, 1895.] Statutes, etc., how proved.

A statute or joint resolution, passed by the legislature of the State, may be read in evidence from a newspaper, designated as prescribed by law, to publish the same, until six months after the close of the session at which it was passed; and, at any time, from a volume printed under the direction of the secretary of State. To entitle any copy of a law published, other than those published under the direction of the secretary of State, to be read in evidence, there shall be contained in the same book or pamphlet, a printed certificate of the secretary of State, that such copy is a correct transcript of the text of the original laws. For such certificate the secretary of State shall collect such a fee as he shall deem just and reasonable.

From 1 R. S. 184 (Part 1, c. 8, tit. 7), §§ 8, 12. Am'd by L. 1877, c. 416; L. 1895, c. 594 (in effect Sept. 1, 1895).

§ 933. [Am'd, 1879.] Copies of records and papers in certain offices, presumptive evidence.

A copy of a paper filed, kept, entered, or recorded, pursuant to law, in a public office of the State, the officer having charge of which has, pursuant to law, an official seal; or with the clerk of a court of the State; or with the clerk or secretary of either house of the legislature, or of any other public body or public board created by authority of a law of the State, and having, pursuant to law, a seal; or a transcript from a record, kept, pursuant to law, in such a public office, or by such a clerk or secretary, is evidence, as if the original was produced. But, to entitle it to be used in evidence, it must be certified by the clerk of the court, under his hand and the seal of the court; or by the officer having the custody of the original, or his deputy, or clerk, appointed pursuant to law, under his official seal, and the hand of the person certifying; or by the presiding officer, secretary, or clerk of the public body or board, appointed pursuant to law, under his hand, and, except where it is certified by the clerk or secretary of either house of the legislature, under the official seal of the body or board.

From various special statutes. Am'd by L. 1879, c. 542.

§ 934. Id.; of papers filed with town clerk.

A copy of a paper filed, pursuant to law, in the office of a town clerk, or a transcript from a record kept therein, pursuant to law, certified by the town clerk, is evidence, with like effect as the original.

From 1 R. S. 350 (Part 1, c. 11, tit. 4), § 16.

§ 935. Conveyance, when acknowledged, or record, or transcript of record, evidence.

A conveyance, acknowledged or proved, and certified, in the manner prescribed by law, to entitle it to be recorded in the county where it is offered, is evidence, without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded, within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance.

From 1 R. S. 759 (Part 2, c. 3), §§ 16, 17.

§ 936. Such evidence may be rebutted.

The certificate of the acknowledgment, or of the proof of a conveyance, or the record, or the transcript of the record, of such a conveyance, is not conclusive; and it may be rebutted, and the effect thereof may be contested, by a party affected thereby. If it appears that the proof was taken upon the oath of an interested or incompetent witness, the conveyance, or the record or transcript thereof, shall not be received in evidence, until its execution is established by other competent proof.

From Id., § 17.

§ 937. What instruments may be acknowledged.

Any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence, as if it was a conveyance of real property.

From L. 1833, c. 271, § 9.

§ 938. Justice's docket and transcript, evidence before him.

The docket-book of a justice of the peace, within the State, or a transcript thereof, certified by him, is evidence before him, of any matter required by law to be entered by him therein.

From 2 R. S. 269 (Part 3, c. 2, tit. 4), § 245.

§ 939. Transcript from justice's docket, evidence generally.

A transcript from the docket-book of a justice of the peace, within the State, subscribed by him, and authenticated by a certificate of the clerk of the county in which the justice resides, under his hand and official seal, to the effect, that the person, subscribing the transcript, was, at the date of the judgment therein mentioned, a justice of the peace of that county; and that the clerk is acquainted with his handwriting, and verily believes that the signature to the transcript is genuine; is evidence of any matter stated in the transcript, which is required by law to be entered by the justice in his docket-book.

From Id., §§ 246, 247.

§ 940. [Am'd, 1877.] Other proof of proceedings before justice.

The proceedings in an action brought, or a special proceeding instituted, before a justice of the peace, within the State, may also be proved by the oath of the justice. In case of his death or absence, they may be proved by the original minutes of the proceedings, kept by him, pursuant to law, accompanied with

proof of his handwriting; or by a copy of the minutes, sworn to, by a competent witness, as having been compared with the original entries, with proof that those entries were in the handwriting of the justice.

From Id., § 248. Am'd by L. 1877, c. 416.

§ 941. [Am'd, 1877, 1894.] Ordinances, etc., of cities, villages, etc.

An act, ordinance, resolution, by-law, rule or proceeding of the common council of a city, or of the board of trustees of an incorporated village, or of a local board of health of a city, town or incorporated village or of a board of supervisors, within the State, may be read in evidence, either from a copy thereof, certified by the city clerk, village clerk, clerk of the common council, clerk or secretary of the local board of health, or clerk of the board of supervisors; or from a volume printed by authority of the common council of the city, or the board of trustees of the village or the local board of health of the city, town or village, or the board of supervisors.

From L. 1882, c. 158, §§ 1, 2; L. 1851, c. 400, § 7; L. 1870, c. 291, tit. 4, § 16. Am'd by L. 1877, c. 416; L. 1894, c. 208.

§ 941a. [Added, 1909.] Proof of colonial statutes.

A statute contained in the compilation of the colonial statutes transmitted to the legislature by the commissioners of statutory revision, pursuant to chapter 125 of the Laws of 1891, shall be evidence in any action or proceeding, and of the same force and effect as though the original was produced, if it appears from such publication that such statute was copied from the original.

From L. 1891, c. 125, § 5 pt., as am'd by L. 1897, c. 408, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

ARTICLE THIRD.

Proof of a document, remaining in a court or public office of the United States, or executed or remaining without the State.

Sec. 942. Printed copies of laws of another state, etc.
943. Copies of records of United States courts.
944. Copies of documents on file in departments of United States, presumptive evidence.
945. Record of bill of sale, etc., of vessels.
946. Conveyance of land without the State.
947. Exemplification of record of conveyance of land without the State.
948. Transcript of docket, etc., of justice of adjoining State.
949. Id.; how authenticated.
950. Other proof.
951. Proof may be rebutted.
952. Copies of records of courts of foreign countries; how authenticated.
953. Other proof.
954. This article does not declare effect of record, etc.
955. Public records in New York county.
956. Documents from foreign countries; how authenticated.

§ 942. Printed copies of laws of another state, etc.

A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree, or ordinance, by the executive power thereof, contained in a book or publication, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted, as evidence of the existing law, in the judicial tribunals thereof, is presumptive evidence of the statute, law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved, as a fact, by oral evidence. The books of reports of cases, adjudged in the courts thereof, must also be admitted, as presumptive evidence of the unwritten or common law thereof.

From Co. Proc., § 426; L. 1848, c. 312.

§ 943. Copies of records of United States courts.

A copy of the record, or any other proceeding, of a court of the United States, is evidence, when certified by the clerk or officer, in whose custody it is required by law to be.

From L. 1845, c. 303, § 1.

§ 944. [Am'd, 1877, 1879, 1899, 1907.] Copies of documents on file in departments of U. S., presumptive evidence.

A copy of a record or other paper, remaining in a department of the government of the United States, is evidence, when certified by the head, or acting chief officer, for the time being, of that department; or when certified by the officer in whose charge it is, pursuant to a statute of the United States, or otherwise in accordance with a statute of the United States, relating to certifying the same. A certificate of the director or other officer in charge of the census of the United States, attested by the secretary of the interior, stating the population of any part of the United States, or giving the result of said census otherwise shall be received as prima facie evidence of such facts. The record of the observations of the weather, taken under the direction of the signal service of the United States, when certified by the officer in charge thereof, at the place where they were taken and are kept, is prima facie evidence of the matters of fact stated therein. The records of the observation of the weather taken at the arsenal in Central park under the direction of the meteorological and astronomical observatory of the city of New York, when duly certified by the official in charge thereof, or his deputy, shall be presumptive evidence of the facts set forth therein, and shall be received in evidence on the trial of any action in all the courts of this state.

From L. 1843, c. 240, § 1; L. 1876, c. 299. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1899, c. 99; L. 1907, c. 252 (in effect April 30, 1907).

§ 945. Record of bill of sale, etc., of vessels.

The record of a bill of sale, mortgage, hypothecation, or conveyance of a vessel, belonging to a port or place, within the United States, recorded in the office of the collector of customs, where the vessel is registered or enrolled, which was acknowledged or proved, before it was recorded, in like manner as a deed to be recorded within the State; or a transcript of such a record, duly certified by the collector; is evidence, with the like effect as the original.

From L. 1862, c. 251, as am'd by L. 1865, c. 512.

§ 946. Conveyance of land without the State.

A conveyance of real property, situated without the State, acknowledged or proved, and certified, in like manner as a deed to be recorded within the county wherein it is offered in evidence, is evidence, without further proof thereof, as if it related to real property situated within the State. A conveyance of real property, situated within another state, or a territory of the United States, which has been duly authenticated, according to the laws of that state or territory, so as to be read in evidence in the courts thereof, is evidence in like manner.

From 1 R. S. 761 (Part 2, c. 3), § 27.

§ 947. Exemplification of record of conveyance of land without the State.

An exemplification of the record of a conveyance of real property situated without the State, and within the United States, which has been recorded in the state or territory, where the real property is situated, pursuant to the laws thereof, when certified under the hand and seal of the officer, having the custody of the record, is, if the original cannot be produced, presumptive evidence of the conveyance, and of the due execution thereof.

New. Analogous to L. 1864, c. 311.

§ 948. Transcript of docket, etc., of justice of adjoining state.

A transcript from the docket-book of a justice of the peace, within an adjoining state, of a judgment rendered by him; a transcript of his minutes of the proceedings in the cause, previous to the judgment; or of an execution issued thereon; or of the return of an execution; when subscribed by the justice, and authenticated as prescribed in the next section, is presumptive evidence of his jurisdiction in the cause, and of the matters shown by the transcript.

From L. 1836, c. 439, § 1.

§ 949. Id.; how authenticated.

Such a transcript must be authenticated by a certificate of the justice, annexed thereto, to the effect, that it is in all respects correct, and that he had jurisdiction of the cause; and also by a certificate of the clerk or prothonotary of the county, in which the justice resided at the time of rendering the judgment, under his hand and the seal of the court of common pleas, or other county court or the county, to the effect that the person, subscribing the certificate attached to the transcript, was, at the date of the judgment, a justice of the peace of that county; and that the signature thereto is in his own handwriting.

From Id., § 2.

§ 950. Other proof.

The judgment and other proceedings, and the justice's authority to render the judgment, may also be proved, by the production of the docket, or of a copy of the judgment or other proceedings; and the oral testimony of the justice, to the truth and correctness thereof, and to his authority to render the judgment.

From L. 1836, c. 439, § 3.

§ 951. Proof may be rebutted.

The last three sections do not prevent the introduction of evidence, to controvert any of the proof, in relation to the validity of a judgment therein specified.

From Id., § 4.

§ 952. Copies of records of courts of foreign countries; how authenticated.

A copy of a record, or other judicial proceeding, of a court of a foreign country, is evidence, when authenticated as follows:

1. By the attestation of the clerk of the court, with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office.

2. By a certificate of the chief-judge or presiding magistrate of the court, to the effect, that the person, so attesting the record, is the clerk of the court; or that he is the officer, in whose custody the record is required by law to be kept; and that his signature to the attestation is genuine.

3. By the certificate, under the great or principal seal of the government, under whose authority the court is held, of the secretary of State, or other officer having the custody of that seal, to the effect, that the court is duly constituted, specifying generally the nature of its jurisdiction; and that the signature of the chief-judge or presiding magistrate, to the certificate specified in the last subdivision, is genuine.

From 2 R. S. 396 (Part 3, c. 7, tit. 3) § 26.

§ 953. Other proof.

A copy of a record, or other judicial proceeding, of a court of a foreign country, attested by the seal of the court, in which it remains, must also be admitted in evidence, upon due proof of the following facts:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of the original.

2. That the original was, when the copy was made, in the custody of the clerk of the court, or other officer, legally having charge of it.

3. That the attestation is genuine.

From Id., § 27.

§ 954. [Am'd, 1877.] This article does not declare effect of record, etc.

Nothing in this article is to be construed, as declaring the effect of a record or other judicial proceeding of a foreign country, authenticated, so as to be evidence.

From Id., § 28, last clause. Am'd by L. 1877, c. 416.

§ 955. [Added, 1892; am'd, 1904.] Public records in New York county.

All maps, surveys and official records, which shall have been on record or on file in the office of either the register of the city and

county of New York, or the surrogate of said city, or any of the courts of record of said city, or the clerk of the city and county of New York, or any county within the city of New York, or any of the departments of said city as enumerated in section thirty-four of the New York city consolidation act, or in the office of the registers, surrogates, commissioners of public works or kindred department, or park department, for a period of twenty years or upwards prior to such trial, shall be presumptive evidence of their contents, and shall be receivable in evidence as such upon any trial in any of the courts of this state in any controversy pending therein, between any parties.

Added by L. 1892, c. 522. Am'd by L. 1904, c. 444 (in effect Sept. 1, 1904).

§ 956. [Am'd, 1877, 1912.] Documents from foreign countries; how authenticated.

A copy of a patent, record or other document remaining of record or on file in a public office of a foreign country, certified according to the form in use in that country, is evidence when authenticated as follows:

1. By the certificate under the hand and official seal of a commissioner appointed by the governor to take the proof or acknowledgment of deeds in that country, to the effect that the patent, record or document is of record or on file in the public office, and that the copy thereof is correct and certified in due form; and

2. By a certificate under the hand and official seal of the Secretary of State, annexed to that of the commissioner, to the same effect as prescribed by law for the authentication of the certificate of such a commissioner upon a conveyance to be recorded within the State. The certificate of the commissioner, thus authenticated, is presumptive evidence that the copy of the patent, record or document is certified according to the form in use in the foreign country; or

3. By a certificate under the hand and official seal of a consular officer of the United States to the effect that the patent, record or document is of record or on file in the public office and certified according to the form in use in the foreign country, and a copy of a patent, record or other document so authenticated is presumptive evidence that the same is certified according to the form in use in the foreign country.

From L. 1875, c. 136, portions of §§ 1, 2, 8, 9. Am'd by L. 1877, c. 416; L. 1912, c. 97 (in effect April 3, 1912).

TITLE V.

Miscellaneous provisions.

Sec. 957. Form of certificate to copies, etc.
958. Certificate must be sealed.
959. Qualification of last section.
960. Evidence, in actions for injury to unoccupied lands and timber thereon.
961. Searching records in the surrogates' offices and certifying in regard thereto.
961a. Determining age of child.
961b. Proof of written instruments where there are subscribing witnesses.
961c. Proof of payments by a municipal corporation or officer thereof.
961d. Proof of instrument by submitting disputed and genuine writing.
961e. Proof of lost execution or writ under which sheriff's sale of real property was made.
961f. Evidence of weather conditions.
962. Saving clause.

§ 957. Form of certificate to copies, etc.

Where a transcript, exemplification, or certified copy of a record or other paper, is declared by law to be evidence, and special provision is not made for the form of the certificate, in the particular case, the person, authorized to certify, must state, in his certificate, that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original.

From 2 R. S. 408 (Part 3, c. 7, tit. 3), § 59.

§ 958. Certificate must be sealed.

If the officer, or the court, body, or board, in whose custody an original paper, specified in the last section, is required to be, by the laws of the State, or of another state, or of the United States, or of a territory thereof, or of a foreign country, has, pursuant to those laws, an official seal, the certificate must be attested by that seal. If the certificate is made by the clerk of a county, within the State, it must be attested by the seal of the county.

From Id., § 59.

§ 959. [Am'd, 1877.] Qualification of last section.

The last section does not require the seal of a court to be affixed to a certified copy of an order, or of a paper filed therein, or entry made, where the copy is used in the same court, or before an officer thereof; or, in the supreme court, where it is used in a circuit court, or a court of oyer and terminer.[1]

From Id., § 60. Am'd by L. 1877, c. 416.

§ 960.[2] [Added, 1892; am'd, 1906.] Evidence, in actions for injury to unoccupied lands and timber thereon.

In all actions to recover the possession of, or otherwise to determine the title to, or for trespass upon or injury to, unoccupied lands, timber, trees or underwood thereon, except an action in which any county or any state or county officer, board or commission is a party defendant, the plaintiff may show an unbroken chain of title or conveyance of the land to himself for thirty years next preceding the commencement of the action, or if an action for trespass, next preceding the commission of the trespass or injury, and such proof shall be presumptive evidence of ownership at the times, respectively, of the commencement of such action or commission of such trespass or injury, but such presumption may be rebutted by the

[1] The present "trial term" of the supreme court corresponds to the former "circuit court," and the present criminal part of the supreme court to the former "court of oyer and terminer."

[2] The original § 960 was repealed by the Statutory Construction Law, L. 1892, c. 677. Its substance is now found in § 43 of the General Construction Law. See Appendix I, post.

defendant by showing ownership of said lands at the times, respectively, of the commencement of said action or the commission of said trespass or injury, in some person other than the plaintiff.

Added by L. 1898, c. 32. Am'd by L. 1906, c. 509 (in effect Sept. 1, 1906).

§ 961. [Am'd, 1909, 1915.] Searching records in the surrogates' offices and certifying in regard thereto.

A surrogate's clerk must, upon request, and upon payment of, or offer to pay, the fees allowed by law, or, if no fees are expressly allowed by law, fees at the rate allowed to a county clerk for a similar service, diligently search the files, papers, records, and dockets in the surrogate's office; and either make one or more transcripts therefrom, and certify to the correctness thereof, and to the search, or certify that a document or paper cannot be found in such office.

From L. 1847, c. 470, § 40. Am'd by L. 1909, chs. 65 and 240; L. 1915, c. 207 (in effect September 1, 1915). (See Table, p. iii, ante.)

§ 961a. [Added, 1909.] Determining age of child.

Whenever in any proceeding or trial it becomes necessary to determine the age of a child, such child may be produced and exhibited to enable the magistrate, court or jury to determine its age by a personal inspection; and such court or magistrate may direct an examination by one or more physicians, whose opinion shall also be competent evidence upon the question of such age.

From L. 1882, c. 340, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 961b. [Added, 1909.] Proof of written instruments where there are subscribing witnesses.

Except in the case of written instruments to the validity of which a subscribing witness, or subscribing witnesses, is, or are necessary, whenever, upon the trial of any action, or upon the hearing of any judicial proceeding, a written instrument is offered in evidence, to which there is a subscribing witness, it shall not be necessary to call such subscribing witness, but such instrument may be proved in the same manner as it might be proved if there were no subscribing witness thereto.

From L. 1883, c. 195, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 961c. [Added, 1909.] Proof of payments by a municipal corporation or officer thereof.

In any action or proceeding now pending or hereafter to be brought in any of the courts of this state, the payment of any sum of money by a municipal corporation, or an officer thereof, may be proved by a receipt purporting upon its face to be given therefor, and to entitle such receipt to be read in evidence, no further or other proof shall be necessary than that it is produced from the files of the office of the chief financial officer of such municipal corporation, or from the files of the office of the person or department charged with the duty of making the payment.

Every such receipt so read in evidence shall be presumptive proof of the fact of the payment to the person by or in whose behalf it purports to be signed of the sum of money and for the purpose therein expressed. But no such receipt shall be entitled to be read in evidence by virtue of the provisions of this section, unless it was given at least six years before the commencement of the action or proceeding in which it shall be offered as evidence. And the date or time appearing upon its face shall be presumptive proof that it was given at such date or time. Nothing in this section contained shall be held to prevent any party to such an action or proceeding from proving affirmatively that the payment so appearing to have been made has not in fact been made.

From L. 1884, c. 376, §§ 1, 2. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 961d. [Added, 1909.] Proof of instrument by submitting disputed and genuine handwriting.

Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing, shall be permitted and submitted to the court and jury in like manner.

From L. 1880, c. 36, § 1, as am'd by L. 1888, c. 555, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 961e. [Added, 1909.] Proof of lost execution or writ under which sheriff's sale of real property was made.

Whenever, upon the trial of an action it shall appear that at least twenty years theretofore real property has been sold by a sheriff for enforcement of the valid lien thereon of a duly docketed judgment, and that a certificate of the sale has been duly made by the sheriff and filed, and that a conveyance in completion of the purchase has been executed and recorded, but that the execution or writ by virtue of which the sale has so been made can not be found in the office of the clerk with whom the same should have been filed, then and in such case the recital of or reference to such execution or writ contained in the said certificate, or in the said conveyance, or in the record thereof shall be prima facie evidence of the said execution or writ and of the issue of the same as against any party whose claim of title is not shown to have been accompanied or supported by peaceable possession of the premises in controversy for at least three years immediately preceding the commencement of the action.

From L. 1880, c. 158, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 961f. [Added, 1909.] Evidence of weather conditions.

Any record of the observations in regard to the conditions of the weather, or in regard to the amount and conditions of the precipitation, taken under the direction of the New York state weather bureau, or any copy thereof, when certified in the form of and pursuant to law by the officer in charge thereof at the place where such record is duly filed, that the same is a true copy of such record, may be read in evidence in any court of this state,

and shall be prima facie evidence of the facts and circumstances therein stated.

From L. 1897, c. 622, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 962. Saving clause.

Nothing in title fourth of this chapter prevents the proof of a fact, act, record, proceeding, document, or other paper or writing, according to the rules of the common law or by any other competent proof.

From 2 R. S. 397 (Part 3, c. 7, tit. 3), § 28; L. 1846, c. 240, § 2.

CHAPTER X.

Trials; Including Jurors and Juries.

TITLE I.—Trials Generally; Including Exceptions and Motion for a New Trial.
TITLE II.—Trials without a Jury.
TITLE III.—Trial Jurors, except in New York and Kings Counties; Mode of Selecting Them, and of Procuring Their Attendance.
TITLE IV.—Trial Jurors in New York and Kings Counties; Mode of Selecting Them, and of Procuring Their Attendance.
TITLE V.—Trial by Jury.
TITLE VI.—Miscellaneous Provisions; Including Those Relating to Embracery, and Other Acts of Misconduct.

TITLE I.

Trials generally; including exceptions and motion for a new trial.

Article 1. Issues, and the mode of trial thereof.
2. The place of trial.
3. Exceptions, case, and motion for a new trial.

ARTICLE FIRST.

Issues, and the mode of trial thereof.

Sec. 963. Issues defined; different kinds of issues.
964. When issues of law arise; when issues of fact arise.
965. Issues to be judicially examined by a trial.
966. Order of trial, where issues of law and of fact arise in the same action.
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970. Order for trial by jury, of specific questions of fact; when of right.
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974. Counterclaim to be deemed an action, within the foregoing sections.
975. Immaterial issues need not be tried.
976. Trial before one judge; supreme court.
977. Notice of trial and note of issue. Calendar to be prepared.
978. Issues, how arranged. Order of disposition at a jury term.
979. Id.; when a jury does not attend.
980. Either party may bring issue to trial.
981. What papers to be furnished on trial, and by whom.

§ 963. Issues defined; different kinds of issues.

The issues, treated of in this chapter, are those only which are presented by the pleadings. An issue arises where a fact, or a conclusion of law, is maintained by one party, and controverted by the other. Issues are of two kinds:

1. Of law; and
2. Of fact.

From Co. Proc., § 248.

§ 964. When issues of law arise; when issues of fact arise.

An issue of law arises only upon a demurrer. An issue of fact arises, in either of the following cases:

1. Upon a denial, contained in the answer, of a material alle-

gation of the complaint; or upon an allegation, contained in the answer, that the defendant has not sufficient knowledge or information to form a belief, with respect to a material allegation of the complaint.

2. Upon a similar denial or allegation, contained in the reply, with respect to a material allegation of the answer.

3. Upon a material allegation of new matter, contained in the answer, not requiring a reply; unless an issue of law is joined thereupon.

4. Upon a material allegation of new matter, contained in the reply; unless an issue of law is joined thereupon.

From Co. Proc., §§ 249, 250.

§ 965. [Am'd, 1879.] Issues to be judicially examined by a trial.

An issue, either of law or of fact, must be tried as prescribed in this chapter, unless it is disposed of as prescribed in chapter sixth of this act.

From Co. Proc., § 252. Am'd by L. 1879, c. 542.

§ 966. [Am'd, 1877.] Order of trial, where issues of law and of fact arise in the same action.

Where an issue of law and an issue of fact arise in one action, the issue of law must be first disposed of, except as otherwise prescribed in the next section.

From Co. Proc., § 251. Am'd by L. 1877, c. 416.

§ 967. [Am'd, 1877.] But court may direct the order, etc., of disposition of the issues.

A separate trial, between the plaintiff and one or more defendants, of some or all of the issues of fact, or one trial of some or all of the issues of law, or a change in the order of disposition of the issues, may be directed by the court, in its discretion. Such a direction may be given, in an order, made upon notice; or, except where an application for such an order has been denied, it may be given, by the judge holding the term, where those issues are regularly upon the calendar for trial, either with or without the entry of an order.

From Co. Proc., §§ 251, 258. Am'd by L. 1877, c. 416.

§ 968. [Am'd, 1877.] What issues of fact are triable by a jury.

In each of the following actions, an issue of fact must be tried by a jury unless a jury trial is waived, or a reference is directed:

1. An action in which the complaint demands judgment for a sum of money only.

2. An action of ejectment; for dower; for waste; for a nuisance; or to recover a chattel.

From Co. Proc., § 253. Am'd by L. 1877, c. 416.

§ 969. What issues are triable by the court.

An issue of law, in any action, and an issue of fact, in an action not specified in the last section, or wherein provision for a trial by a jury is not expressly made by law, must be tried by the court, unless a reference or a jury trial is directed.

From Co. Proc., §§ 253, 254.

§ 970. [Am'd, 1877, 1891, 1892.] Order for trial by jury, of specific questions of fact; when of right.

Where a party is entitled by the constitution, or by express provision of law, to a trial by a jury, of one or more issues of fact,

in an action not specified in section 968 of this act, he may apply, upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated for trial accordingly. Upon the hearing of the application, the court must cause the issues, to the trial of which by a jury the party is entitled, to be distinctly and plainly stated. The subsequent proceedings are the same, as where questions arising upon the issues, are stated for trial by a jury, in a case where neither party can, as of right, require such a trial; except that the finding of the jury upon such questions so stated, is conclusive in the action unless the verdict is set aside, or a new trial is granted.

From Co. Proc., § 254. Am'd by L. 1877, c. 416; L. 1891, c. 208; L. 1892, c. 186.

§ 971. [Am'd, 1877.] Id.; when discretionary.

In an action, where a party is not entitled, as of right, to a trial by a jury, the court may, in its discretion, upon the application of either party, or without application, direct that one or more questions of fact, arising upon the issues, be tried by a jury, and may cause those questions to be distinctly and plainly stated for trial accordingly.

From Co. Proc., § 254. Am'd by L. 1877, c. 416.

§ 972. [Am'd, 1877.] Trial of the remainder of the issues.

If the questions, directed to be tried by a jury, as prescribed in the last two sections, do not embrace all the issues of fact in the action, the remaining issues of fact must be tried by the court, or by a referee.

From Co. Proc., § 254. Am'd by L. 1877, c. 416.

§ 973. [Added, 1907.] One or more issues may be ordered to be tried separately.

The court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case.

Added by L. 1907, c. 526 (in effect Sept. 1, 1907).

§ 974. [Am'd, 1877.] Counterclaim to be deemed an action, within the foregoing sections.

Where the defendant interposes a counterclaim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same, as if it arose in an action, brought by the defendant, against the plaintiff, for the cause of action stated in the counterclaim, and demanding the same judgment.

New. Am'd by L. 1877, c. 416.

§ 975. Immaterial issues need not be tried.

An issue, the disposition of which is not necessary to enable the court to render the appropriate judgment, is not required to be tried.

New.

§ 976. [Am'd, 1895, 1900, 1909.] What issues to be tried before one judge; regulation of trial in the supreme court.

An issue of law, or an issue of fact, triable by a jury or by the court, must be tried at a term held by one judge only. In the supreme court, an issue of fact triable by jury must be tried at a trial term thereof, and an issue of fact triable by the court may be tried at a trial term or a special term of the supreme court as prescribed in the general rules of practice. An issue of law may be brought on and tried at any term of court as a contested motion.

From Co. Proc., § 255. Am'd by L. 1895, c. 946; L. 1900, c. 669; L. 1909, c. 499 (in effect Sept. 1, 1909).

§ 977. [Am'd, 1877, 1883, 1896, 1898, 1899, 1903, 1904, 1907, 1909, 1911, 1912, 1915.] Notice of trial and note of issue. Calendar to be prepared.

At any time after the joinder of issue, and at least fourteen days before the commencement of the term, either party may serve a notice of trial. The party serving the notice must file with the clerk a note of issue, stating the title of the action, the names of the attorneys, the time when the last pleading was served, the nature of the issue, whether of fact or of law; and, if an issue of fact, whether it is triable by jury, or by the court, without a jury, and the particular nature of the same and the object of the action. The note of issue must be filed at least twelve days before the commencement of the term. The clerk must thereupon enter the cause upon the calendar according to the date of issue. The clerk must prepare the calendar and have the necessary copies ready for distribution at least five days before the commencement of the term. In the counties of New York, Kings, Bronx, Queens, Nassau, Richmond, Albany, Erie, Niagara, Monroe, Onondaga, Schenectady, and Westchester, where a party has served a notice of trial, and filed a note of issue, for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the action must remain on the calendar until it is disposed of.

From Co. Proc., § 256; L. 1876, c. 431, § 9. Am'd by L. 1877, c. 416; L. 1882, c. 96; L. 1896, c. 565; L. 1898, c. 70; L. 1899, c. 18; L. 1903, c. 51; L. 1904, c. 474; L. 1907, c. 211; L. 1909, c. 65; L. 1911, c. 218; L. 1912, c. 96; L. 1915, c. 60 (in effect March 11, 1915). (See Table, p. iii, ante.)

§ 978. [Am'd, 1877.] Issues, how arranged. Order of disposition at a jury term.

The issues on the calendar must be arranged by the clerk in the following order:

1. Issues of fact.
2. Issues of law.

Where a jury is in attendance, the issues must be disposed of in the same order; unless, for the convenience of parties, or the dispatch of business, the judge holding the term otherwise directs.

From Co. Proc., § 257. Am'd by L. 1877, c. 416.

§ 979. Id.; when a jury does not attend.

Where a jury is not in attendance, issues of law have a preference over issues of fact; unless the judge holding the term otherwise directs.

See Co. Proc., § 255, last sentence.

§ 980. [Am'd, 1877.] Either party may bring issue to trial.

Either party, who has served the notice, may bring the issue to trial; and, in the absence of the adverse party, unless the judge holding the term, for good cause, otherwise directs, may proceed with the cause, and take a dismissal of the complaint, or a verdict, decision, or judgment, as the case requires. An inquest, for want of an affidavit of merits, cannot be taken where the answer is verified.

From Co. Proc., § 256; L. 1876, c. 431, § 10. Am'd by L. 1877, c. 416.

§ 981. What papers to be furnished on trial, and by whom.

Where the issue is brought to trial by the plaintiff, he must furnish the court with copies of the summons and pleadings, and of the offer, if any has been made. Where the issue is brought to trial by the defendant, and the plaintiff does not furnish these papers, they must be furnished by the defendant.

From Co. Proc., § 259.

ARTICLE SECOND.

The place of trial.

Sec. 982. Certain actions to be tried where the subject thereof is situated.
982a. Actions relating to real property situate without the state.
983. Other actions, where the case thereof arose.
984. Other actions, according to the residence of the parties.
985. Place of trial, if proper county not designated.
986. Defendant may demand change; proceedings thereupon.
987. When court may change the place of trial.
988. Effect of changing the place of trial.
989. Effect of order changing place of trial.
990. Issues of law and certain issues of fact; where triable.
991. This article applicable only to the supreme court.

§ 982. Certain actions to be tried where the subject thereof is situated.

Each of the following actions must be tried in the county, in which the subject of the action, or some part thereof, is situated: an action of ejectment; for the partition of real property; for dower; to foreclose a mortgage upon real property, or upon a chattel real; to compel the determination of a claim to real property; for waste; for a nuisance; or to procure a judgment, directing a conveyance of real property; and every other action to recover, or to procure a judgment, establishing, determining, defining, forfeiting, annulling, or otherwise affecting, an estate, right, title, lien, or other interest, in real property, or a chattel real. But where all the real property, to which the action relates, is situated without the State, the action must be tried, as prescribed in section 984 of this act.

From Co. Proc., § 123.

§ 982a. [Added, 1913.] Actions relating to real property situate without the state.

An action may be maintained in the courts of this state to recover damages for injuries to real estate situate without the state, or for breach of contracts or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state. The action must be tried in the county in which the parties or some one thereof resides, or if no party resides within the state, in any county.

Added by L. 1913, c. 76 (in effect Sept. 1, 1913).

§ 983. [Am'd, 1877, 1890.] Other actions, where the cause thereof arose.

An action, for either of the following causes, must be tried in the county, where the cause of action, or some part thereof, arose:

1. To recover a penalty or forfeiture, imposed by statute, except that, where the offence, for which it is imposed, was committed on a lake, river, or other stream of water, situated in two or more counties, the action may be tried in any county bordering on the lake, river, or stream, and opposite to the place where the offence was committed. But in an action where the people of the State are a party, to recover a penalty for trespass upon the lands of the forest preserve, the action may be tried in a county adjoining the county where the cause of action arose.

2. Against a public officer, or a person specially appointed to execute his duties, for an act done, in virtue of his office, or for an omission to perform a duty, incident to his office; or against a person, who, by the command or in the aid of a public officer, has done any thing touching his duties.

3. To recover a chattel distrained, or damages for distraining a chattel.

From Co. Proc., § 124. Am'd by L. 1877, c. 416; L. 1890, c. 179.

§ 984. Other actions, according to the residence of the parties.

An action, not specified in the last two sections, must be tried in the county, in which one of the parties resided, at the commencement thereof. If neither of the parties then resided in the State, it may be tried in any county, which the plaintiff designates, for that purpose, in the title of the complaint.

From Co. Proc., § 125.

§ 985. Place of trial, if proper county not designated.

If the county, designated in the complaint, as the place of trial, is not the proper county, the action may notwithstanding be tried therein; unless the place of trial is changed to the proper county, upon the demand of the defendant, followed by the consent of the plaintiff, or the order of the court.

From Co. Proc., § 126, first sentence.

§ 986. Defendant may demand change; proceedings thereupon.

Where the defendant demands that the action be tried in the proper county, his attorney must serve upon the plaintiff's attorney, with the answer, or before service of the answer, a written demand accordingly. The demand must specify the county, where the defendant requires the action to be tried. If the plaintiff's attorney does not serve his written consent to the change, as proposed by the defendant, within five days after service of the demand, the defendant's attorney may, within ten days thereafter, serve notice of a motion to change the place of trial.

Id.

§ 987. When court may change the place of trial.

The court may, by order, change the place of trial, in either of the following cases:

1. Where the county, designated for that purpose in the complaint, is not the proper county.
2. Where there is reason to believe, that an impartial trial cannot be had in the proper county.
3. Where the convenience of witnesses, and the ends of justice, will be promoted by the change.

From Co. Proc., part of § 126.

§ 988. [Am'd, 1877.] Effect of changing the place of trial.

Where the place of trial is changed to another county, the subsequent proceedings shall be had in the county to which the change is made, the same as if it had been designated in the complaint, as the place of trial; except as otherwise directed by the court, or provided by the written consent of the parties, filed with the clerk. And the clerk of the county, from which it is changed, must forthwith deliver to the clerk of the county, to which it is changed, all papers filed in the action, and certified copies of all minutes and entries relating thereto, which must be filed, entered, or recorded, as the case requires, in the office of the last named clerk.

From Id., § 126, last sentence. Am'd by L. 1877, c. 416.

§ 989. [Am'd, 1877.] Effect of order changing place of trial. Rule 147

An order to change the place of trial takes effect, upon the entry thereof, in the office of the clerk of the county, from which the place of trial is changed. But for the purposes of the place of hearing a motion to set it aside, or an appeal therefrom, the place of trial is deemed unchanged.

New. Am'd by L. 1877, c. 416.

§ 990. [Am'd, 1879, 1913.] Issues of law and certain issues of fact; where triable.

An issue of law, or an issue of fact triable by the court without a jury, arising in a county where no special terms distinct from trial terms are appointed to be held for the trial of such cases, may be tried at a special term in any county within the judicial district embracing the county wherein the action is triable; but after the trial, the decision and all other papers relating to the trial must be filed, and the judgment rendered must be entered, in the last named county. (155)

New. Am'd by L. 1879, c. 542; L. 1913, c. 446 (in effect Sept. 1, 1913).

§ 991. This article applicable only to the supreme court.

This article is applicable to an action in the supreme court only.

New.

ARTICLE THIRD.

Exceptions, case, and motions for a new trial.

Sec. 992. What rulings may be excepted to.
993. Exceptions to findings of fact.
994. When and how exceptions may be taken, after close of trial by court or referee.
995. Id., during the trial, or upon trial by jury.
996. Ruling excepted to; how reviewed.
997. Case, when necessary; how made and settled.
998. When appeal, etc., may be heard without a case.
999. Motion for new trial upon judge's minutes; appeal from order thereupon.
1000. When and how exceptions, taken upon a jury trial, heard by the appellate division.
1001. Motion for new trial at the appellate division when trial was by court or referee.
1002. When motion for new trial to be made at special term. Restrictions thereupon.
1003. Application of this article to trials of specific questions by jury; special provisions applicable thereto.
1004. Motion for new hearing, after trial of specific questions by a referee.
1005. Final judgment, etc., not stayed, by motion for a new trial. Motion may be heard afterwards.
1006. When exception not to prejudice motion for new trial.
1007. Notes of stenographer may be treated as minutes of the judge.

§ 992. What rulings may be excepted to.

An exception may be taken to the ruling of the court or of a referee, upon a question of law, arising upon the trial of an issue of fact. Except as prescribed in section 1180 of this act, an exception cannot be taken to a ruling upon a question of fact. For the purposes of this article, a trial by a jury is regarded as continuing, until the verdict is rendered.

New.

§ 993. [Am'd, 1894; repealed, 1895; reënacted 1903.] Exceptions to findings of fact.

Upon the trial of an issue of fact by a referee or by a court without a jury, a finding of fact without any evidence tending to sustain it, is a ruling upon a question of law within the meaning of the last section. The appellate division of the supreme court shall, on appeal from a judgment entered on the report of a referee, or the decision of a court on such trial, review all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party the judgment which the facts warrant.

New. Am'd by L. 1894, c. 688; repealed by L. 1895, c. 946; reënacted, with amendments, by L. 1903, c. 85 (in effect Sept. 1, 1903).

§ 994. When and how exceptions may be taken, after close of trial by court or referee.

Where an issue of fact is tried by a referee, or by the court, without a jury, an exception to a ruling, upon a question of law, made after the cause is finally submitted must be taken, by filing a notice of the exception in the clerk's office, and serving a copy thereof upon the attorney for the adverse party. The exception may be so taken, at any time before the expiration of ten days after service, upon the attorney for the exceptant, of a copy of the decision of the court, or report of the referee, and a written notice of the entry of judgment thereupon. If the notice of exception is filed before the entry of final judgment, it must be inserted in the judgment-roll; if afterwards, it must be annexed to the judgment-roll. In either case, it constitutes a part of the papers, upon which an appeal from the judgment must be heard.

From Co. Proc., §§ 268, 272.

§ 995. Id.; during the trial, or upon trial by jury.

In any other case, an exception must be taken, at the time when the ruling is made, unless it is taken to the charge given to the jury; in which case, it must be taken before the jury have rendered their verdict. It must, at the time when it is taken, be reduced to writing by the exceptant, or entered in the minutes.

From 2 R. S. 422 (Part 3, c. 7, tit. 4), §§ 73, 74, as modified by Co. Proc., § 264.

§ 996. Ruling excepted to; how reviewed.

A ruling, to which an exception is taken, as prescribed in the last four sections, can be reviewed only upon an appeal from the judgment, rendered after the trial; except in a case, where it is expressly prescribed by law, that a motion for a new trial may be made thereupon.

New.

§ 997. [Am'd, 1877, 1895.] Case, when necessary; how made and settled.

When a party intends to appeal from a judgment, rendered after the trial of an issue of fact, or to move for a new trial of such an issue, he must, except as otherwise prescribed by law, make a case, and procure the same to be settled and signed, by the judge, justice or the referee, by or before whom the action was tried, as prescribed in the general rules of practice; or, in a case of the death or disability of the judge, justice or referee, in such manner as the court directs. The case must contain so much of the evidence, and other proceedings upon the trial, as is material to the questions to be raised thereby, and also the exceptions taken by the party making the case; and in a case where a special question is submitted to the jury, or the jury have assessed damages, such exceptions taken by any party to the action as shall be necessary to determine whether there should be a new trial in case the judgment should be reversed. If it afterwards becomes necessary to separate the exceptions, the separation may be made, and the exceptions may be stated, with so much of the evidence and other proceedings, as is material to the questions raised by them, in a case, prepared and settled, as directed in the general rules of practice; or, in the absence of directions therein, by the court, upon motion. It is not necessary to state, in a case, that a finding upon the facts, or a ruling upon the law, was made, where the finding or ruling appears in a referee's report, or in the decision of the court, upon a trial by the court, without a jury.

From Co. Proc., §§ 264, 268, 272. Am'd by L. 1877, c. 416; L. 1895, c. 946 (In effect Jan. 1, 1896).

§ 998. When appeal, etc., may be heard without a case.

It is not necessary to make a case, for the purpose of moving for a new trial, upon the minutes of the judge, who presided at a trial by a jury: or upon an allegation of irregularity, or surprise: or where a party intends to appeal from a judgment entered upon a referee's report, or a decision of the court upon a trial, without a jury, and to rely only upon exceptions, taken as prescribed in section 994 of this act.

From Co. Proc., § 268.

§ 999. [Am'd, 1899.] Motion for new trial upon judge's minutes; appeal from order thereupon.

The judge, presiding at a trial by a jury, may, in his discretion, entertain a motion, made upon his minutes, at the same term, to set aside the verdict or a direction dismissing the complaint and grant a new trial upon exceptions; or because the verdict is for excessive or insufficient damages, or otherwise contrary

to the evidence, or contrary to law. If an appeal is taken from the order, made upon the motion, it must be heard upon a case prepared and settled in the usual manner.

From Co. Proc., part of § 264. Am'd by L. 1889, c. 262.

§ 1000. [Am'd, 1877, 1882, 1895.] When and how exceptions, taken upon a jury trial, heard by the appellate division.

Upon the application of a party who has taken one or more exceptions, the judge presiding at a trial by jury, may, in his discretion, at any time during the same term, direct an order to be entered, that the exceptions so taken be heard in the first instance by the appellate division of the supreme court; and that judgment be suspended in the mean time. At any time before the hearing of the exceptions the order may be revoked or modified, upon notice, in court or out of court, by the judge who made it; or it may be set aside for irregularity, by the court, at any term thereof. Unless it is so revoked or set aside, the exceptions must be heard upon a motion for a new trial, which must be decided by the appellate division. The motion is deemed to have been made, when the order was granted; and either party may notice it for hearing at a term of the appellate division, upon the exceptions.

From Co. Proc., § 265. Am'd by L. 1877, c. 418; L. 1882, c. 29; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1001. [Am'd, 1895.] Motion for new trial at the appellate division, when trial was by court or referee.

Where the decision or report, rendered upon the trial of an issue of fact by the court, without a jury, or by a referee, directs an interlocutory judgment to be entered; and further proceedings must be taken before the court or a judge thereof, or a referee, before a final judgment can be entered, a motion for a new trial, upon one or more exceptions, may be made at a term of the appellate division of the supreme court, after the entry of the interlocutory judgment, and before the commencement of the hearing directed therein. The time within which the party must except, for that purpose, to a ruling of law made upon such a trial, by the judge or the referee, after the close of the testimony, is ten days after service of a copy of the decision or report, and notice of the entry of the interlocutory judgment thereupon.

From Co. Proc., § 268. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1002. [Am'd, 1884, 1890.] When motion for new trial to be made at special term. Restrictions thereupon.

In a case not specified in the last three sections, a motion for a new trial must, in the first instance, be heard and decided at the special term. But where it is founded upon an allegation of error, in a finding of fact, or ruling upon the law, made by the judge upon the trial, it cannot be made, unless notice therefor be given before the expiration of the time within which an appeal can be taken from the judgment, and it cannot be heard at a special term, held by another judge; unless the judge, who presided at the trial, is dead, or his term of office has expired, or he is disqualified for any reason, or he specifically directs the motion to be heard before another judge. And a trial by a referee cannot be reviewed, by a motion for a new trial, founded upon such an allegation, except in a case specified in the last section.

From Co. Proc., § 265. Am'd by L. 1884, c. 408; L. 1890, c. 208.

§ 1003. [Am'd, 1895.] Application of this article to trials of specific questions by jury; special provisions applicable thereto.

The provisions of this article, relating to the proceedings to review a trial by a jury, are applicable to the trial, by a jury, of one or more specific questions of fact, arising upon the issues, in an action triable by the court. But, except in a case specified in section 970 of this act, a new trial may be granted, as to some of the questions so tried, and refused as to the others; and an error, in the admission or exclusion of evidence, or in any other ruling or direction of the judge, upon the trial, may, in the discretion of the court which reviews it, be disregarded, if that court is of opinion, that substantial justice does not require that a new trial should be granted. Where the judge, who presided at the trial, neither entertains a motion for a new trial, nor directs exceptions, taken at the trial, to be heard at a term of the appellate division of the supreme court, a motion for a new trial can be made only at the term, where the motion for final judgment is made, or the remaining issues of fact are tried, as the case requires.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1004. Motion for new hearing, after trial of specific questions by a referee.

In an action triable by the court, where a reference has been made, to report upon one or more specific questions of fact, involved in the issue, a motion for a new hearing may be made at a special term, at any time before the hearing of a motion for final judgment, or the trial of the remaining issues of fact. The motion must be made upon affidavits, unless the court, or a judge thereof, directs a case to be prepared and settled.

New.

§ 1005. Final judgment, etc., not stayed, by motion for a new trial. Motion may be heard afterwards.

The entry of final judgment, and the subsequent proceedings to collect or otherwise enforce it, are not stayed by an exception, the preparation or settlement of a case, or a motion for a new trial, unless an order for such a stay is procured and served; and the entry, collection, or other enforcement of a judgment does not prejudice a subsequent motion for a new trial. Where a new trial is granted, the court may direct and enforce restitution, as where a judgment is reversed upon appeal.

From L. 1882, c. 128, § 1.

§ 1006. When exception not to prejudice motion for new trial.

The taking of an exception, upon a trial by a jury, or the statement thereof in a case, as prescribed in this article, does not prejudice a motion for a new trial, on the ground that the verdict was contrary to evidence; but such a motion may be made, before or after the hearing of the exception; or, in the discretion of the court before which the exception is heard, at the time of the hearing.

From 2 R. S. 422 (Part 3, c. 7, tit. 4), § 76.

§ 1007. [Am'd, 1883, 1884, 1909.] Notes of stenographer may be treated as minutes of the judge.

The notes of an official stenographer or assistant stenographer, taken at a trial, when written out at length, may be treated, in the discretion of the judge, as the minutes of the judge upon the trial, for the purposes of this article.

New. Am'd by L. 1883, c. 218; L. 1884, c. 277; L. 1909, c. 65 (See Table, p. iii, ante).

TITLE II.

Trials without a jury.

Sec. 1008. If trial by jury waived, action must be tried by the court.
1009. Trial by jury; how waived.
1010. Decision upon trial by the court, when to be filed; consequence of failure.
1011. Reference by consent; when and how made.
1012. Qualification of the last section.
1013. Compulsory reference for the trial of issues; in what cases it may be made.
1014. Proceedings where the reference is for trial of part of the issues.
1015. Compulsory reference upon questions incidentally arising.
1016. Referee to be sworn.
1017. Witnesses may be subpoenaed.
1018. General powers of a referee upon a trial.
1019. Referee's report; when to be made; consequence of failure.
1020. Double or other increased damages.
1021. Decision of court or report of referee, upon trial of demurrer.
1022. Id.; upon trial of the whole issues of fact.
1023. Parties may require court or referee to determine particular questions.
1024. Qualifications of a referee.
1025. Several referees may be appointed.
1026. Proceedings regulated where there are several referees.

§ 1008. [Am'd, 1877.] If trial by jury waived, action must be tried by the court.

In an action triable by a jury, if the parties waive the trial, by a jury, of the issue[1] of fact, the action must be tried by the court, without a jury: unless a reference is directed, in a case prescribed by law. But such an action, other than to recover damages for breach of a contract, cannot be tried by the court, without a jury, unless the judge, presiding at the term where it is brought on for trial, assents to such a trial. His refusal so to assent annuls a waiver, made as prescribed in subdivision second, third, or fourth of the next section.

From Co. Proc., §§ 253, 254, 266. Am'd by L. 1877, c. 416.

§ 1009. [Am'd, 1877.] Trial by jury; how waived.

A party may waive his right to the trial of the issue of fact, by a jury, in any of the following modes:

1. By failing to appear at the trial.
2. By filing with the clerk a written waiver, signed by the attorney for the party.
3. By an oral consent in open court, entered in the minutes.
4. By moving the trial of the action, without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial.

From Co. Proc., § 266. Am'd by L. 1877, c. 416.

§ 1010. Decision upon trial by the court, when to be filed; consequence of failure.

Upon a trial, by the court, of an issue of fact or of law, its decision, in writing, must be filed, in the clerk's office, within twenty days after the final adjournment of the term, where the issue was tried. If it is not so filed, either party may move, at a special term, for a new trial upon that ground. If the decision has not been filed, when the motion is heard, the court must make an order for a new trial, either absolutely, or unless it is filed, within a time specified in the order. If an order for a

[1] Error in engrossing for "issues."

new trial is made, or a contingent order for a new trial becomes absolute, the costs of the former trial abide the event.

From Co. Proc., § 267.

§ 1011. [Am'd, 1879.] Reference by consent; when and how made.

Except in a case specified in the next section, the whole issue, or any of the issues in an action, either of fact or of law, must be referred, upon the consent of the parties, manifested by a written stipulation, signed by their attorneys, and filed with the clerk. Where the stipulation does not name the referee, he may be designated by the court, on motion of either party. Where the stipulation names the referee, the clerk must enter an order, of course, referring the issue or issues for trial, to that person only. If the referee named in a stipulation refuses to serve, or if a new trial of an action tried by a referee so named is granted, the court must appoint another referee, unless the stipulation expressly provides otherwise.

From Id., §§ 270, 273. Am'd by L. 1879, c. 542.

§ 1012. [Am'd, 1898.] Qualification of the last section.

But a reference shall not be made, of course, upon the consent of the parties, in an action to annul the marriage, or for a divorce or a separation; or an action against a corporation, to obtain a dissolution thereof, the appointment of a receiver of its property, or the distribution of its property, unless it is brought by the attorney general; or an action wherein a defendant, to be affected by the result of the trial, is an infant. In a case specified in this section, where the parties consent to a reference, the court may, in its discretion, grant or refuse a reference; and, where a reference is granted, the court must designate the referee. If the referee, thus designated, refuses to serve, or if a new trial of an action tried by a referee, so designated, is granted, the court must, upon the application of either party, appoint another referee.

From Co. Proc., § 273. Am'd by L. 1898, c. 317 (in effect Sept. 1, 1898).

§ 1013. Compulsory reference for the trial of issues; in what cases it may be made.

The court may, of its own motion, or upon the application of either party, without the consent of the other, direct a trial of the issues of fact, by a referee, where the trial will require the examination of a long account, on either side, and will not require the decision of difficult questions of law. In an action, triable by the court, without a jury, a reference may be made, as prescribed in this section, to decide the whole issue, or any of the issues; or to report the referee's finding, upon one or more specific questions of fact, involved in the issue.

From Co. Proc., § 271. Made applicable to City Court of New York by L. 1896, c. 954, § 2; L. 1902, c. 515; see § 3160, post.

§ 1014. Proceedings where the reference is for trial of part of the issues.

Where a reference is made, as prescribed in the last section, to report upon a specific question of fact, involved in the issue, and the determination of one or more other issues is necessary, in order to enable the court to render judgment, they must be tried, either before or after the filing of the report, as the court directs, and either by a jury, or by the court, without a jury, as the case requires. Where they are tried by a jury, application for judgment must be made upon the verdict and the report.

From Co. Proc., § 272.

§ 1015. Compulsory reference upon questions incidentally arising.

The court may likewise, of its own motion, or upon the application of either party, without the consent of the other, direct a reference to take an account, and report to the court thereon, either with or without the testimony, after interlocutory or final judgment, or where it is necessary to do so, for the information of the court; and also to determine and report upon a question of fact, arising in any stage of the action, upon a motion, or otherwise, except upon the pleadings.

From Co. Proc., § 271, subds. 2 and 3.

§ 1016. Referee to be sworn.

A referee, appointed as prescribed in either of the foregoing sections of this title, must, before proceeding to hear the testimony, be sworn faithfully and fairly to try the issues, or to determine the questions referred to him, as the case requires, and to make a just and true report, according to the best of his understanding. The oath may be administered by an officer specified in section 842 of this act. But where all the parties, whose interest will be affected by the result, are of age, and present, in person or by attorney, they may expressly waive the referee's oath. The waiver may be made by written stipulation, or orally. If it is oral, it must be entered in the referee's minutes.

From 2 R. S. 384 (Part 3, c. 6, tit. 6), § 44.

§ 1017. Witnesses may be subpoenaed.

A witness may be subpoenaed to attend before a referee, appointed as prescribed in either of the foregoing sections of this title, to testify, and, in a proper case, to bring with him a book, document, or other paper, as upon a trial by the court.

From Id., § 45.

§ 1018. General powers of a referee upon a trial.

The trial, by a referee, of an issue of fact, or of an issue of law, must be brought on upon like notice, and conducted in like manner, and the papers to be furnished thereupon are the same, and are furnished in like manner, as where the trial is by the court, without a jury. The referee exercises, upon such a trial, the same power as the court, to grant adjournments, to preserve order, and punish the violation thereof. Upon the trial of an issue of fact, the referee exercises also the same power as the court, to allow amendments to the summons, or to the pleadings; to compel the attendance of a witness by attachment; and to punish a witness for a contempt of court, for non-attendance, or refusal to be sworn, or to testify. Upon the trial of an issue of law, the referee exercises the same power as the court, to permit a party in fault to plead anew or amend; to direct the action to be divided into two or more actions; to award costs, and otherwise to dispose of any question, arising upon the decision of the issue referred to him. The powers, conferred by this section, are exercised in like manner, and upon like terms, as similar powers are exercised by the court, upon a trial.

From Co. Proc., § 272.

§ 1019. [Am'd, 1882.] Referee's report; when to be made; consequence of failure.

Upon the trial, by a referee, of an issue of fact, or an issue of law, or where a reference is made as prescribed in section 1015 of this act, the referee's written report must be either filed with the clerk, or delivered to the attorney for one of the parties, within sixty days from the time when the cause or matter is finally submitted; otherwise either party may before it is filed or delivered,

serve a notice, upon the attorney for the adverse party, that he elects to end the reference. In such a case, the action must thenceforth proceed, as if the reference had not been directed; and the referee is not entitled to any fees.

From Co. Proc., § 273. Am'd by L. 1882, c. 397.

§ 1020. Double or other increased damages.

Where the [1] double, treble, or other increased damages are given by statute, the decision of the court, or the report of the referee, must specify the sum awarded as single damages, and direct judgment for the increased damages.

New. See § 1184, post.

§ 1021. [Am'd, 1879, 1895.] Decision of court or report of referee, upon trial of demurrer.

The decision of the court, or the report of a referee, upon the trial of a demurrer, or upon the trial of the issues of fact or law, where a nonsuit is granted, must direct the final or interlocutory judgment to be entered thereupon, and in any such case it shall not be necessary for the court or referee to make any finding of fact. Where it directs an interlocutory judgment, with leave to the party in fault to plead anew or amend, or permitting the action to be divided into two or more actions, and no other issue remains to be disposed of, it may also direct the final judgment to be entered if the party in fault fails to comply with any of the directions given or terms imposed.

Substituted for Co. Proc., part of § 267. Am'd by L. 1879, c. 542; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1022. [Am'd, 1877, 1894, 1895, 1903.] Id.; upon trial of the whole issue of fact.

The decision of the court or the report of a referee upon the trial of the whole issues of fact, must state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment-roll. In an action where the costs are in the discretion of the court the decision or report must award or deny costs, and if it awards costs it must designate the party to whom the costs to be taxed are awarded.

From Co. Proc., §§ 267, 272. Am'd by L. 1877, c. 416; L. 1894, c. 688; L. 1895, c. 946; L. 1903, c. 85 (in effect Sept. 1, 1903).

§ 1023. [Re-enacted, 1904.] Parties may require court or referee to determine particular questions.

Before the cause is finally submitted to the court or the referee, or within such time afterwards, and before the decision or report is rendered, as the court or referee allows, the attorney for either party may submit, in writing, a statement of the facts, which he deems established by the evidence, and of the rulings upon questions of law, which he desires the court or the referee to make. The statement must be in the form of distinct propositions of law, or of fact, or both, separately stated; each of which must be numbered, and so prepared, with respect to its length, and the subject and phraseology thereof, that the court or referee may conveniently pass upon it. At or before the time, when the decision or report is rendered, the court or the referee must note, in the margin of the statement, the manner in which each proposition has been disposed of, and must either file, or return to the attorney, the statement thus noted; but an omission so to do does not affect the validity of the decision or report. An exception may be taken to a refusal of the court or referee to find any request thus submitted.

New. Repealed by L. 1894, c. 688; re-enacted by L. 1904, c. 491 (in effect Sept. 1, 1904).

[1] This word inserted by error in engrossing.

§ 1024. [Am'd, 1905.] Qualifications of a referee.

A referee, appointed by the court, must be free from all just objection; and no person shall be so appointed, to whom all the parties object, except in an action to annul a marriage, or for a divorce, or a separation. A judge cannot be appointed a referee,[1] in an action brought in a court, of which he is a judge, except by the written consent of the parties; and, in that case, he cannot receive any compensation as referee. No person shall be appointed a commissioner of estimate and appraisement in condemnation or street opening proceedings or referee, in the first or second judicial districts, in an action or special proceeding, who holds the position of clerk, private secretary, secretary, or stenographer to any justice or judge of a court of record, or to any board of justices or judges of such a court in any department where such justice or judge is engaged in the discharge of the duties of his office.

From Co. Proc., part of § 273. Am'd by L. 1905, c. 435 (in effect Sept. 1, 1905).

§ 1025. Several referees may be appointed.

Where the court is authorized to appoint a referee, it may, in its discretion, appoint either one or three. And where a reference is made by consent of the parties, they may select any number of referees, not exceeding five.

Substitute for Co. Proc., part of § 273.

§ 1026. Proceedings regulated where there are several referees.

Where the reference is to more than one referee, all must meet together, and hear all the allegations and proofs of the parties; but a majority may appoint a time and place for the trial, decide any question which arises upon the trial, sign a report, or settle a case. Either of them may administer an oath to a witness; and a majority of those present, at a time and place appointed for the trial, may adjourn the trial to a future day.

From 2 R. S. 384 (Part 3, c. 6, tit. 6), § 46.

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[1] Section 115 of the Judiciary Law as am'd by L. 1916, c. 262, provides as follows: The appellate divisions of the supreme court in the first, second, third and fourth departments may from time to time appoint any former judge of the court of common pleas and justices of the supreme court, who shall have served as such judge and justice for eight years or more in the first judicial district, and who after such service was retired before the expiration of his term because he had arrived at the age of 70 years, and any former judge of the court of common pleas and justice of the supreme court who shall have served as such judge and justice for 28 years or more in the first judicial district and who has attained the age of 70 years, and any justice or justices or any former justice or justices of the supreme court in the first judicial department or the judicial districts situated in the second, third and fourth judicial departments who shall have served as a judge or justice of a court of record for 14 years or more, and who after such service shall in his 65th year or thereafter have retired or who shall hereafter retire from his or their office, by expiration of term or resignation or because he or they shall have arrived at the age of 70 years, or who has served not less than 25 years in a court of record, of which 14 years thereof at least shall have been served in the supreme court, as official referee or referees, for the term of his or their life. To any of such official referees may be referred any action, matter or proceeding pending in said supreme court, referable by statute or the rules and practice of said court, in which the justice making the order of reference shall deem that for any reason the expense of such reference should not be borne by the parties to such action, matter or proceeding. (The compensation of such official referees is also provided for in L. 1916, c. 262, § 2.)

By L. 1911, c. 229 (in effect June 2, 1911), "Every judge of the court of appeals whose term of office shall expire by reason of his having attained the constitutional age limit, or who shall have attained the age of seventy years in the year when his term of office expires, may signify to the governor in writing his willingness to perform the duties imposed upon a retired judge of the court of appeals by this act; and upon taking the constitutional oath of office to discharge the duties hereby imposed such retired judge of the court of appeals shall act as referee, without any compensation whatsoever to be paid by the parties, in any and all actions and special proceedings of a civil nature which may be referred to him by consent, wherein the people of the state of New York may be a party or in which the attorney-general is authorized by law to appear or which the attorney-general is authorized to prosecute or defend in his official capacity; for which services, so rendered or to be rendered, each such retired judge of the court of appeals shall receive an annual salary of $6,000, in equal quarterly installments, to be paid by the comptroller."

TITLE III.

Trial jurors, except in New-York and Kings counties; mode of selecting them, and of procuring their attendance.

Article 1. Qualifications and exemptions of trial jurors.
2. Mode of selecting, drawing, and procuring the attendance of trial jurors, in ordinary cases.
3. Mode of striking and procuring a special jury, and of procuring a foreign jury.
4. Penalties for non-attendance.

[N. B.—Of this Title there has been transferred to the "Consolidated Laws" the whole of Article I (comprising §§ 1027-1034); the whole of Article II (comprising §§ 1035-1062), except § 1055; and the whole of Article IV (comprising §§ 1072-1078). These sections are now contained in the Judiciary Law.]

ARTICLE FIRST.

Qualifications and exemptions of trial jurors.

§§ 1027-1034. [Omitted; see Table, p. iii.]

ARTICLE SECOND.

Mode of selecting, drawing, and procuring the attendance of trial jurors, in ordinary cases.

§§ 1035-1054. [Omitted; see Table, p. iii.]

§ 1055. [Am'd, 1909.] Application of certain provisions to trial jurors.

The provisions of title five of this chapter apply to each person notified by the sheriff as provided by section 537 of the Judiciary Law.

Am'd by L. 1909, chs. 65 and 240 (in effect April 22, 1909).

§§ 1056-1062. [Omitted; see Table, p. iii.]

ARTICLE THIRD.

Mode of striking and procuring a special jury, and of procuring a foreign jury.

Sec. 1063. What courts may order a special jury to be struck.
1064. Party obtaining order to give eight days' notice.
1065. Mode of striking jury.
1066. Jurors so drawn to be notified to attend.
1067. Jury to be formed as in other cases.
1068. Provision where clerk or commissioner of jurors is interested.
1069. Party applying for special jury to pay expenses.
1070. Copy of order for foreign jury to be delivered to sheriff.
1071. Mode of obtaining a foreign jury.

§ 1063. [Am'd, 1895.] What courts may order a special jury to be struck.

Where it appears to the court, that a fair and impartial trial of an issue of fact, triable by a jury, joined in an action, pending in the supreme court, cannot be had without a struck jury, or that the importance or intricacy of the case requires such a jury, the court must make an order, upon notice, directing a special jury to be struck, for the trial of the issue. The order must specify the term, and it may specify a particular day in the term, when the jurors must attend.

From 2 R. S. 418 (Part 3, c. 7, tit. 4), § 46; L. 1857, c. 580. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1064. [Am'd, 1895.] Party obtaining order to give eight days' notice.

Unless the order specifies, or directs the officer, who is to strike the jury, to fix a time for the parties to attend, the party obtaining it must give at least eight days' notice of the time when he will

attend, before the clerk of the county in which the action is triable, or, if it is triable in the city and county of New-York, or the county of Kings, before the commissioner of jurors, for the purpose of having the jury struck.

From 2 R. S. 418, § 47. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1065. [Am'd, 1877.] Mode of striking jury.

At the time appointed, the clerk, or, in his absence, the deputy-clerk, or the commissioner, as the case requires, must attend at his office, with the original lists or books, filed or kept in his office, as required by law, containing the names of the persons who are then liable to serve as trial jurors; and, in the presence of the parties, or their attorneys or counsel, must strike a trial jury, as follows:

1. The clerk, deputy-clerk, or commissioner, must select from the lists or books, the names of forty-eight persons, whom he deems most indifferent between the parties, and best qualified to try the issue; and must make and certify a list of those names.

2. The party, on whose application the special jury was directed to be struck, or his attorney or counsel, may then first strike from the list one name; the adverse party or his attorney or counsel may then strike therefrom one name; and so alternately, until each party has stricken out twelve names.

3. If either party fails to attend, at the time and place of striking the jury, or neglects to strike out a name, the clerk, deputy-clerk, or commissioner, must strike for him.

4. The clerk, deputy-clerk, or commissioner, must thereupon make out a list of the names of the twenty-four persons not stricken out, and must certify that it is a correct list of the persons, drawn to serve as jurors, pursuant to the order of the court. He must immediately deliver the list so certified, and a certified copy of the order, to the sheriff of the county. If the list, from any ward or town, cannot be found, the clerk must make a new list from the ballots then in use for jurors for that ward or town, and must use that list upon striking the jury, in place of the original list.

From 2 R. S. 418, § 48; L. 1876, c. 69. Am'd by L. 1877, c. 416.

§ 1066. Jurors so drawn to be notified to attend.

The sheriff must notify the persons whose names are contained in the list; and must return the names of those notified, to the term, at which they are required to attend, as prescribed by law for notifying and returning ordinary trial jurors.

From 2 R. S. 418, § 49; see L. 1858, c. 322, § 36; L. 1873, c. 166, § 1.

§ 1067. [Am'd, 1895.] Jury to be formed as in other cases.

From the persons so notified and attending, a jury must be formed for the trial, and the issue must be tried, as prescribed in this chapter with respect to an ordinary jury trial. The court has the same power to excuse or discharge a juror, and to cause additional jurors to be drawn, or talesmen to attend, as upon an ordinary jury trial. But the court may, in its discretion, set aside an additional juror so drawn, or a talesman, upon the objection of either party, without a formal challenge, but neither party shall have more than two peremptory challenges.

From 2 R. S. 418, § 50. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1068. [Am'd, 1884.] Provision where clerk or commissioner of jurors is interested.

If it appears to the court, to which an application for a special jury is made, that the clerk, or the commissioner of jurors, as the case may be, is interested in the action; or is related to either of the parties; or is not indifferent between them; the court must appoint two disinterested persons to strike the jury; and the court may, in its discretion, in any case appoint two such persons to strike such jury. The persons so appointed possess, for the purposes of the action, all the powers conferred by this article, upon the clerk, or the commissioner of jurors.

From 2 R. S. 418, § 51. Am'd by L. 1884, c. 460.

§ 1069. Party applying for special jury to pay expenses.

The expense of striking a special jury must be paid by the party applying for it, and shall not be taxed in the costs of the action.

From 2 R. S. 418, § 52.

§ 1070. Copy of order for foreign jury to be delivered to sheriff.

Where an order for a trial by a foreign jury is made, a certified copy thereof must be delivered to the sheriff of the county, from which it is to be drawn; who must give notice thereof to the clerk of that county, and also, in the city and county of New-York, or the county of Kings, to the commissioner of jurors, at least twenty days before the first day of the term, at which the foreign jury is required to attend.

From 2 R. S. 410 (Part 3, c. 7, tit. 4), § 10.

§ 1071. Mode of obtaining a foreign jury.

The clerk, or, in the county of Kings, the commissioner, to whom the notice is given, must draw the names of twenty-four persons, in the same manner, and in presence of the same officers, as prescribed by law, with respect to ordinary trial jurors; except that notice of the drawing need not be published. A certified list of the names drawn must be delivered to the sheriff, who must notify each person drawn, and make a return, as in an ordinary case.

From Id., § 11.

ARTICLE FOURTH.

Penalties for non-attendance.

§§ 1072–1078. [Omitted; see Table, p. iii.]

TITLE IV.

Trial jurors in New-York and Kings counties; mode of selecting them, and of procuring their attendance.

Article 1. Provisions relating to trial jurors in the city and county of New-York.
2. Provisions relating to trial jurors in the county of Kings.

[N. B.—The whole of this Title has been transferred to the **Judiciary Law** of the "**Consolidated Laws**," with the exception of a few sections which have been transferred to the **Penal Law.**]

§§ 1079–1162. [Omitted; see Table, p. iii.]

277-315

TITLE V.

Trial by jury.

Article 1. Formation of the jury.
2. The verdict.

ARTICLE FIRST.

Formation of the jury.

Sec. 1163. Clerk to prepare ballots of jurors for trial.
1164. Clerk to draw ballots.
1165. Mode of drawing ballots.
1166. Persons drawn, etc., to form the jury.
1167. Ballots drawn, when to be deposited in a second box.
1168. Id.; when to be returned to the first box.
1169. Ballots of absentees, etc., to be returned to first box.
1170. New jury may be drawn while first is empanelled.
1171. When talesmen to be procured, or jurors drawn from third box.
1172. When talesmen to be procured.
1173. If sheriff is a party, court may appoint a person to act for him.
1174. Duty of sheriff and of talesmen.
1175. Jury competent, although containing only part or none of original panel.
1176. Peremptory challenges in a civil action.
1177. No challenge allowed because officer drawing is a party, etc.
1178. No challenge allowed because officer notifying is a party, etc.
1179. Challenges in penal actions.
1180. Challenges, how tried. Exceptions to and review of the determination of the court, in reference thereto.

§ 1163. Clerk to prepare ballots of jurors for trial.

At the opening of a term of a court of record at which issues of fact are to be tried by jury, the clerk must cause ballots, uniform, as nearly as may be, in appearance, to be prepared, by writing the name of each person, returned to the term as a trial juror, with his proper additions, on a separate piece of paper. He must roll up or fold each ballot, in the same manner, as nearly as may be, so as to resemble the others, and so that the name is not visible. The ballots must be deposited in a sufficient box, from which they must be drawn, as prescribed in this article.

From 2 R. S. 420 (Part 3, c. 7, tit. 4), § 59.

§ 1164. Clerk to draw ballots.

When an issue of fact, to be tried by a jury, is brought to trial, the clerk, under the direction of the court, must openly draw, out of the box, as many of the ballots, one after another, as are sufficient to form a jury.

From Id., § 60.

§ 1165. Mode of drawing ballots.

Before the first ballot is drawn, the box must be closed and well shaken, so as thoroughly to mix the ballots; and the clerk must draw each ballot, without seeing the name written on any of them, through an aperture, made in the lid of the box, large enough only to admit his hand conveniently.

From Id., § 66.

§ 1166. [Am'd, 1883.] Persons drawn, etc., to form the jury.

The first twelve persons who appear, as their names are drawn and called, and are approved as indifferent between the parties

and not discharged or excused, must be sworn, and constitute the jury to try the issue. Persons shall be disqualified from sitting as jurors if related by consanguinity or affinity to a party to the issue in the same cases in which judges are disqualified. The party related to the juror must raise the objection before the case is opened; but any other party to the issue may raise the objection within six months from the date of verdict.

From 2 R. S. 420, § 61. Am'd by L. 1883, c. 234.

§ 1167. Ballots drawn, when to be deposited in a second box.

The ballots, containing the names of the jurors, so sworn, must be then deposited in another box, and there kept, apart from the other ballots, until that jury is discharged.

From 2 R. S. 420, § 62.

§ 1168. Id.; when to be returned to the first box.

After that jury is discharged, the ballots containing their names must be again rolled up or folded, as prescribed in section 1163 of this act, and returned to the box from which they were first taken; and the same course must be pursued, as often as an issue is brought to trial by a jury.

From 2 R. S. 421, § 63.

§ 1169. Ballots of absentees, etc., to be returned to first box.

The ballot, containing the name of a juror, who is absent, when his name is drawn or called, or is set aside, or excused from serving on that trial, must be again rolled up or folded, in the same manner as before, and returned to the box, containing the undrawn ballots, as soon as the jury is sworn.

From Id., § 67.

§ 1170. New jury may be drawn while first is empanelled.

If an issue is brought to trial by a jury, while a jury is empanelled in another cause, at the same term, and not then discharged, the court may order a jury, for the trial of that issue, to be drawn, out of the box containing the ballots then undrawn; but, in any other case, the ballots, containing the names of all the trial jurors, returned at, and attending the term, must be placed together in the same box, before a jury is drawn therefrom.

From Id., § 64.

§ 1171. [Am'd, 1879, 1909.] When talesmen to be procured, or jurors drawn from third box.

If a sufficient number of jurors, duly drawn and notified, do not attend, or cannot be obtained, to form a trial jury, the court may, in any county except Westchester, direct the sheriff to require the attendance of such a number of talesmen, from the bystanders, or from the county at large, qualified to serve as trial jurors, as it deems sufficient for the purpose. In Westchester county, the court must direct the sheriff to draw a sufficient number of ballots from the first box, specified in section 508 of the Judiciary Law; if there is not a sufficient number of ballots remaining therein, to draw the residue from the second box, specified in section 523 of the Judiciary Law. In any other county, except New-York and Kings, it may, in its discretion, instead of directing him to require talesmen to attend, direct him to draw a sufficient

number of ballots from the third box, specified in section 524 of the Judiciary Law. In either case, the sheriff must notify the persons thus drawn to attend forthwith, or upon a day fixed by the court. If, for any reason, a sufficient number of jurors to try the issue is not obtained, from the persons notified, under an order made as prescribed in this section, the court may make another order, or successive orders, until a sufficient number is obtained; and in making each order, the court may exercise the same discretion, as in making the first order.

From 2 R. S. 419, § 54. Am'd by L. 1879, c. 542; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 1172. When talesmen to be procured.

In any county, except New-York, Kings, or Westchester, the court may also direct the sheriff to require the attendance of such a number of qualified talesmen, for the trial of an issue of fact, as it deems sufficient, where, by reason of one or more juries being empanelled, or for any other reason, no ballot remains undrawn; or where, in consequence of jurors being set aside, a juror cannot be obtained, for the trial of that issue, from the list of those returned.

From 2 R. S. 421, § 65.

§ 1173. If sheriff is a party, court may appoint a person to act for him.

If, in a case specified in the last two sections, the sheriff is a party to the issue, the court must appoint a disinterested person, to act in place of the sheriff. For that purpose, the person so appointed possesses all the powers, and is subject to all the duties and liabilities of the sheriff, with respect to the matters specified in those sections.

From Id., § 65.

§ 1174. [Am'd, 1909.] Duty of sheriff and of talesmen.

The sheriff, or person appointed by the court, must notify the requisite number of persons to attend, and make return thereof, as prescribed in section 536 of the Judiciary Law; except that each person must be required to attend forthwith. Each person so notified must attend forthwith, and, unless excused by the court or set aside, must serve as a juror upon the trial. For a neglect or refusal so to do, he may be fined, in the same manner as a trial juror, regularly drawn and notified, as prescribed in the Judiciary Law, and he is subject to the same exceptions and challenges, as any other trial juror.

From Id., § 55. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 1175. [Am'd, 1877.] Jury competent, although containing only part or none of original panel.

It is not a valid objection to a jury, procured as prescribed in the last four sections, that it contains none of the jurors originally returned to the term, or is only partially composed of such jurors.

From Id., § 65. Am'd by L. 1877, c. 416.

§ 1176. [Am'd, 1891, 1894.] Peremptory challenges in a civil action.

Upon the trial of an issue of fact, joined in a civil action in a court of record, each party may peremptorily challenge not more than six, and in a court not of record each party may peremptorily

challenge not more than three of the persons drawn as jurors for the trial.

From L. 1847, c. 134, § 1. Am'd by L. 1891, c. 169; L. 1894, c. 434.

§ 1177. No challenge allowed because officer drawing is a party, etc.

It is not a good cause of challenge, to the panel or array of trial jurors, in an action in a court of record, that the officer who drew them is a party to, or interested in the action, or counsel or attorney for, or related to, a party.

From 2 R. S. 420, § 56.

§ 1178. No challenge allowed because officer notifying is a party, etc.

It is not a good cause of challenge to the panel or array of trial jurors, in an action in a court of record, that they were notified to attend by an officer, who is a party to, or interested in, the action, or related to a party; unless it is alleged in the challenge, and is established, that one or more of the jurors drawn were not notified, and that the omission was intentional.

From Id., § 57.

§ 1179. [Am'd, 1903.] Challenges in penal actions.

In an action, in a court of record, or not of record, wherein a city, town or county is a party, it is not a good cause of challenge to a trial juror, or to an officer who notified the trial jurors, that the juror or the officer is a resident of, or liable to pay taxes, in the city, town or county, which is a party to such action.

From Id., § 58. See, also, 2 R. S. 551 (Part 3, c. 8, tit. 17), § 2. Am'd by L. 1903, c. 294 (in effect Sept. 1, 1903).

§ 1180. [Am'd, 1877, 1901, 1911.] Challenges, how tried. Exceptions to and review of the determination of the court, in reference thereto. Grounds for challenges.

An objection to the qualifications of a juror is available only upon a challenge. A challenge of a juror, or a challenge to the panel or array of jurors, must be tried and determined by the court only. Either party may except to the determination, and it may be reviewed, upon a question of fact, or a question of law, or both, as where an issue of fact presented by the pleadings is tried by the court; except that where one or more exceptions are taken, to the rulings of the court, made after the jury is empanelled, an exception to the determination of a challenge must be heard at the same time; and the case must contain the matters necessary to present it, upon the facts, or the law, or both. The fact that a juror is in the employ of a party to the action; or, if a party to the action is a corporation, that he is an employee thereof or a shareholder or a stockholder therein; or in actions for damages for injuries to person or property, that he is a shareholder, stockholder, director, officer or employee, or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to person or property, shall constitute a good ground for a challenge to the favor as to such juror.

From L. 1873, c. 427, § 1. Am'd by L. 1877, c. 416; L. 1901, c. 243; L. 1911, c. 206 (in effect Sept. 1, 1911).

ARTICLE SECOND.

The verdict.

Sec. 1181. Discharge of jury failing to agree.
1182. Plaintiff cannot submit to nonsuit after jury retires.
1183. In an action to recover money, jury to assess damages.
1184. How double, treble, or increased damages, found and awarded.
1185. When verdict to be taken, subject to the opinion of the court.
1186. General and special verdict defined.
1187. General or special verdict, when rendered; special finding with general verdict.
1188. Special finding controls general verdict.
1189. Entry of verdict; subsequent proceedings.

§ 1181. Discharge of jury failing to agree.

Where a jury is empanelled to try an issue, to make an inquiry, or to assess damages, in an action in a court of record, or not of record, or in a special proceeding before an officer, if the jurors cannot agree, after being kept together, for such a time as is deemed reasonable, by the court before which, or the officer before whom, they were empanelled, the court or officer may discharge them, and issue a precept for a new jury, or order another jury to be drawn, as the case requires; and the same proceedings must be had before the new jury, as if it was the jury first empanelled.

From 2 R. S. 554 (Part 3, c. 8, tit. 17), § 26.

§ 1182. Plaintiff cannot submit to nonsuit after jury retires.

It is not necessary, in an action in a court of record, to call the plaintiff, when the jurors are about to deliver their verdict; and the plaintiff, in such an action, cannot submit to a nonsuit, after the cause has been committed to the jury, to consider the verdict.

From Rule 31 of Supreme Court Rules of 1858.

§ 1183. In action to recover money, jury to assess damages.

In an action to recover a sum of money only, if a verdict is found, either in favor of the plaintiff, or in favor of a defendant, who has set up a counterclaim for a sum of money, the jury must assess the amount of damages. The jury may also, under the direction of the court, assess the amount of the damages, where the court directs judgment for the plaintiff, on the pleadings.

From Co. Proc., § 263.

§ 1184. How double, treble, or increased damages, found and awarded.

Where double, treble, or other increased damages are given by statute, single damages only are to be found by the jury; except in a case where the statute prescribes a different rule. The sum so found must be increased by the court, and judgment rendered accordingly.

New. Embodies the rule in 8 Johns. 648, and 25 Wend. 420.

§ 1185. [Am'd, 1879.] When verdict to be taken, subject to the opinion of the court.

Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict, subject to the opinion of the court. Notwithstanding that such a verdict has been rendered, the judge holding the trial term may, at the same term, set aside the verdict, and direct

judgment to be entered for either party, with like effect and in like manner, as if such a direction had been given at the trial. An exception to such a direction may be taken as prescribed in section 994 of this act.

From Co. Proc., § 265. Am'd by L. 1879, c. 542.

§ 1186. General and special verdict defined.

A general verdict is one, by which the jury pronounces, generally, upon all or any of the issues, in favor either of the plaintiff or of the defendant. A special verdict is one, by which the jury finds the facts only, leaving the court to determine, which party is entitled to judgment thereupon.

From Co. Proc., § 260.

§1187. [Am'd, 1895, 1904.] General or specific verdict, when rendered; special finding with general verdict.

In an action to recover a sum of money only, or real property, or a chattel, the jury may render a general or special verdict, in its discretion. In any other action, except where one or more specific questions of fact, stated under the direction of the court, are tried by a jury, the court may direct the jury to find a special verdict, upon all or any of the issues. Where the jury finds a general verdict, the court may instruct it to find also specially, upon one or more questions of fact, stated in writing. The special verdict or special finding must be in writing; it must be filed with the clerk, and entered in the minutes. When a motion is made to nonsuit the plaintiffs or for the direction of a verdict, the court may, pending the decision of such motion, submit any question of fact raised by the pleadings to the jury or require the jury to assess the damage. After the jury shall have rendered a special verdict upon such submission or shall have assessed the damage, the court may then pass upon the motion to nonsuit or direct such general verdict as either party may be entitled to. On an appeal from the judgment entered upon such nonsuit or general verdict, such special verdict, or general verdict, shall form a part of the record, and the appellate division or the court of appeals may direct such judgment thereon as either party may be entitled to.

From Id., § 261. Am'd by L. 1895, c. 946; L. 1904, c. 181 (in effect March 28, 1904).

§ 1188. Special finding controls general verdict.

Where a special finding is inconsistent with a general verdict, the former controls the latter, and the court must render judgment accordingly.

From Co. Proc., § 262.

§ 1189. [Am'd, 1877.] Entry of verdict; subsequent proceedings.

When the jury renders a verdict, or finds upon one or more specific questions of fact, stated under the direction of the court, the clerk must make an entry, in his minutes, specifying the time and place of the trial; the names of the jurors and witnesses; the verdict, or the questions and findings thereupon, as the case requires; and the direction, if any, which the court gives, with respect to the subsequent proceedings. Upon the application of the party in whose favor a general verdict is rendered, the clerk must enter judgment, in conformity to the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law.

From Co. Proc., § 264. Am'd by L. 1877, c. 416.

TITLE VI.

Miscellaneous provisions; including those relating to embracery, and other acts of misconduct.

Sec. 1190. Trials by jury to be as herein provided.
1191. Venire not necessary.
1192. Jurors not to be questioned for their verdict.
1193. Penalty where juror takes gift, etc.
1194. Embracery; penalty therefor.
1195. Penalty for juror's non-attendance in special proceeding.
1196. Sheriff, etc., to keep jury in special proceeding; penalty.
1197. Notice of imposition of fine.
1198. Special return of delinquency and fine to county court.
1199. Collection or remission of fine.

§ 1190. [Am'd, 1907, 1909.] Trials by jury to be as herein provided.

A trial by a jury, of an issue of fact, joined in a civil action, in a court of record, must be had, as prescribed in this chapter; except in a case where it is otherwise specially prescribed by law. The court may, upon the application of either party, exclude from the court-room the jurors sitting in an action during the argument of a motion for non-suit, dismissal of the complaint or direction of a verdict.

From 2 R. S. 419 (Part 3, c. 7, tit. 4), § 53. Am'd by L. 1907, c. 502; L. 1909, c. 65. (See Table, p. iii).

§ 1191. Venire not necessary.

A venire to procure jurors cannot be issued in a civil action, brought in a court of record, except as specially prescribed by law.

From Id., 410, § 9.

§ 1192. [Omitted; see Table, p. iii.] Jurors not to be questioned for their verdict.

A juror shall not be questioned, and is not subject to an action, or other liability civil or criminal, for a verdict rendered by him, in an action in a court of record, or not of record, or in a special proceeding before an officer, except by indictment, for corrupt conduct, in a case prescribed by law.

From 2 R. S. 421 (Part 3, c. 7, tit. 4), § 69.

§ 1193. [Omitted; see Table, p. iii.] Penalty where juror takes gift, etc.

A person, drawn or notified to attend, as a trial juror, in an action in a court of record, or not of record, or in a special proceeding before an officer, who takes any thing to render his verdict, or receives, from a party to the action or special proceeding, a gift or gratuity, forfeits ten times the sum, or ten times the value of that, which he took or received, to the party to the action or special proceeding, aggrieved thereby; and is also liable to that party, for his damages sustained thereby; besides being subject to the punishment, prescribed by law.

From Id., § 70.

§ 1194. [Omitted; see Table, p. iii.] Embracery: penalty therefor.

An embraceor, who procures a person, drawn or notified to attend, as a trial juror, to take gain or profit, contrary to the

last section, forfeits ten times the sum, or ten times the value of that, which was so taken, to the party aggrieved thereby; and is also liable to that party for his damages sustained thereby; besides being subject to the punishment, prescribed by law.

From Id., § 71.

§ 1195. [Omitted; see Table, p. iii.] Penalty for juror's non-attendance in special proceeding.

A person, who has been lawfully and personally notified to attend, as a trial juror, to inquire into a matter or thing, or to hear and try a controversy, in a special proceeding, pending before a judge, justice of the peace, commissioner, or other officer, and who wilfully neglects to attend, as required by the notice, may be fined by the officer, in a sum, not exceeding twenty-five dollars. But this section does not extend to a case, where special provision is made by law, for punishing the default of a trial juror.

From 2 R. S. 551 (Part 3, c. 8, tit. 17), § 4.

§ 1196. [Omitted; see Table, p. iii.] Sheriff, etc., to keep jury in special proceeding; penalty.

A sheriff, constable, or other officer, who notified jurors to attend, in a case specified in the last section, must, when directed by the officer, before whom the special proceeding is pending, attend, and take charge of the jury. For a wilful neglect to obey such a direction, or for any misconduct, while attending the jury, by which a right or remedy of a party to the special proceeding may be impaired or prejudiced, he must be fined, by that officer, in a sum not exceeding twenty-five dollars.

From Id., § 5.

§ 1197. [Omitted; see Table, p. iii.] Notice of imposition of fine.

Where a fine is imposed, in a case specified in the last two sections, written notice thereof must be served upon the person fined, to the end that he may apply to the officer imposing it, for the remission of the whole or a part thereof, upon proof that he had a reasonable excuse for his neglect or misconduct, or that other good cause exists for the remission.

From Id., § 6.

§ 1198. [Omitted; see Table, p. iii.] Special return of delinquency and fine to county court.

If, within thirty days after the service of the notice, the fine has not been remitted by the officer imposing it, he must make a special return of the delinquency or misconduct, for which the fine was imposed, and of the amount of the fine, accompanied with proof, by affidavit, of service of the notice specified in the last section, to the next term of the county court of the county, in which the delinquent resides.

From Id., § 7.

§ 1199. [Omitted; see Table, p. iii.]. Collection or remission of fine.

The county clerk must deliver to the district-attorney, a copy of the return and of the affidavit, at the time when he delivers to him copies of the minutes of fines, imposed by the county court. The fine must be collected, or it may be remitted or reduced, in the same manner as a fine imposed by the county court upon a defaulting trial juror.

From Id., § 8.

CHAPTER XI.

Judgments.

TITLE I.—Judgment in an Action.
TITLE II.—Judgments Taken Without Process.
TITLE III.—Vacating or Setting Aside a Judgment, for Irregularity or Error in Fact.

TITLE I.

Judgment in an action.

Article 1. General provisions.
2. Mode of taking, entering, and enforcing a judgment.
3. Docketing a judgment; effect thereof, as a lien upon real property: suspending and discharging the lien; satisfaction and assignment of a judgment.

ARTICLE FIRST.

General provisions.

Sec. 1200. Definition of judgment.
1201. [Repealed.]
1202. When judgment may be entered.
1203. Application for judgment.
1204. Judgment may be for or against any of the parties.
1205. When a several judgment may be taken.
1206. Judgment for or against a married woman.
1207. When judgment for plaintiff not to exceed judgment demanded.
1208. Rate of damages.
1209. Effect of judgment dismissing the complaint.
1210. Judgment against a dead person.
1211. Judgment to bear interest.

§ 1200. [Am'd, 1877.] Definition of judgment.

A judgment is either interlocutory or the final determination of the rights of the parties in the action.

From Co. Proc., § 245. Am'd by L. 1877, c. 416.

§ 1201. [Stricken out by L. 1877, c. 416.]

§ 1202. When judgment may be entered.

Judgment may be entered in term or vacation.

From L. 1840, c. 386, § 23.

§ 1203. [Am'd, 1900.] Application for judgment.

Judgment must be entered, in the first instance, pursuant to the direction of the court, at a term held by one judge; except where special provision is otherwise made by law. If notice of an application for judgment is not required, and an order for judgment is made by a judge out of court, the judgment may be entered with the same force and effect as if granted in court.

Substitute for Co. Proc., § 278. Am'd by L. 1900, c. 147 (in effect Sept. 1, 1900).

§ 1204. Judgment may be for or against any of the parties.

Judgment may be given for or against one or more plaintiffs, and for or against one or more defendants. It may determine the ultimate rights of the parties on the same side, as between themselves; and it may grant, to a defendant, any affirmative relief, to which he is entitled.

From Co. Proc., § 274, first sentence.

§ 1205. When a several judgment may be taken.

Where the action is against two or more defendants, and a several judgment is proper, the court may, in its discretion, render judgment, or require the plaintiff to take judgment, against one or more of the defendants; and direct that the action be severed, and proceed against the others, as the only defendants therein.

From Id., § 274, second sentence.

§ 1206. [Omitted; see Table, p. iii.] Judgment for or against a married woman.

Judgment for or against a married woman, may be rendered and enforced, in a court of record, or not of record, as if she was single.

From Id., § 274, last two sentences.

§ 1207. When judgment for plaintiff not to exceed judgment demanded.

Where there is no answer, the judgment shall not be more favorable to the plaintiff, than that demanded in the complaint. Where there is an answer, the court may permit the plaintiff to take any judgment, consistent with the case made by the complaint, and embraced within the issue.

From Co. Proc., § 275.

§ 1208. Rate of damages.

Where either party is entitled to recover damages, he may recover any rate of damages, which he might have heretofore recovered, for the same cause of action.

From Id., § 276.

§ 1209. [Am'd, 1877.] Effect of judgment dismissing the complaint.

A final judgment, dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced, does not prevent a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon the merits.

New. Am'd by L. 1877, c. 416.

§ 1210. Judgment against a dead person.

Where a judgment for a sum of money, or directing the payment of money, is entered against a party, after his death, in a case where it may be so taken, by special provision of law, a memorandum of the party's death must be entered, with the judgment, in the judgment-book, indorsed on the judgment-roll, and noted on the margin of the docket of the judgment. Such a judgment does not become a lien upon the real property, or chattels real, of the decedent; but it establishes a debt, to be paid in the course of administration.

From 2 R. S. 359 (Part 3, c. 6, tit. 4), § 7.

§ 1211. Judgment to bear interest.

A judgment for a sum of money, rendered in a court of record, or not of record, or a judgment rendered in a court of record, directing the payment of money, bears interest from the time when it is entered. But where a judgment directs that money paid out shall be refunded or repaid, the direction includes interest from the time when the money was paid, unless the contrary is expressed.

From L. 1844, c. 324, § 1; L. 1869, c. 907, § 1.

ARTICLE SECOND.

Mode of taking, entering, and enforcing a judgment

Sec. 1212. Judgment by default in certain actions on contract; how taken.
1213. Amount of judgment in such cases; how determined.
1214. Application to court for judgment by default; when necessary.
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1244. Conveyance to state name of party.

§ 1212. [Am'd 1877, 1879.] Judgment by default in certain actions on contract; how taken.

In an action specified in section 420 of this act, where the summons was personally served upon the defendant, and the copy of the complaint, or a notice stating the sum of money for which judgment will be taken, was served with the summons, or where the defendant has appeared, but has made default in pleading, the plaintiff may take judgment by default, as follows:

1. If the defendant has made default in appearing, the plaintiff must file proof of the service of the summons, and of a copy of the complaint or the notice; and also proof, by affidavit, that the defendant has not appeared. Whereupon the clerk must enter final judgment in his favor.

2. If the defendant has seasonably appeared, but has made default in pleading, the plaintiff must file proof of the service of the summons and of the appearance, or of the appearance only; and also proof, by affidavit, of the default. Whereupon, the clerk must enter final judgment in his favor.

If the defendant has made default in appearing or pleading, and the case is not one where the clerk can enter final judgment, as prescribed in either of the foregoing subdivisions of this sec-

tion, the plaintiff must apply to the court for judgment, as prescribed in section 1214 of this act.

From Co. Proc., § 246, subd. 1. Am'd by L. 1877, c. 416; L. 1879, c. 542.

§ 1213. Amount of judgment in such cases; how determined.

Where final judgment may be entered by the clerk, as prescribed in the last section, the amount thereof must be determined as follows:

1. If the complaint is verified, the judgment must be entered for the sum, for which the complaint demands judgment; or, at the plaintiff's option, for a smaller sum; and if a computation of interest is necessary, it may be made by the clerk.

2. If the complaint is not verified, the clerk must assess the amount due to the plaintiff, by computing the sum due upon an instrument for the payment of money only, the non-payment of which constitutes a cause of action, stated in the complaint; and by ascertaining, by the examination of the plaintiff, upon oath, or by other competent proof, the amount due to him for any other cause of action stated in the complaint. If an instrument, specified in this subdivision, has been lost, so that it cannot be produced to the clerk, he must take proof of its loss and of its contents. Either party may require the clerk to reduce to writing and file the assessment, and the oral proof, if any, taken thereupon.

From Co. Proc., § 246, subd. 1.

§ 1214. [Am'd, 1877, 1900.] Application to court for judgment by default; when necessary.

Where the summons was personally served upon the defendant, within the State, and he has made default in appearing, or where the defendant has appeared, but has made default in pleading; and the case is not one where the clerk can enter final judgment, as prescribed in the last two sections, the plaintiff may apply to the court, or to a judge or justice thereof out of court, for judgment. Upon the application he must file, if the default was in appearing, proof of service of the summons; or, if the default was in pleading, proof of appearance, and also, if a copy of the complaint was demanded, proof of service thereof, upon the defendant's attorney; and in either case, proof by affidavit, of the default which entitles him to judgment. If one or more of the defendants have appeared, and one or more defendants have failed to appear, then the application for judgment must be made to the court, unless the defendants who have appeared consent to the making of such application to a judge or justice out of court.

From Co. Proc., § 246, subd. 2. Am'd by L. 1877, c. 416; L. 1900, c. 147 (in effect Sept. 1, 1900).

§ 1215. [Am'd, 1877, 1901.] Proceedings on such an application.

The court, or a judge or justice thereof, must thereupon render the judgment to which the plaintiff is entitled. It, or they, may, without a jury, or with a jury if one is present in court, make a computation or assessment, or take an account, or proof of a fact, for the purpose of enabling it, or them, to render the judgment, or to carry it into effect; or it, or they, may in its, or their, discretion, direct a reference, or a writ of inquiry, for either purpose; except that where the action is brought to recover damages for a personal injury or an injury to property, the damages must be ascertained by means of a writ of inquiry. Where a reference or writ of inquiry is directed, the court, or a judge or justice thereof, may direct that the report or inquisition be returned to the court.

or a judge or justice thereof, for its, or their, further action; or it, or they, may in its, or their, discretion, except where special provision is otherwise made by law, omit that direction; in which case final judgment may be entered by the clerk, in accordance with the report of the referee, or for the damages ascertained by the inquisition, without any further application.

From Co. Proc., § 246, subd. 2. Am'd by L. 1877, c. 416; L. 1901, c. 511 (in effect April 24, 1901).

§ 1216. [Am'd, 1877, 1895, 1901.] Application for judgment in case of service by publication.

Where the summons was served upon the defendant without the state, or otherwise than personally, if the defendant does not demand a copy of the complaint, or plead, as the case requires, within twenty days after the service is complete, the plaintiff may apply to the court, or a judge or justice thereof, for the judgment demanded in the complaint. Upon such an application, he must file proof that the service is complete, and proof, by affidavit, of the defendant's default. The court, or a judge or justice thereof, must require proof of the cause of action, set forth in the complaint, to be made, either before such court, or such judge or justice, or before a referee appointed for that purpose; except that where the action is brought to recover damages for a personal injury, or an injury to property, the damages must be ascertained by means of a writ of inquiry as prescribed in the last section. If the defendant is an[1] non-resident, or a foreign corporation, the court, or a judge or justice to whom such application is made, must require the plaintiff, or his agent or attorney, to be examined on oath, respecting any payments to the plaintiff, or to any one for his use, on account of his demand, and must render the judgment to which the plaintiff is entitled. But before rendering judgment, the court, or a judge or justice thereof, to whom the application is made, may, in any case, in its, or their, discretion, require the plaintiff to file an undertaking, to abide the order of the court touching the restitution of any estate or effects which may be directed by the judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of the judgment, in case the defendant or his representative applies and is admitted to defend the action, and succeeds in his defense.

From Co. Proc., § 246, subd. 3. Am'd by L. 1877, c. 416; L. 1895, c. 582; L. 1901, c. 511 (in effect April 24, 1901).

§ 1217. [Am'd, 1877.] Attachment and undertaking for restitution, required in certain actions.

A judgment shall not be rendered for a sum of money only, upon an application made pursuant to the last section, except in an action specified in section 635 of this act. Where the defendant is a non-resident, or a foreign corporation, and has not appeared, the plaintiff, upon the application for judgment in such an action, must produce and file the following papers:

1. Proof, by affidavit, that a warrant of attachment, granted in the action, has been levied upon property of the defendant.
2. A description of the property, so attached, verified by affidavit; with a statement of the value thereof according to the inventory.
3. The undertaking mentioned in section 1216, if one has been required.

From Co. Proc., § 246, subd. 3, last sentence. Am'd by L. 1877, c. 416.

§ 1218. [Am'd, 1879.] When judgment cannot be taken against an infant defendant.

A judgment by default shall not be taken against an infant defendant, until twenty days have expired, since the appointment of a guardian ad litem for him.

See Co. Proc., § 115; also § 471, ante. Am'd by L. 1879, c. 542.

[1] So in the original.

§ 1219. [Am'd, 1879.] When a defendant in default is entitled to notice.

A defendant, against whom judgment is taken, pursuant to the foregoing sections of this article, is entitled to notice, as follows:

1. If he has appeared generally but has made default in pleading, he is entitled to at least five days' notice of the time and place of an assessment by the clerk, and to at least eight days' notice of the time and place of an application to the court for judgment.

2. In a case where an application for judgment must be made to the court, the defendant may serve upon the plaintiff's attorney, at any time before the application for judgment, a written demand of notice of the execution of any reference, or writ of inquiry, which may be granted upon the application. Such a demand is not an appearance in the action. It must be subscribed by the defendant, in person, or by an attorney or agent, who must add to his signature his office address, with the particulars, prescribed in section 417 of this act, concerning the office address of the plaintiff's attorney. Thereupon at least five days' notice of the time and place of the execution of the reference, or writ of inquiry, must be given to the defendant, by service thereof upon the person, whose name is subscribed to the demand, in the manner prescribed in this act, for service of a paper upon an attorney in an action.

From Co. Proc., § 246, subds. 1, 2. Am'd by L. 1879, c 542.

§ 1220. When action may be severed, if issues of law and issues of fact presented.

Where an issue of law and an issue of fact arise, with respect to different causes of action, set forth in the complaint, and final judgment can be taken, with respect to one or more of the causes of action, without prejudice to either party in maintaining the action, or a defence or counterclaim, with respect to the other causes of action, or in the recovery of final judgment upon the whole issue, the court may, in its discretion, and at any stage of the action, direct that the action be divided into two or more actions, as the case requires.

New. See Co. Proc., § 172, last sentence; also § 497, ante.

§ 1221. [Am'd, 1877.] Judgment how taken, after trial of issues of law and issues of fact, in the same action.

Where one or more issues of law, and one or more issues of fact, arise in the same action, and all the issues have been tried, final judgment upon the whole issue must be taken, as follows:

1. Where an application must be made to the court for judgment upon the issue last tried, the application must be for judgment, upon the whole issue; and judgment must be rendered accordingly.

2. Where the action is triable by a jury, and the issue last tried is tried at a term of the court, the application for judgment, upon the whole issue, may be entertained, in the discretion of the court, at that term and with or without notice; if not so entertained, it must be heard as a motion.

3. Where the issue last tried is tried before a referee, his report must award the proper judgment upon the whole issue, unless otherwise prescribed in the order of reference.

New. Am'd by L. 1877, c. 416.

§ 1222. [Am'd, 1879.] Final judgment, how taken after issue of law only.

Final judgment upon an issue of law, where no issue of fact remains to be tried, and final judgment has not been directed as

prescribed in section 1021 of this act, may be entered upon application to the court or by the clerk in an action specified in section 420 of this act.

From Co. Proc., part of § 269. Am'd by L. 1879, c. 142.

§ 1223. [Am'd, 1877.] Proceedings upon application under the last two sections.

Upon an application, by either party, to the court, for final judgment, after the decision of an issue of law, as prescribed in the last two sections, the court has the powers specified in section 1215 of this act, upon an application for judgment by the plaintiff. Where final judgment may be awarded in a referee's report, as prescribed in section 1221 of this act, the referee may make a computation, or an assessment, or take an account, or proof of a fact, for the purpose of enabling him to award the proper judgment, or enabling the court to carry it into effect; and he may ascertain and fix the damages, as a jury may do, upon the execution of a writ of inquiry.

From Co. Proc., part of § 269. Am'd by L. 1877, c. 416.

§ 1224. [Am'd, 1877, 1895.] Id.; upon interlocutory judgment, etc., affirmed at a term of the appellate division of the supreme court.

When an order or judgment is wholly or partly affirmed upon an appeal to the appellate division of the supreme court, and no issue of fact remains to be tried, the appellate division may, in its discretion, render final judgment, unless it permits the appellant to amend or plead over.

New. Am'd by L. 1877, c. 416; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1225. Judgment after trial by jury of specific questions of fact.

In an action triable by the court, where one or more specific questions of fact, arising upon the issues, have been tried by a jury, judgment may be taken, upon the application of either party, as follows:

1. If all the issues of fact in the action are determined by the findings of the jury, or the remaining issues of fact have been determined by the decision of the court, or the report of a referee, an application for judgment, upon the whole issue, may be made as upon a motion.

2. If one or more issues of fact remain to be tried, judgment may be rendered upon the whole issue, at the term of the court where, or by direction of the referee by whom, they are tried.

See §§ 970-972, ante.

§ 1226. Id.; after reference to determine specific questions of fact.

Where a reference has been made, to report upon one or more specific questions of fact, arising upon the issue, and the remaining issues have been tried, judgment must be taken, upon the application of either party, as prescribed in section 1221 of this act.

From Co. Proc., part of § 272. See §§ 972, 1221, ante.

§ 1227. [Am'd, 1895.] Id.; upon motion for new trial, heard by the appellate division of the supreme court.

Where a motion for a new trial, made at the first instance at a term of the appellate division of the supreme court, is denied, judgment may be taken, as if the motion for a new trial had not been made, after the expiration of four days from the entry of

the order, and the service, upon the attorney for the adverse party, of a copy thereof, and notice of the entry; but not before.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1228. [Am'd, 1879.] Id.; upon trial by court or referee of the whole issue of fact.

Where the whole issue is an issue of fact, which was tried by a referee, the report stands as a decision of the court. Except where it is otherwise expressly prescribed by law, judgment upon such a report, or upon the decision of the court, upon the trial of the whole issue of fact without a jury, may be entered by the clerk, as directed therein, upon filing the decision or report.

From Co. Proc., parts of §§ 267, 272. Am'd by L. 1879, c. 542.

§ 1229. In matrimonial causes, judgment can be rendered only by the court.

In an action to annul a marriage, or for a divorce or separation, judgment cannot be taken, of course, upon a referee's report, as prescribed in the last section, or where the reference was made, as prescribed in section 1215 of this act. Where a reference is made in such an action, the testimony, and the other proceedings upon the reference, must be certified to the court, by the referee, with his report; and judgment must be rendered by the court.

From Rules 78 and 83 of Supreme Court Rules of 1877.

§ 1230. [Am'd, 1877.] Final judgment upon decision or report awarding interlocutory judgment, etc.

In a case, not provided for in the foregoing sections of this article, where the decision, upon a trial by the court, without a jury, or the report, upon a trial by a referee, directs an interlocutory judgment to be entered, and the party afterwards becomes entitled to a final judgment, an application for the latter may be made, as upon a motion. And where a judgment requires the appointment of a referee, to do any act thereunder, the referee must be appointed by the judgment, or by the court, upon motion, except as otherwise prescribed in the next section.

New. Am'd by L. 1877, c. 416.

§ 1231. Id.; how final judgment entered and settled in certain cases.

In an action triable by the court, an interlocutory judgment, rendered upon a default in appearing or pleading, or pursuant to the direction contained in a decision or report, may state the substance of the final judgment, to which the party will be entitled. It may also direct, that the final judgment be settled by a judge, or a referee. In that case, final judgment shall not be entered, until a settlement thereof, subscribed by the judge or referee, is filed. Where an interlocutory judgment awards costs, they may be awarded generally, without specifying the amount thereof. Where the final judgment is directed to be settled, and the costs have not been taxed when the settlement thereof is filed, a blank for the amount of the costs must be left in the settlement; and the costs must be taxed, and the blank filled up accordingly, by the clerk, when the final judgment is entered.

New.

§ 1232. Interlocutory reference or inquisition; how reviewed.

Where a reference, or writ of inquiry, directed as prescribed in section 1015, or section 1215 of this act, has been executed, either party may apply for an order, directing a new hearing, or a

new writ of inquiry, upon proof, by affidavit, that error was committed, to his prejudice, upon the hearing, or in the report, or upon the execution of the writ, or in the inquisition. In a proper case, the application may be granted, after judgment has been entered. In that case, the judgment may be set aside, either then or after the new hearing, or the execution of the new writ, as justice requires.

New.

§ 1233. Motion for judgment upon a special verdict, etc.

A motion for judgment, upon a special verdict, may be made by either party; and must, in the first instance, be heard and decided, at a term held by one judge.

From Co. Proc., § 265. See § 1186, ante.

§ 1234. [Am'd, 1895.] Id.; upon verdict subject to opinion of court.

A motion for judgment, upon a verdict subject to the opinion of the court, may be made by either party; and must be heard and decided at a term of the appellate division of the supreme court.

From Co. Proc., § 265. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896). See § 1185, ante.

§ 1235. Interest on verdict, etc., to be included in recovery.

Where final judgment is rendered for a sum of money, awarded by a verdict, report, or decision, interest upon the sum awarded, from the time when the verdict was rendered, or the report or decision was made, to the time of entering judgment, must be computed by the clerk, added to the sum awarded, and included in the amount of the judgment.

From Co. Proc., § 310.

§ 1236. [Am'd, 1897.] Entry of judgment.

Every interlocutory judgment or final judgment shall be signed by the clerk and filed in his office, and such signing and filing shall constitute the entry of the judgment. The clerk shall, in addition to the docket-books required to be kept by law, keep a book, styled the "judgment-book," in which he shall record all judgments entered in his office.

From Co. Proc., §§ 279, 280; 2 R. S. 360 (Part 3, c. 6, tit. 4), § 9. Am'd by L. 1897, c. 188 (in effect April 6, 1897). See L. 1897, c. 187.

§ 1237. [Am'd, 1877, 1879, 1913.] Judgment-roll to be filed; of what it consists.

The clerk, upon entering final judgment, must immediately file the judgment-roll, which must consist, except where special provision is otherwise made by law, of the following papers: the summons; the pleadings, or copies thereof; the final judgment, and the interlocutory judgment, if any, or copies thereof; and each paper on file, or a copy thereof, and a copy of each order, which in any way involves the merits, or necessarily affects the judgment. If judgment is taken by default, the judgment-roll must also contain the papers required to be filed, upon so taking judgment, or upon making application therefor; together with any report, decision or writ of inquiry, and return thereto. If judgment is taken after a trial, the judgment-roll must contain the verdict, report, or decision; each offer, if any, made as prescribed in this act, and the exceptions or case then on file.

Upon an appeal to the court of appeals from a judgment or order of the appellate division of the supreme court, the opinion of the appellate division, if any, shall, for the purposes of the appeal, be deemed to be a part of the judgment-roll or appeal papers.

See Co. Proc., § 281, subds. 1, 2. Am'd by L. 1877, c. 416; L. 1879, c. 542; L. 1913, c. 545 (in effect Sept. 1, 1913).

§ 1238. Id.; by whom prepared.

The judgment-roll must be prepared, and furnished to the clerk, by the attorney, for the party, at whose instance the final judgment is entered; except that the clerk must attach thereto the necessary original papers, on file. But the clerk may, at his option, make up the entire judgment-roll.

See Co. Proc., § 281, first clause.

§ 1239. Time of filing judgment-roll to be noted.

The clerk must make a minute, upon the back of each judgment-roll, filed in his office, of the time of filing it, specifying the year, month, day, hour, and minute. A proceeding to enforce or collect a final judgment, cannot be taken, until the judgment-roll is filed.

From 2 R. S. 389 (Part 3, c. 6, tit. 4), § 11.

§ 1240. When a judgment may be enforced by execution.

In either of the following cases, a final judgment may be enforced by execution:

1. Where it is for a sum of money, in favor of either party; or directs the payment of a sum of money.
2. Where it is in favor of the plaintiff, in an action of ejectment, or for dower.
3. In an action to recover a chattel, where it awards a chattel to either party.

See Co. Proc., § 285.

§ 1241. When a judgment may be enforced by punishment for disobeying it.

In either of the following cases, a judgment may be enforced, by serving a certified copy thereof, upon the party against whom it is rendered, or the officer or person, who is required thereby, or by law, to obey it; and, if he refuses or wilfully neglects to obey it, by punishing him for a contempt of the court:

1. Where the judgment is final, and cannot be enforced by execution, as prescribed in the last section.
2. Where the judgment is final, and part of it cannot be enforced by execution, as prescribed in the last section: in which case, the part or parts, which cannot be so enforced, may be enforced as prescribed in this section.
3. Where the judgment is interlocutory, and requires a party to do, or to refrain from doing, an act, except in a case specified in the next subdivision.
4. Where the judgment requires the payment of money into court, or to an officer of the court: except where the money is due upon a contract, express or implied, or as damages for non-performance of a contract. In a case specified in this subdivision, if the judgment is final, it may be enforced, as prescribed in this section, either simultaneously with, or before or after the issuing of an execution thereupon, as the court directs.

See Co. Proc., § 285.

§ 1242. [Am'd, 1877, 1902, 1911.] Real property; how sold; effect of conveyance.

Except where special provision is otherwise made by law, real property adjudged to be sold, must be sold in the county and borough where it is situated, by the sheriff of the county or by a referee, appointed by the court for that purpose, who must execute a conveyance to the purchaser. If such real property is situated partly in one county or borough and partly in another and is so circumstanced that a sale of the whole will be most beneficial to the parties, the court rendering judgment may direct in which county

and borough the whole of such real property shall be sold. The conveyance is effectual, to pass the right, title, or interest of a party adjudged to be sold; but nothing contained in this section shall be deemed to repeal or modify the provisions of any law specially regulating the sale of real property under a judgment or decree of any court, in any particular county of the State.

From Co. Proc., § 287, last sentence but one. Am'd by L. 1877, c. 416; L. 1902, c. 138; L. 1911, c. 180 (in effect Sept. 1, 1911).

§ 1243. [Am'd, 1877.] Security upon sale by referee.

Where a referee is appointed by the court, to sell real property, the court may provide for his giving such security, as the court deems just, for the proper application of the money received upon the sale; or for the payment thereof by the purchaser, directly to the person or persons entitled thereto, or their attorneys.

New. Am'd by L. 1877, c. 416.

§ 1244. [Am'd, 1877, 1879.] Conveyance to state name of party.

A conveyance of property, sold by virtue of an execution, or sold pursuant to a judgment, which specifies the particular party or parties, whose right, title or interest is directed to be sold, must distinctly state, in the granting clause thereof, whose right, title, or interest was sold, and is conveyed, without naming, in that clause, any of the other parties to the action; otherwise, the purchaser is not bound to accept the conveyance, and the officer executing it is liable for the damages, which the purchaser sustains by the omission, whether he accepts or refuses to accept it.

New. Am'd by L. 1877, c. 416; L. 1879, c. 542.

ARTICLE THIRD.

Docketing a judgment; effect thereof, as a lien upon real property; suspending and discharging the lien; satisfaction and assignment of a judgment.

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Sec. 1268. Discharge of a judgment against a bankrupt.
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§ 1245. [Am'd, 1895, 1911, 1912.] Certain clerks to keep docket books.

Each county clerk, and the clerk of the city court of the city of New York, must keep one or more books, ruled in columns, convenient for making the entries prescribed in section twelve hundred and forty-six; in which he must docket, in its regular order, and according to its priority, each judgment which he is required by this article to docket. The expense of procuring new books when necessary is a county charge. The judgment dockets kept by the county clerk of New York county must hereafter be kept in two separate sets of books, one set to be designated and used for judgment debtors that are individuals, including all individual members of a copartnership or of a firm doing business under a firm name or style as stated in the title of the action, and the other set to be designated and used for judgment debtors that are corporations, a joint stock company, a copartnership or a firm name or style under which a person or persons are doing business; and each set of such judgment dockets must have a separate volume or volumes for each letter of the alphabet, and each judgment docket book shall have its letter, and the year or years of its entries plainly marked on its back and cover and on every page. A judgment docket for judgment debtors that are individuals shall contain the names of those judgment debtors whose last name begins with the letter marked on the back of the volume. Each volume shall also have a marginal page index showing each letter of the alphabet in order. And a page of such judgment docket for judgment debtors that are individuals shall contain the names of those judgment debtors whose first name begins with the letter or whose first initial is the letter marked on the marginal index for that page; except that there shall be at the back of each of such volumes blank pages not indexed which shall contain the names of those judgment debtors whose first names or initials are stated in the title of the action to be unknown or fictitious. And a judgment docket for those judgment debtors that are corporations, a joint stock company, a copartnership or a firm name or style under which a person or persons are doing business shall contain the names of those judgment debtors the first letter or initial of whose name as it appears, following the prefixed articles "A," "An," or "The," is the letter marked on the page and on the back of the book. And there must be prepared and kept two separate sets of volumes for judgment dockets, designated, lettered, indexed and marked as hereinbefore provided in which there shall be entered in the same manner as hereinbefore directed to be entered, in their regular order and according to their priority and as soon as it may be practicable to have it done, the names of judgment debtors against whom judgments have been docketed within ten years of the time of the making of the entry in such volumes. And the county clerk of New York county shall prepare and keep a card index, supplemental to the judgment docket books hereinbefore provided for, wherein he shall enter and arrange in alphabetical order the names of all judgment debtors hereinbefore directed to be docketed. And with every entry of a judgment in an action begun on or after September first, nineteen hundred and eleven, there shall be entered as a part of such entry the number of the action and the year in which it was begun.

From L. 1840, c. 386, § 34. Am'd by L. 1895, c. 946; L. 1911, c. 290; L. 1912, c. 344 (in effect April 15, 1912).

§ 1245a. [Added, 1911, am'd, 1912.] Current docket books.

The county clerk of New York county must keep books to be known as current docket books. Each half page of space in each book shall be

consecutively numbered in a series of consecutive numbers for each year and shall be devoted to one action. On a half page so numbered the clerk shall enter the title of the action having the same consecutive number for that year, with the names of the plaintiffs and defendants and attorneys in full, and in chronological order a brief description of each paper as it is filed, together with the date of filing thereof, also the verdict, report or decision, if any, rendered in the action as of the date of the rendering thereof, also all orders and judgments in the action. All interlocutory and provisional proceedings, and proceedings supplementary to execution, shall be entered on the same half page of the docket as the action out of which they arise, except in actions where the entries are so voluminous as to require one or more additional half pages of space; in which case the entries shall be continued under the same number upon other pages of that or a subsequent docket book, reference thereto being entered at the end of the first and all additional half pages, and the clerk upon entering the description of a paper filed in an action shall enter upon its front page and opposite the title caption the number of the action and the filing date and number of entry of the paper. There shall be kept an alphabetical index of all the actions entered in such current docket books during any year, which index shall consist of two sets of separate volumes, one set to be designated and used for indexing actions wherein the plaintiff or plaintiffs are individuals, including all individual members of a copartnership or of a firm doing business under a firm name or style as stated in the title of the action, and the other set to be designated and used for indexing actions wherein the plaintiff or plaintiffs are corporations, a joint stock company, a copartnership or a firm name or style under which a person or persons are doing business. Each of such sets of index books shall have a separate volume or volumes for each letter of the alphabet, and the volumes designated and used for indexing actions wherein the plaintiff or plaintiffs are individuals shall have a marginal page index showing each letter of the alphabet in order, and shall have the designation of its set of books, its letter and the year or years of its entries plainly marked on its back and cover and on every page. And all such actions shall be indexed in such index volumes according to all the plaintiffs of each title, in the same manner as it is provided in section twelve hundred and forty-five that judgment debtors shall be docketed in the judgment docket books, and in every case the serial number of the action shall be entered opposite the name indexed. Within three days after a summons, writ or other original process is served in an action in the supreme court, New York county, the attorney or party causing the same to be served shall file said process with proof of service in the office of the clerk who has custody of the records of the court in which the action is brought. The said clerk shall, upon receipt thereof, stamp the same upon its front page with a certain number to be one of the series for that year, and enter in the current docket book, on the half page bearing the same number, the names of the parties as they appear on said process, and the name and address of the attorney who issued the same. And the attorney or party causing such summons, writ or original process to be served shall, upon demand, give to the party so served, or to the attorney of such party, the number so stamped by the clerk, stamped or indorsed upon a paper with the title of the action, and the name and address of the attorney or party who made or caused the service to be made. All papers in the action shall bear the same number and year as the summons, writ or other original process, which number shall constitute a part of the title of such action. All original papers in the action, with proof or admission of their service, not later than the day after their service, shall be filed with or mailed to the clerk who stamped the number on the summons, writ or other original process. All papers to be hereafter filed with the clerk of New York county must be flat and filed flat. The word "action" as used in this section shall mean "action or special proceeding." Whenever a paper pertaining to

any action begun prior to the passage of this act is filed in the office of the clerk who has custody of the records of the court in which the action is pending the clerk shall upon receipt of such paper stamp the same upon the front page with a certain number, to be one of a series of consecutive numbers for the year in which said action was brought, and shall enter in a current docket book prepared for that year the names of the parties to the action and the name and address of the attorney who filed the paper, in the same manner as if such paper were the original summons, writ or other process in such action; and the clerk shall as soon as practicable thereafter stamp or indorse that number upon every paper in that action theretofore filed in his office and shall enter such papers, as they are so numbered, in such docket book in the same manner as if such docketing had been begun with the first paper in such action. And all such entries in such docket books of actions begun prior to the passage of this act shall be indexed in separate volumes for each letter of the alphabet, and for corporations, a joint stock company, a copartnership or a person or persons doing business under a firm name or style, as hereinbefore provided, in the same manner as actions begun after the passage of this act are hereinbefore directed to be indexed. Whenever an action is transferred to another court, or the place of trial changed, the clerk to whom the papers in such action are delivered shall enter in the current docket book in which he makes entries copies of all entries theretofore made in said action, and shall continue to make subsequent entries therein in the same manner as if the process had originally been filed with him. All papers numbered and docketed as herein directed shall be filed together; and on the entry of final judgment in any action all the papers in that action shall be arranged in the order of the dates on which they were filed and shall be fastened or bound together flat with the judgment-roll and so filed. The county clerk of New York county shall appoint, subject to the rules of the state civil service commission, such subordinates as may be necessary for the work required to be done in his office under the provisions of this act, and shall designate the positions and fix the compensation of such subordinates, subject to the approval of the board of estimate and apportionment of the city of New York; and the comptroller of the city of New York shall issue and sell certificates of indebtedness to an amount sufficient to provide for the payment of the salaries of such subordinates during the year nineteen hundred and twelve, which shall be a charge against the county of New York, and an amount sufficient to pay and discharge the certificates so issued shall be included in the budget made by said board of estimate and apportionment for the year nineteen hundred and thirteen.

Added by L. 1911, c. 290; am'd L. 1912, c. 344 (in effect April 15, 1912).

1245a - Order of Aug. 16, 1915 P. 1756

§ 1246. Clerks to docket judgments.

Each clerk, specified in the last section, must, when he files a judgment-roll, upon a judgment, rendered in a court of which he is clerk, docket the judgment, by entering in the proper docket-book, the following particulars, under the initial letter of the surname of the judgment debtor, in its alphabetical order:

1. The name, at length, of the judgment debtor; and also his residence, title, and trade or profession, if any of them are stated in the judgment.
2. The name of the party, in whose favor the judgment was rendered.
3. The sum, recovered or directed to be paid, in figures.
4. The day, hour, and minute, when the judgment-roll was filed.
5. The day, hour, and minute, when the judgment was docketed in his office.
6. The court in which the judgment was rendered, and, if it was rendered in the supreme court, the county where the judgment-roll is filed.

7. The name of the attorney for the party recovering the judgment.

If there are two or more judgment debtors, those entries must be repeated, under the initial letter of the surname of each.

From 2 R. S. 361 (Part 3, c. 6, tit. 4), § 13.

§ 1247. Filing transcripts, and docketing judgments thereon.

A clerk, with whom a judgment-roll is filed, upon a judgment docketed as prescribed in the last section, must furnish, to any person applying therefor, and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk to whom such a transcript is presented, must, upon payment of his fees therefor, immediately file it, and docket the judgment, as prescribed in the last section, in the appropriate docket-book, kept in his office.

From L. 1840, c. 386, § 26.

§ 1248. Penalty for clerk's neglect.

A clerk who omits, as soon as practicable, to docket a judgment required to be docketed, or to furnish a transcript of a judgment, so docketed in his office, as prescribed in the last two sections, forfeits to the person aggrieved, two hundred and fifty dollars, in addition to the damages sustained by reason of the omission.

From 2 R. S. 362 (Part 3, c. 6, tit. 4), § 20.

§ 1249. Dockets to be public.

A docket-book, kept by a clerk, must be kept open, during the business hours fixed by law, for search and examination by any person.

From Id., § 19.

§ 1250. Judgment not to be a lien until docketed.

A judgment, required to be docketed, as prescribed in this article, neither affects real property or chattels real, nor is entitled to a preference, until the judgment-roll is filed, and the judgment docketed.

From Id., § 12.

§ 1251. [Am'd, 1902, 1905.] Real property bound for ten years by a judgment thus docketed; name of debtor to be docketed.

Except as otherwise specially prescribed by law, and except also as in this section below provided, a judgment, hereafter rendered, which is docketed in a county clerk's office, as prescribed in this article, binds, and is a charge upon, for ten years after filing the judgment roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years. Provided however that no judgment shall be a charge upon or bind the real property of any person unless and until he be designated by his name in a docket of such judgment in the office of the clerk in the county where such property is. Upon such notice to a judgment debtor as the court may direct the supreme court may order that any judgment heretofore or hereafter rendered therein against such debtor be amended so as to designate such debtor by his name and that the clerk of the county in which the judgment roll is filed redocket such judgment as so amended; and from the time of such redocket during the remainder of ten years from the filing of the judgment roll, such judgment shall bind and be a charge upon the real property and chattels real in that county which such judgment debtor may have at the time of such redocket or may thereafter within said ten years acquire, and a transcript of such new docket may be filed and docketed in the office of the clerk of any other county in the state in like manner and with like effect as a transcript of an original docket may be filed. Upon such notice to a judgment debtor as the court may direct any court other than the supreme court may order that any judgment heretofore or hereafter rendered therein against such debtor and any docket thereof in such court be amended so as to designate such debtor by his name, and at any time after such amendment shall have been made a transcript of the docket of such judgment as so amended may be filed and docketed in the office of the clerk of any county in this state in like manner and with like effect as a transcript of an original docket may be filed.

This and the next section are substituted for 2 R. S. 359 (Part 3, c. 6, tit. 4), §§ 3, 4; L. 1840, c. 386, § 25; and Co. Proc., part of § 282. Am'd by L. 1902, c. 318; L. 1905, c. 432 (in effect May 16, 1905).

§ 1252. Real property may be levied upon after ten years.

When ten years after filing the judgment-roll have expired, real property or a chattel real, which the judgment debtor, or real property which a person, deriving his right or title thereto, as the heir or devisee of the judgment debtor, then has, in any county, may be levied upon, by virtue of an execution, against property, issued to the sheriff of that county, upon a judgment hereafter rendered, by filing, with the clerk of that county, a notice, subscribed by the sheriff, describing the judgment, the execution, and the property levied upon; and, if the interest levied upon is that of an heir or devisee, specifying that fact, and the name of the heir or devisee. The notice must be recorded and indexed by the clerk, as a notice of the pendency of an action. For that purpose, the judgment debtor, or his heir, or devisee, named in the notice, is regarded as a party to an action. The judgment binds, and becomes a charge upon, the right and title thus levied upon, of the judgment debtor, or of his heir or devisee, as the case may be, only from the time of recording and indexing the notice, and until the execution is set aside, or returned.

Id.

§ 1253. Land held under contract not bound by judgment.

The interest of a person, holding a contract for the purchase of real property, is not bound by the docketing of a judgment; and cannot be levied upon or sold, by virtue of an execution, issued upon a judgment.

From 1 R. S. 744 (Part 2, c. 1, tit. 4), § 4.

§ 1254. Preference of mortgages for purchase-money.

Where real property is sold and conveyed, and, at the same time, a mortgage thereupon is given by the purchaser, to secure the payment of the whole or a part of the purchase-money, the lien of the mortgage, upon that real property, is superior to the lien of a previous judgment against the purchaser.

From 1 R. S. 749 (Part 2, c. 1, tit. 5), § 5.

§ 1255. Certain time not to be included in the ten years.

The time, during which a judgment creditor is stayed, by an injunction or other order, or by the operation of an appeal, or by express provision of law, from enforcing a judgment, is not a part of the ten years, to which the lien of a judgment is limited by this article. But this section does not extend the time of the lien, as against a purchaser, creditor, or mortgagee in good faith.

From Co. Proc., § 282, second sentence.

§ 1256. Court may order lien of judgment to be suspended upon appeal.

Where an appeal from a judgment has been perfected, and an undertaking has been given, sufficient to entitle the appellant to a stay of the execution of the judgment, without an order for that purpose, the court, in which the judgment was recovered, may, in its discretion and upon such terms as justice requires, make an order, upon notice to the attorney for the respondent, and to the sureties in the undertaking, exempting from the lien of the judgment, as against judgment creditors, and purchasers and mortgagees in good faith, the real property or chattels real, upon which the judgment is a lien, or a portion thereof, specifically described in the order. If all the property, subject to the lien, is so exempted, the order must direct the clerk, in whose office the judgment-roll is filed, to make an entry, on the docket of the judgment, in each place where it appears in the docket-book, substantially as follows: "Lien suspended upon appeal. See order

entered"; adding the proper date. If a portion only is exempted, the order must direct the clerk to make, in like manner, an entry, substantially as follows: "Lien partially suspended upon appeal. See order entered"; adding the proper date. The clerk must, when he files the motion papers, and enters the order, make the entry or entries in the docket-book, as required by the order.

See Co. Proc., § 282, last sentence.

§ 1257. From what time order suspends the lien.

Where an order is made, as prescribed in the last section, by the supreme court or by a county court, it operates as a suspension of the lien upon property situated in the county, where the judgment-roll is filed, from the time when the order is entered, and the proper entry made in the docket-book. If the property exempted is situated in another county, or if the order was made by a court, other than the supreme court or a county court; the order operates as a suspension, from the time, when the proper entry is made in the docket-book, kept by the clerk of that county, as prescribed in the next section.

Id.

§ 1258. How lien suspended in any other county.

The clerk, with whom the order is entered, must, upon payment of his fees therefor, furnish to the party who obtained the order, one or more transcripts, attested by his signature, of the docket of the judgment, including the entry made upon the docket. A county clerk, in whose office the judgment is docketed, must, upon payment of his fees therefor, immediately file such a transcript; and make an entry upon the docket of the judgment, in each place where it appears in his docket-book, substantially as follows: "Lien suspended", or, "Lien partially suspended", according to the entry upon the original docket, and also, "See transcript filed"; adding the proper date.

Id.

§ 1259. When and how lien restored.

At any time after a judgment, which has ceased to be a lien, as prescribed in the last three sections, is affirmed, or the appeal therefrom is dismissed, the lien thereof may be restored, as follows:

1. The clerk, in whose office the judgment of affirmance, or the order dismissing the appeal, is entered, must, upon the request of the judgment creditor, docket the judgment anew, as it was originally docketed, but in the order of priority of the new docket; and he must write, upon the new docket, the words, "Lien restored by redocket"; adding the date of redocketing.

2. A transcript of the new docket must be furnished to a county clerk, in whose office an entry of the suspension of the lien has been made, as prescribed in the last two sections; and thereupon the judgment must be docketed by him anew, in the order of the priority of the new docket. The clerk who so redockets the judgment, must make an entry upon the new docket, substantially as follows: "Lien restored by redocket. See transcript filed"; adding the date of redocketing in his county.

The lien of the judgment is thereupon restored, for the unexpired period thereof, as if the order had not been made; but with like effect only, as against judgment creditors, purchasers, and mortgagees in good faith, as if the judgment had then been first docketed.

New.

§ 1260. [Am'd, 1899, 1911, 1913.] Docket of judgment, how cancelled.

The docket of a judgment must be cancelled and discharged by the clerk, in whose office the judgment-roll is filed, or by the clerk of any county where a transcript of said judgment shall have been docketed, upon filing with him a satisfaction-piece, describing the judgment, and executed as follows:

1. Except as otherwise prescribed in the next subdivision, the satisfaction piece must be executed by the party in whose favor the judgment was rendered, or his executor or administrator; or, if it is made within two years after the entry of judgment, or after the entry of final judgment or order of affirmance, by the attorney of record of the party. But where the authority of the attorney has been revoked, a satisfaction by him is not conclusive, against the person entitled to enforce the judgment, in respect to a person, who had actual notice of the revocation, before a payment on the judgment was made, or a purchase of property bound thereby was effected.

2. If an assignment of the judgment, executed by the party in whose favor it was rendered, or his executor or administrator, has been filed in the clerk's office, the satisfaction-piece must be executed by the person, who appears, from the assignment, or from the last of the subsequent assignments, if any, so filed, showing a continuous chain of title, to be the owner of the judgment; or by his executor or administrator.

3. If the satisfaction-piece is executed by an attorney in fact, in behalf of a person authorized to execute it, other than the attorney of record, an instrument, containing a power to acknowledge the satisfaction, must be filed with the satisfaction-piece, unless it has been recorded, in the proper book for recording deeds, in that or another county; in which case, the satisfaction-piece must refer to the record, and the clerk may, for his own indemnity, require evidence of a record remaining in another office.

The execution of each satisfaction-piece or power of attorney must be acknowledged, before the clerk, or his deputy, and certified by him thereupon; or it must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where it is filed.

4. In the absence of a satisfaction piece under any of the foregoing provisions of this section the docket of a judgment must be canceled, satisfied and discharged by the clerk in whose office the judgment-roll is filed at any time if the judgment debtor, or his legal representatives, or any other person shall deposit with such clerk a sum of money equal to the amount of the judgment, or if the docket shows a partial satisfaction thereof, the unpaid residue thereof, with interest to the time of such deposit and in addition thereto a sum equal to one per centum of said judgment or unpaid residue. There shall be delivered to such clerk with such a deposit a certificate of the sheriff of the same county dated on the day of such deposit that no execution upon the judgment is in his hands. Upon any such payment and delivery of such certificate the clerk shall enter upon the judgment docket the words "satisfied and discharged by deposit." All the provisions of section 1267 of this act, so far as they affect, shall be applicable to this subdivision of this section, except that the clerk of a county with whom a judgment has been docketed, but with whom the judgment-roll has not been filed, before filing the transcript and canceling and discharging the docket of a judgment satisfied of record pursuant to this subdivision of this section, shall also require to be delivered to him in addition to the certificate provided for in section 1267 of this act, a certificate of the sheriff of the same county showing that no execution is in his hands or

that an execution is in his hands and that he has received payment of all fees to which he would by law be entitled if he had collected by virtue of an execution the amount of said judgment or unpaid residue thereof with interest. It shall be the duty of such sheriff to accept such fees without payment to him of the amount of the judgment or any part thereof, upon there being delivered to him a certificate of the clerk with whom the judgment-roll is filed, showing that the judgment has been satisfied of record; and it shall be the duty of any sheriff to give any and all certificates required under this subdivision of this section, upon compliance with the provisions hereof and he shall be entitled to receive fifty cents for each certificate. All deposits of money hereunder shall be considered as paid into court and shall be subject to the provisions of the code of civil procedure relative to the payment of money into court, and the surrender of such money by an order of the court. The additional one per centum to be deposited as aforesaid shall be in payment of all fees of the financial officer of the city or county with whom any money is deposited hereunder. But no provision of this subdivision shall affect the right of the judgment creditor to appeal from the judgment, or make any motion with respect thereto, nor shall any proceedings on appeal be affected by this subdivision.

From 2 R. S. 362 (Part 3, c. 6, tit. 4), §§ 22, 23, 24; L. 1834, c. 262, §§ 1, 2, 3. Am'd by L. 1899, c. 95; L. 1911, c. 599; L. 1913, c. 30 (in effect Sept. 1, 1913).

§ 1261. Satisfaction-piece to be given on payment of judgment.

The person, entitled to enforce a judgment, must execute, and acknowledge before the proper officer, a satisfaction-piece thereof, at the request of the judgment debtor, or of a person interested in property bound by the judgment, upon presentation of a satisfaction-piece, and payment of the sum due upon the judgment, and the fees allowed by law for taking the acknowledgment of a deed.

From 2 R. S. 362 (Part 3, c. 6, tit. 4), § 25.

§ 1262. [Am'd, 1895.] Assignor must acknowledge assignment.

A person who has heretofore executed, or hereafter executes, a written assignment of a judgment, owned by him, without acknowledging the execution thereof, before an officer authorized to take the acknowledgment of a deed, must so acknowledge it, at the request of his assignee, or of a subsequent assignee thereof, or of the judgment debtor, upon presentation of the assignment, and payment of the officer's fees.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1263. Assignee who is a receiver, etc., may file notice.

A resident of the State, or a person having an office within the State, for the regular transaction of business, in person, who becomes the owner of a judgment, by virtue of a general assignment for the benefit of creditors, or of an appointment as a receiver, or trustee or assignee of an insolvent debtor or bankrupt, may file with the clerk, in whose office the judgment-roll is filed, a notice of the assignment, or of his appointment, and of his ownership of the judgment. The notice must be subscribed by him, adding to his signature his place of residence, and also, if he resides without the State, his office address. A notice so filed has the same force and effect, for the purposes of this article, as if it was an assignment of the judgment.

New.

§ 1264. Entry in docket, upon return of execution satisfied.

Where an execution is returned, wholly or partly satisfied, the clerk must make an entry of the satisfaction, or partial satisfaction, in the docket of the judgment, upon which it was issued. Thereupon the judgment is deemed satisfied, to the extent of the amount returned as collected, unless the return is vacated by the court.

From 2 R. S. 362 (Part 3, c. 6, tit. 4), § 26.

§ 1265. Id.; where execution returned unsatisfied.

Where an execution is returned wholly unsatisfied, the clerk must immediately make, in the docket of the judgment, upon which it was issued, an entry of the fact, stating the time when the execution was returned.

New.

§ 1266. Sheriff to give copy of satisfied execution; clerk to enter satisfaction.

A sheriff, upon being paid the full amount due upon an execution in his hands, must immediately indorse thereupon a return of satisfaction thereof. He must also deliver, to the person making the payment, upon the latter's request, and payment of the fees allowed by law therefor, a certified copy of the execution, and of the return of satisfaction thereupon; which may be filed with the clerk of the same county, who must thereupon cancel and discharge the docket of the judgment, as if the judgment-roll was filed in his office, and the execution was returned to him, as satisfied. But this section does not exonerate the sheriff, from his duty to return the execution, to the clerk with whom the judgment-roll is filed.

From L. 1860, c. 6, § 1.

§ 1267. Docket; when to be discharged and cancelled.

The clerk of a county, with whom a judgment has been docketed, must cancel and discharge the docket thereof, upon the filing, with him, of a certificate of the clerk, with whom the judgment-roll is filed, showing that the judgment has been reversed, vacated, or satisfied of record; or the certificate of the clerk of the county, with whom a copy of an execution, and of a return of satisfaction thereupon, have been filed, as prescribed in the last section, showing that they have been so filed, and the docket cancelled and discharged accordingly.

From L. 1860, c. 6, § 2; L. 1844, c. 104, § 5.

§ 1268. [Omitted; see Table, p. iii.] Discharge of a judgment against a bankrupt.

At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him, or if rendered in a court not of record, to the court of which it has become a judgment by docketing it, or filing a transcript thereof, for an order, directing the judgment to be cancelled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment, or the debt upon which such judgment was recovered, an order must be made directing said judgment be cancelled and discharged of record; and thereupon the clerk of said court shall cancel and discharge the same by marking on the docket thereof that the same is cancelled and discharged by order of the court, giving the date of entry of the order of discharge. Where the judgment was a lien on real property owned

by the bankrupt prior to the time he was adjudged a bankrupt, the lien thereof upon said real estate shall not be affected by said order and may be enforced, but in all other respects the judgment shall be of no force or validity, nor shall the same be a lien on real property acquired by him subsequent to his discharge in bankruptcy. Notice of the application, accompanied with copies of the papers upon which it is made, must be served upon the judgment creditor, or his attorney of record in said judgment, in the same manner as prescribed in sections 796 and 797 of the code of civil procedure, if the residence or place of business of such creditor, or his attorney is known, but if unknown and cannot be ascertained after due diligence, or if such creditor is a non-resident of this State, and his attorney is dead, removed from, or cannot be found within the State, upon proof of said facts by affidavit a judge of the court may make an order that the notice of such application be published in a newspaper designated therein once a week for not more than three weeks, which publication shown by the affidavit of the publisher shall be sufficient service upon such judgment creditor, of the application.

From L. 1875, c. 52. Am'd by L. 1899, c. 602 (in effect Sept. 1, 1899).

§ 1269. Power of courts respecting docket.

A court of record has the same power and jurisdiction, concerning the docket of its judgments, kept by a county clerk, which it has concerning the docket, kept by its own clerk. It may direct that such a docket be amended; or that its judgment, there docketed, be docketed nunc pro tunc.

From L. 1844, c. 104, § 7.

§ 1270. Clerk to file and note assignment of judgment.

Upon the presentation, to the clerk of a court of record, of an assignment of a judgment, entered in his office, executed by a person entitled to satisfy the judgment, as prescribed in section 1260 of this act, and otherwise executed as prescribed in that section, with respect to a satisfaction-piece, and upon payment of the fees, allowed by law, for filing a transcript, and docketing a judgment thereupon, the clerk must forthwith file the assignment in his office, and make, upon the docket of the judgment, an entry of the fact, and of the day of filing; or, if he keeps a separate book for the entry of assignments of judgments, an entry, referring to the page of the book, where the filing of the assignment is noted.

New.

§ 1271. [Stricken out by L. 1879, c. 542.]

§ 1272. To what judgments and executions this article applies.

This article applies only to a judgment, wholly or partly for a sum of money, or directing the payment of a sum of money; and to an execution issued upon such a judgment.

New.

TITLE II.

Judgment taken without process.

Article 1. Confession of judgment.
2. Submission of a controversy, upon facts admitted.

ARTICLE FIRST.

Confession of judgment.

Sec. 1273. Judgment may be confessed.
1274. Statement; form thereof.
1275. Statement to be filed, and judgment entered.
1276. Judgment-roll; docketing and enforcing the judgment.
1277. Execution, where the judgment is not all due.
1278. Confession by one of several joint debtors.

§ 1273. [Am'd, 1877, 1897, 1909.] Judgment may be confessed.

A judgment by confession may be entered, without action, either for money due or to become due, or to secure a person against contingent liability in behalf of the defendant, or both, as prescribed in this article.[1]

From Co. Proc., § 382. Am'd by L. 1877, c. 416; L. 1897, c. 38; L. 1909, c. 65. (See Table, p. iii, ante).

§ 1274. Statement; form thereof.

A written statement must be made, and signed by the defendant, to the following effect:

1. It must state the sum, for which judgment may be entered, and authorize the entry of judgment therefor.

2. If the judgment to be confessed is for money due or to become due, it must state concisely the facts, out of which the debt arose; and must show, that the sum confessed therefor is justly due or to become due.

3. If the judgment to be confessed is for the purpose of securing the plaintiff, against a contingent liability, it must state concisely the facts, constituting the liability; and must show, that the sum confessed therefor does not exceed the amount of the liability.

The statement must be verified by the oath of the defendant, to the effect, that the matters of fact therein set forth are true.

From Co. Proc., § 383.

§ 1275. [Am'd, 1895, 1915.] Statement to be filed, and judgment entered.

At any time within three years after the statement is verified, it may be filed with the county clerk of the county of which the defendant was a resident at the time of making such statement, or, where the sum, for which judgment is confessed, does not exceed $2,000, exclusive of interest from the time of making the statement, with the clerk of the city court of the city of New York, provided, however, that the defendant at time of making such statement was a resident of the city of New York. Thereupon the clerk must enter, in like manner as a judgment is entered in an action, a judgment for the sum confessed, with costs, which he must tax, to the amount of fifteen dollars, besides disbursements taxable in an action. If the

[1] It is provided in § 51 of the Domestic Relations Law that "a married woman may confess a judgment specified in § 1273 of the Code of Civil Procedure."

statement is filed with a county clerk, the judgment must be entered in the supreme court; if it is filed with the clerk of another court, specified in this section, the judgment must be entered in the court of which he is clerk. But a judgment shall not be entered upon such a statement, after the defendant's death.

From Co. Proc., § 384, first sentence. Am'd by L. 1895, c. 946; L. 1915, c. 639 (in effect Sept. 1, 1915).

§ 1276. [Am'd, 1879.] Judgment-roll; docketing and enforcing the judgment.

The clerk, immediately after entering the judgment, must attach together and file the statement, as verified, and a copy of the judgment; which constitute the judgment-roll. The judgment may be docketed, and enforced against property, in the same manner, and with the same effect, as a judgment in an action, rendered in the same court; and each provision of law, relating to a judgment in an action, and the proceedings subsequent thereto, apply to a judgment thus taken.

From Co. Proc., § 384, second and third sentences. Am'd by L. 1879, c. 542.

§ 1277. Execution where the judgment is not all due.

Where the debt, for which the judgment is rendered, is not all due, execution may be issued, upon the judgment, for the collection of the sum which has become due. The execution must be in the form prescribed by law, for an execution upon a judgment for the full amount recovered; but the person, whose name is subscribed to it, must indorse thereupon a direction to the sheriff, to collect only the sum due, stating the amount thereof, with interest thereon, and the costs of the judgment. Notwithstanding the issuing and collection of such an execution, the judgment shall remain, as security for the sum or sums to become due, after the execution is issued. When a further sum becomes due, an execution may, in like manner, be issued for the collection thereof; and successive executions may be issued, as further sums become due.

From Co. Proc., rest of § 384.

§ 1278. Confession by one of several joint debtors.

One or more joint debtors may confess a judgment for a joint debt, due or to become due. Where all the joint debtors do not unite in the confession, the judgment must be entered and enforced against those only who confessed it; and it is not a bar to an action against all the joint debtors, upon the same demand.

New.

ARTICLE SECOND.

Submission of a controversy, upon facts admitted.

Sec. 1279. Controversy, how submitted without process.
1280. Papers to be filed; controversy thereupon becomes an action.
1281. Subsequent proceedings regulated.

§ 1279. Controversy, how submitted without process.

The parties to a question in difference, which might be the subject of an action, being of full age, may agree upon a case, containing a statement of the facts, upon which the controversy depends; and may present a written submission thereof to a court of record, which would have jurisdiction of an action, brought for the same cause. The case must be accompanied with the affidavit of one of the parties, to the effect, that the controversy is real; and that the submission is made in good faith, for the purpose of determining the rights of the parties. The submission must be acknowledged or proved, and certified, in like manner as a deed, to be recorded in the county where it is filed.

From Co. Proc., § 372.

§ 1280. Papers to be filed; controversy thereupon becomes an action.

The case, submission, and affidavit, must be filed in the office of the clerk of the court to which the submission is made. If the submission is made to the supreme court, they must be filed in the office of the county clerk, if any, specified in the submission; if no county clerk is so specified, they may be filed in the office of any county clerk. The filing is a presentation of the submission; and thenceforth the controversy becomes an action; and each provision of law, relating to a proceeding in an action, applies to the subsequent proceedings therein except as otherwise prescribed in the next section.

From Co. Proc., §§ 372, 373, 374.

§ 1281. [Am'd, 1895, 1899.] Subsequent proceedings regulated.

An order of arrest, a temporary injunction, or a warrant of attachment, cannot be granted in such an action; the costs thereof are always in the discretion of the court, but costs cannot be taxed, for any proceedings before notice of trial; the action must be tried by the court, upon the case alone; and the case, submission, affidavit, and a certified copy of the judgment, and of any order or paper necessarily affecting the judgment, constitute the judgment roll. If the action is in the supreme court, it must be tried and judgment rendered by the appellate division thereof, and if in the city court of the city of New York, it must be tried and judgment rendered at the general term thereof.[1] If the statement of facts, contained in the case, is not sufficient to enable the court to render judgment, an order must be made dismissing the submission, without costs to either party; unless the court permits the parties, or, in a proper case their representatives, to file an additional statement, which it may do, in its discretion, without prejudice to the original statement.

From Co. Proc., §§ 372, 373. Am'd by L. 1895, c. 946; L. 1899, c. 526 (in effect May 5, 1899).

[1] The General Term of the City Court of New York city was abolished by L. 1902, c. 515.

TITLE III.

Vacating or setting aside a judgment, for irregularity or error in fact.

Sec. 1282. Motion to set aside judgment for irregularity; when it may be heard.
1283. Motion to set aside judgment for error in fact; when it may be made by party.
1284. Id.; after a party's death.
1285. Id.; by a person not a party.
1286. Id.; when several parties are entitled to move.
1287. To whom notice of the motion must be given.
1288. Id.; when real property recovered by the judgment has been conveyed.
1289. How notice given under this title.
1290. Within what time motion to be made.
1291. Exceptions in cases of disability.
1292. Restitution; when directed.

§ 1282. Motion to set aside judgment for irregularity; when it may be heard.

A motion to set aside a final judgment, for irregularity, shall not be heard, after the expiration of one year since the filing of the judgment-roll; unless notice thereof is given for a day within the year, and either the hearing is adjourned, by one or more orders, until after the expiration of the year; or the term, for which it is thus noticed, is not held. In the latter event, the motion may be re-noticed for, and heard at, the next term at which it can be made, held not less than ten days after the day, when the first term was appointed to be held.

From 2 R. S. 359 (Part 3, c. 6, tit. 4), § 2.

§ 1283. Motion to set aside judgment for error in fact; when it may be made by party.

A motion to set aside a final judgment, rendered in a court of record, for error in fact, not arising upon the trial, may be made by the party against whom it is rendered; or, if an execution has not been issued thereon, and the judgment has not been wholly or partly satisfied or enforced, by the party in whose favor it is rendered.

From 2 R. S. 591 (Part 3, c. 9, tit. 3), §§ 2, 3.

§ 1284. Id.; after a party's death.

A like motion may be made, after the death of a party entitled to make it, as prescribed in the last section, by the following persons:

1. Where the judgment awards a sum of money, or a chattel, or an interest in real property, which is declared by law to be assets, the motion may be made by his executor or administrator.

2. Where the judgment awards real property, or the possession thereof, or where the title to or an estate or interest in real property is determined or affected thereby, the motion may be made by the heir of the decedent, to whom the real property descended, or might have descended, or by the person to whom he devised it.

3. Where the judgment is rendered against or in favor of two or more persons, the motion may be made, jointly, by the survivor, and the person who would have been entitled to make it, if the judgment had been rendered in favor of or against the decedent only.

From 2 R. S. 591, § 2, subds. 2, 3, 6.

§ 1285. Id.; by a person not a party.

A motion may be made, either before or after the death of the defendant, by a person, who is not a party, to set aside, for error in fact, not arising upon the trial, a judgment, rendered in an action against a tenant for life, or for years, awarding real property, or the possession of real property, in which the person making the motion has an estate, or interest, in reversion or remainder.

From Id., § 2, subd. 4.

§ 1286. Id.; when several parties are entitled to move.

Where two or more persons are entitled to move to set aside a judgment, as prescribed in the last three sections, one or more of them may move separately; but, in that case, notice of the motion must be given to those who do not join therein, in like manner as if they were adverse parties.

From 2 R. S. 592, §§ 7-17.

§ 1287. To whom notice of the motion must be given.

Notice of a motion to set aside a final judgment, for error in fact, not arising upon the trial, must be given to the adverse party, or, in case of his death, to each person who might have moved, as against the moving party, to set aside the judgment for the same cause, as prescribed in this title. Where the motion is made by the party against whom the judgment is rendered, or by his heir, devisee, executor, or administrator, service of the notice, upon the attorney of record for the party, in whose favor the judgment is rendered, has the like effect, as if it was served upon the party.

From Id., § 19.

§ 1288. Id.; when real property recovered by the judgment has been conveyed.

Where the judgment awards real property, or the possession thereof, or where the title to, or an estate or interest in, real property is determined or affected thereby, and the real property, or estate or interest therein, has been conveyed, by the adverse party, more than eight days before the hearing of the motion, notice of the motion must also be given to each actual occupant of the property, claiming under the conveyance.

From Id., § 19.

§ 1289. How notice given under this title.

Notice must be given, in a case specified in this title, by personal service of a written notice, or of an order to show cause why the motion should not be granted; or, if a person entitled to notice cannot, with due diligence, be found within the State, in any manner which the court, or a judge thereof, directs in an order to show cause, or which the court directs in a subsequent order.

New. See 2 R. S. 592, § 11.

§ 1290. Within what time motion to be made.

A motion to set aside a final judgment, for error in fact, not arising upon the trial, shall not be heard, except as specified in the next section, after the expiration of two years since the filing of the judgment-roll, unless notice thereof is given, for a day within the two years; and either the hearing is adjourned, by one or more orders, until after the expiration of the two

years; or the term, for which it is thus noticed, is not held. In the latter event, the motion may be re-noticed for, and heard at, the next term at which it can be made, held not less than ten days after the day, when the first term was appointed to be held.

New. See 2 R. S. 594, § 21.

§ 1291. Exceptions in cases of disability.

If the person, against whom the judgment is rendered, is, at the time of filing the judgment-roll, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution, upon conviction of a criminal offence, for a term less than for life.

The time of such a disability is not a part of the time, limited by the last section; except that the time, within which the motion may be heard, cannot be extended more than five years by such a disability, nor, in any case, more than one year after the disability ceases.

From 2 R. S. 594, §§ 22, 24.

§ 1292. Restitution; when directed.

Where a judgment is set aside for any cause, upon motion, the court may direct and enforce restitution, in like manner, with like effect, and subject to the same conditions, as where a judgment is reversed upon appeal.

New. See § 1323, post.

CHAPTER XII.

Appeals.

TITLE I.—General Provisions, Relating to the Appeals Provided for in this Chapter.
TITLE II.—Appeal to the Court of Appeals.
TITLE III.—Appeal to the Supreme Court from an Inferior Court.
TITLE IV.—Appeal to the Appellate Division of the Supreme Court.
TITLE V.—Appeal From a Determination in a Special Proceeding.

TITLE I.

General provisions, relating to the appeals provided for in this chapter.

Sec. 1293. Writ of error abolished.
1294. When party may appeal.
1295. Parties to appeal; how designated. Title of cause.
1296. When a person entitled to become a party may appeal.
1297. Appeal when adverse party has died.
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1318. When no appeal lies from judgment of reversal.
1319. Mode of enforcing affirmed or modified judgment.
1320. Id.; as to order.
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1322. Id.; when reversal, etc., was by court of appeals.
1323. Restitution; when awarded.
1323a. Remarks or comments of judge, duly excepted to, shall be subject of review.

§ 1293. Writ of error abolished.

The writ of error in a civil action or special proceeding has been abolished.

See Co. Proc., §§ 333, 457.

§ 1294. When party may appeal.

A party aggrieved may appeal, in a case prescribed in this chapter, except where the judgment or order, of which he complains, was rendered or made upon his default.

From Co. Proc., § 325.

§ 1295. Parties to appeal; how designated. Title of cause.

The party or person appealing is designated as the appellant, and the adverse party as the respondent. After an appeal is taken to another court, the name of the appellate court must be substituted, for that of the court below, in the title of the action or special proceeding, and in any case, the name of the county, if it is mentioned, may be omitted; otherwise the title shall not be changed, in consequence of the appeal.

From Co. Proc., § 326.

§ 1296. When a person entitled to become a party may appeal.

A person aggrieved, who is not a party, but is entitled by law to be substituted, in place of a party; or who has acquired, since the making of the order, or the rendering of the judgment appealed from, an interest, which would have entitled him to be so substituted, if it had been previously acquired, may also appeal, as prescribed in this chapter, for an appeal by a party. But the appeal cannot be heard, until he has been substituted in place of the party; and if he unreasonably neglects to procure an order of substitution, the appeal may be dismissed, upon motion of the respondent.

New.

§ 1297. Appeal when adverse party has died.

Where the adverse party has died, since the making of the order, or the rendering of the judgment appealed from, or where the judgment appealed from was rendered, after his death, in a case prescribed by law, an appeal may be taken, as if he was living; but it cannot be heard, until the heir, devisee, executor, or administrator, as the case requires, has been substituted as the respondent. In such a case, an undertaking required to perfect the appeal, or to stay the execution of the judgment or order appealed from, must recite the fact of the adverse party's death; and the undertaking enures, after substitution, to the benefit of the person substituted.

New.

§ 1298. [Am'd, 1877.] Proceedings, when party dies pending appeal.

Where either party to an appeal dies, before the appeal is heard, or has heretofore died, and the appeal has not been heard, if an order, substituting another person in his place, is not made, within three months after his death, or, where he has heretofore died, within three months after this section takes effect, the court, in which the appeal is pending, may, in its discretion, make an order, requiring all persons interested in the decedent's estate, to show cause before it, why the judgment or order appealed from should not be reversed or affirmed, or the appeal dismissed, as the case requires. The order must specify a day, when cause is to be shown, which must be not less than six months after making the order; and it must designate the mode of giving notice to the persons interested. Upon the return day of the order, or at a subsequent day, appointed by the court, if the proper person has not been substituted, the court, upon proof, by affidavit, that notice has been given, as required by the order, may reverse or affirm the judgment or order appealed from, or dismiss the appeal, or make such further order in the premises, as justice requires.

See Co. Proc., § 121. Am'd by L. 1877, c. 416.

§ 1299. Order of substitution.

Where the appeal is from one court to another, an application for an order of substitution, as prescribed by the last three sections, must be made to the appellate court. Where personal service of notice of application for an order has been made, within the State, upon the proper representative of the decedent, an order of substitution may be made, upon the application of the surviving party.

New.

§ 1300. [Am'd, 1909.] Appeal, how taken.

An appeal must be taken, by serving, upon the attorney for the adverse party, as prescribed in article third of title sixth of chapter eighth of this act, and upon the clerk, with whom the judgment or order appealed from is entered, by filing it in his office, a written notice, to the effect, that the appellant appeals from the judgment or order, or from a specified part thereof. Upon an appeal to the court of appeals from an order of the appellate division, made upon an appeal from the surrogate's court, the notice of appeal shall be filed with the clerk of the surrogate's court.

From Co. Proc., § 327. Am'd by L. 1909, c. 416 (in effect Sept. 1, 1909).

§ 1301. When notice of appeal to specify interlocutory judgment, etc.

Where the appeal is from a final judgment, or from a final order in a special proceeding, and the appellant intends to bring up, for review thereupon, an interlocutory judgment, or an intermediate order, he must, in the notice of appeal, distinctly specify the interlocutory judgment, or intermediate order, to be reviewed.

New. See §§ 1316, 1317, post.

§ 1302. Proceedings, if attorney or party not found.

If the attorney for the adverse party is dead; or if he has been removed, and notice of the removal has been served upon the appellant's attorney, and another attorney has not been substituted in his place; or if, for any reason, service of a notice of appeal, upon the proper attorney for the adverse party, cannot, with due diligence, be made within the State, the notice of appeal may be served upon the respondent, in the manner prescribed by law for serving it upon an attorney. If personal service upon the respondent cannot, with due diligence, be so made within the State, the notice of appeal may be served upon him, and notice of the subsequent proceedings may be given to him, as directed by a judge of the court, in or to which the appeal is taken.

New.

§ 1303. Defects in proceedings may be supplied.

Where the appellant, seasonably and in good faith, serves the notice of appeal, either upon the clerk or upon the adverse party, or his attorney, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act, necessary to perfect the appeal, or to stay the execution of the judgment or order appealed from; the court, in or to which the appeal is taken, upon proof, by affidavit, of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

From Co. Proc., § 327, last sentence.

§ 1304. Order appealed from must be entered. Proceedings to compel entry.

An appeal cannot be taken from an order made by a judge, out of court, until it is entered in the office of the proper clerk.

Where such an order has not been so entered, or the papers, upon which it was founded, have not been filed in the same clerk's office, the judge who made it, or, if he is absent, or unable or disqualified to act, a judge of the court, in or to which an appeal therefrom may be taken, must, upon the application of a party or other person, entitled to take such an appeal, make an order, requiring the omission to be supplied, within a specified time after service of a copy of the order made by him. Upon proof, by affidavit, that a copy of the latter order has been served, and that the omission has not been supplied, the same judge may make, upon notice, an order revoking and annulling the original order. The provisions of the last section but one apply to the service of an order, or a notice, as prescribed in this section.

See Co. Proc., § 350.

§ 1305. Security may be waived.

An undertaking, which the appellant is required, by this chapter, to give, or any other act which he is so required to do, for the security of the respondent, may be waived by the written consent of the respondent.

From Co. Proc., § 334, last sentence.

§ 1306. Deposit, in lieu of undertaking.

Where the appellant is required, by this chapter, to give an undertaking, he may, in lieu thereof, deposit with the clerk, with whom the judgment or order appealed from is entered, a sum of money, equal to the amount for which the undertaking is required to be given. The deposit has the same effect, as filing the undertaking; and notice that it has been made, has the same effect, as notice of the filing and service of a copy of the undertaking. The court, wherein the appeal is pending, may direct the mode, in which the money shall be kept and disposed of, during the pendency, or after the determination of the appeal.

From Id., § 335.

§ 1307. [Am'd, 1910.] Undertaking must be filed.

An undertaking, given as prescribed in this chapter, must be filed with the clerk, with whom the judgment or order appealed from is entered, except that upon an appeal to the court of appeals the undertaking must be filed with the clerk of the court wherein the original judgment or order was entered.

From Id., § 343, first sentence. Am'd by L. 1910, c. 582 (in effect Sept. 1, 1910).

§ 1308. [Am'd, 1895.] New undertaking to be given, when sureties are insolvent, etc.

The court, in which the appeal is pending, upon satisfactory proof, by affidavit, that since the execution of an undertaking, given as prescribed in this chapter, one or more of the sureties therein have become insolvent; or that his or their circumstances have become so precarious, that there is reason to apprehend, that the undertaking is not sufficient for the security of the respondent; may make an order, requiring the appellant to file a new undertaking, and to serve a copy thereof, as required with respect to the original undertaking. If the appellant fails so to do, within twenty days after the service of a copy of the order, or such further time as the court allows, the appeal must be dismissed, or the order or judgment, from which the appeal is taken, must be executed, as if the original undertaking had not been given.

From Co. Proc., § 335. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1309. [Am'd, 1894.] Action upon undertaking; when not to be brought.

An action shall not be maintained upon an undertaking, given upon an appeal, taken as prescribed in title third, fourth or fifth of this chapter, until ten days have expired, since the service, upon the attorney for the appellant, and upon the sureties on such undertaking, of a written notice of the entry of a judgment or order, affirming the judgment or order appealed from, or dismissing the appeal. Such service may be made by mailing such notice in a postpaid wrapper addressed to said surety or sureties, at the last known post-office address of such surety or sureties. Where an appeal to the court of appeals from that judgment or order is perfected, and security is given thereupon, to stay the execution of the judgment or order appealed from, an action shall not be maintained upon the undertaking, given upon the preceding appeal, until after the final determination of the appeal to the court of appeals.

From Co. Proc., § 348. Am'd by L. 1894, c. 108.

§ 1310. [Am'd, 1888, 1895, 1896.] When appeal stays proceedings; effect thereof.

Where an appeal to the general term of any court or to the appellate division of the supreme court or to the court of appeals or otherwise has been heretofore or shall hereafter be perfected, as prescribed in this chapter, and the other acts, if any, required to be done, to stay the execution of the judgment or order appealed from, have been done, the appeal stays all proceedings to enforce the judgment or order appealed from; except that the court or judge from whose determination the appeal is taken, may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from or not embraced within the appeal; or may cause perishable property to be sold, pursuant to the judgment or order appealed from. The proceeds of such a sale must be paid, to abide the result of the appeal, into the court from or in which the appeal is taken, or, if it was taken as prescribed in title fifth of this chapter, into the supreme court. When an appeal from a judgment for rent has been perfected and execution stayed as herein provided, the appeal stays all summary proceedings, pending or otherwise, to recover the possession of real property or dispossess tenants therefrom, based on the failure to pay the rent included in the judgment appealed from. In a case, specified in subdivision two of section 191 of this act, a party aggrieved, upon presenting to the court proof by affidavit that he intends to apply to the appellate division, rendering such decision, for leave to appeal to the court of appeals, and in case such appellate division shall refuse such leave, then that such party intends to apply to a judge of the court of appeals to be allowed to appeal to said court of appeals, and proof that an undertaking, given as prescribed in this chapter, has been filed with the clerk with whom the judgment appealed from is entered, shall be entitled to an order staying all proceedings to enforce such judgment, until the granting or refusal of such leave to appeal by such appellate division or a judge of the court of appeals. The party desiring to make such application must do so at the same term or at the term of said appellate division next succeeding that at which judgment of affirmance was rendered and notice of entry thereof served upon the party aggrieved, and in case said appellate division refuses such application, then such party shall have thirty days, from and after service of a copy of the

order of said appellate division denying such application, with notice of entry, in which to apply to a judge of the court of appeals, to be allowed to so appeal.

From Co. Proc., §§ 339, 342. Am'd by L. 1893, c. 4; L. 1895, c. 946; L. 1898, c. 292 (in effect April 19, 1898).

§ 1311. [Am'd, 1895, 1899.] Levy upon personal property, when superseded by appeal.

Where an appeal, taken from a final judgment, to the court of appeals, has been perfected, and the security, required to stay the execution of the judgment, has been given; or where the security, given upon an appeal, taken from a final judgment of the supreme court, a county court or the city court of the city of New York, or the municipal court of the city of New York, is equal to that required to perfect an appeal to the court of appeals, and to stay the execution of the judgment; the court, in which the judgment appealed from was rendered, may, in its discretion, and upon such terms as justice requires, make an order, upon notice to the respondent, and the sureties in the undertaking, discharging a levy upon personal property, made by virtue of an execution, issued upon the judgment appealed from. But this section does not authorize the discharge of a levy, made by virtue of a warrant of attachment.

New. Am'd by L. 1895, c. 946; L. 1899, c. 215 (in effect Sept. 1, 1899).

§ 1312. Court may limit amount of security in certain cases.

Where an appeal is taken, as prescribed in title second or fourth of this chapter, the court, in or from which the appeal is taken; or, where an appeal is taken as prescribed in title third or fifth of this chapter, the court, to which the appeal is taken; may, in its discretion, make an order, upon notice to the respondent, dispensing with or limiting the security, required to stay the execution of the judgment or order appealed from, as follows:

1. Where the appellant is an executor, administrator, trustee, or other person acting in another's right, the security may be dispensed with or limited, in the discretion of the court.

2. The aggregate sum, in which one or more undertakings are required to be given, may be limited to not less than fifty thousand dollars, where it would otherwise exceed that sum.

See Co. Proc., § 339.

§ 1313. [Am'd, 1889.] No security necessary, on appeal by the people, etc.

Upon an appeal, taken by the people of the State, or by a State officer, or board of State officers, or a board of supervisors of a county, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking, or other security.

From L. 1858, c. 37, § 2; L. 1861, c. 288. Am'd by L. 1889, c. 501.

§ 1314. [Am'd, 1877.] Id.; on appeal by a domestic municipal corporation.

Upon an appeal, taken by a domestic municipal corporation, the service of the notice of appeal perfects the appeal, and stays the execution of the judgment or order appealed from, without an undertaking, or other security; except that, where an appeal is taken, as prescribed in title second, third or fourth of this chapter, the court, in or from which the appeal is taken, may, in its

discretion, require security to be given. In that case, the form, nature, and extent of the security, not exceeding that which is required in a like case, from a natural person, and the time and manner in which it must be given, must be prescribed by the order of the court, and the mayor, comptroller, or counsel to the corporation, may execute, in behalf of the corporation, an undertaking, so required to be given.

From L. 1859, c. 262, § 1. Am'd by L. 1877, c. 416.

§ 1315. [Am'd, 1880.] Papers to be transmitted to appellate court.

Where an appeal is taken from a final judgment, as prescribed in title second or third of this chapter, the appellant must, within twenty days after it is perfected, cause a copy of the judgment-roll and of the case and notice of exceptions, if any, filed after the entry of judgment, and a certified copy of the judgment given thereon and of the notice of appeal, to be transmitted to the appellate court by the clerk upon whom the notice of appeal was served.

Where an appeal from an order, or a part of an order, is taken as prescribed in title second, third, and fifth of this chapter, the appellant must, within the same time, cause a certified copy of the notice of appeal, of the order, and of the papers upon which the order was founded, to be transmitted to the appellate court, by the same clerk. If the appellant fails so to do, the respondent may cause those papers to be so transmitted; and he is entitled to tax the expense thereof, as a disbursement, where he recovers costs. The clerk of the appellate court must file the papers so transmitted; and, except where it is otherwise specially prescribed by law, the appeal must be heard upon them.

From Co. Proc., § 328. Am'd by L. 1890, c. 312.

§ 1316. Interlocutory judgment, or intermediate order, may be reviewed.

An appeal, taken from a final judgment, brings up for review, an interlocutory judgment, or an intermediate order, which is specified in the notice of appeal, and necessarily affects the final judgment; and which has not already been reviewed, upon a separate appeal therefrom, by the court or the term of the court, to which the appeal from the final judgment is taken. The right to review an interlocutory judgment, or an intermediate order, as prescribed in this section, is not affected by the expiration of the time, within which a separate appeal therefrom might have been taken.

Based on Code Proc., § 329.

§ 1317. [Am'd, 1895, 1912.] Judgment or order on appeal.

Upon an appeal from a judgment or an order, the appellate division of the supreme court, or appellate term, to which the appeal is taken, may reverse or affirm, wholly or partly, or may modify, the judgment or order appealed from, and each interlocutory judgment or intermediate order, which it is authorized to review, as specified in the notice of appeal, and as to any or all of the parties. It shall thereupon render judgment of affirmance, judgment of reversal and final judgment upon the right of any or all of the parties, or judgment of modification thereon, according to law, except where it may be necessary or proper to grant a new trial or hearing, when it may grant a new trial or hearing. When a trial has been before a jury, the judgment of the appellate court must be rendered either upon special findings of the jury or the general verdict, or upon a motion to dismiss the complaint or to direct a verdict. A judgment, affirming wholly or partly a judgment, from which an appeal has been taken, shall not, expressly and in terms, award to the respondent, a sum of money, or other relief, which was awarded to him by the judgment so affirmed. After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.

From Co. Proc., § 330. Am'd by L. 1895, c. 946; L. 1912, ch. 380 (in effect Sept. 1, 1912).

§ 1318. When no appeal lies from judgment of reversal.

Where a judgment, from which an appeal is taken, is reversed upon the appeal, and a new trial is granted, an appeal cannot be taken from the judgment of reversal; but upon an appeal from the order granting a new trial, taken, as prescribed by law, the judgment of reversal must also be reviewed.

New.

§ 1319. Mode of enforcing affirmed or modified judgment.

Where a judgment, from which an appeal has been taken, from one court to another, is wholly or partly affirmed, or is modified, upon the appeal, it must be enforced, by the court in which it was rendered, to the extent permitted by the determination of the appellate court, as if the appeal therefrom had not been taken.

New.

§ 1320. Id.; as to order.

Where a final order, from which an appeal has been taken, from one court to another, as prescribed in title fifth of this chapter, is wholly or partly affirmed, or is modified, upon the appeal, the appellate court may enforce its order, or may direct the proceedings to be remitted, for that purpose, to the court below, or to the judge who made the order appealed from.

New.

§ 1321. [Am'd, 1877.] Mode of cancelling docket of reversed or modified judgment.

Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or has been affirmed as to part only of the sum, upon an appeal, taken as prescribed in title third or fourth of this chapter; and an appeal to the court of appeals is not taken and perfected, and the security required to stay execution is not given, within ten days after the entry of the judgment upon the appeal, in the clerk's office where the judgment appealed from is entered, the clerk must make a minute of the reversal of the judgment, or of the amount to which it has been reduced, upon his docket-book, in each place, where the judgment is docketed. A transcript of the docket, as thus corrected, must be furnished by him, and may be filed in any county clerk's office, where the original judgment is docketed, as prescribed by law, with respect to the original docket; and thereupon the county clerk must correct his docket accordingly. The lien of a judgment, the docket of which is not corrected, as prescribed in this section, remains unaffected by the reversal or modification thereof, until the decision of the court of appeals, upon an appeal from the judgment reversing or modifying the same, or the expiration of the time to take such an appeal.

New. Am'd by L. 1877, c. 416.

§ 1322. Id.; when reversal, etc., was by court of appeals.

Where a final judgment for a sum of money, or directing the payment of a sum of money, has been reversed, or affirmed as to part only of the sum, upon an appeal to the court of appeals, the docket may be corrected, as prescribed in the last section, at any time after the remittitur has been filed in the court below.

New.

§ 1323. [Am'd, 1877, 1880, 1899.] Restitution; when awarded.

When a final judgment or order is reversed or modified, upon appeal, the appellate court, or the general term of the same court, as the case may be, may make or compel restitution of property, or of a right, lost by means of the erroneous judgment or order; but not so as to affect the title of a purchaser in good faith and for value. When property has been sold, the court may compel the value, or the purchase price, to be restored, or deposited to abide the event of the action, as justice requires. When the appeal is from a judgment in favor of the owner of real estate in an action to set aside a conveyance thereof, or in an action to compel the specific performance of a contract for the sale thereof, such owner shall have the same right to sell or dispose of the same as though no appeal had been taken; unless the appellant shall file with the clerk of the court a written undertaking, in a sum fixed by the court, or a judge thereof, upon a notice to the respondent of at least ten days, and to be approved by such court or judge, to the effect that the appellant will, in case the judgment appealed from shall be affirmed, pay to such owner such damages as he may suffer by reason of such appeal, not exceeding the amount of the penalty in such undertaking. Such undertaking may be filed at any time during the appeal, but any sale of such real estate or contract to sell the same in good faith and for a valuable consideration, after said judgment and before the filing of such undertaking, shall be as valid as if such undertaking had not been filed. In case such undertaking shall not be filed, the respondent shall be entitled, at any time during such appeal, to an order discharging of record any notice of pendency of action filed in the action, and, in an action to compel the specific performance of a contract for the sale of real estate, also canceling and discharging of record said contract, in case the same has been recorded.

See Co. Proc., § 330. Am'd by L. 1877, c. 416; L. 1880, c. 529; L. 1899, c. 850 (in effect Sept. 1, 1899).

§ 1323a. [Added, 1909.] Remarks or comments of judge, duly excepted to, shall be subject of review.

In case of an appeal, every remark or comment of the presiding judge during the trial, duly excepted to, shall be the subject of review, but the case and exceptions on appeal shall be settled by the trial justice as now provided by law.

From Code Civ. Proc., § 83 pt. Added here by L. 1909, c. 65 (in effect Feb. 17, 1909). (For remainder of section see Judiciary Law, §§ 14, 24, 295-297, 301.)

TITLE II.

Appeals to the court of appeals.

Sec. 1324. What appeals may be taken.
1325. Limitation of time to appeal.
1326. Security to perfect appeal.
1327. Security to stay execution on judgment, etc., for money.
1328. Id.; on judgment, etc., for delivery of property.
1329. Id.; on judgment for a chattel.
1330. Id.; on judgment, etc., directing conveyance.
1331. Id.; on judgment, etc., for the possession of real property.
1332. Construction of the last five sections.
1333. The last six sections qualified.
1334. Undertakings may be in one instrument; form, and service thereof.
1335. Exceptions to sureties; justification.
1336. Appeal from final judgment rendered after affirmance of interlocutory judgment, or denial of motion for new trial.
1337. What questions are brought up for review.
1338. When reversal presumed not to be on a question of fact.
1339. Preparation of a case for an appeal from a judgment rendered upon a verdict subject to the opinion of the court.

§ 1324. What appeals may be taken.

An appeal may be taken to the court of appeals, in a case where that court has jurisdiction, as prescribed in sections 190 and 191 of this act.

From Co. Proc., § 333, first sentence.

§ 1325. [Am'd, 1877, 1895, 1909.] Limitation of time to appeal.

An appeal to the court of appeals must be taken within sixty days after service, upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice of the entry thereof.

See Co. Proc., § 331. Am'd by L. 1877, c. 416; L. 1895, c. 946; L. 1909, c. 418 (in effect Sept. 1, 1909).

§ 1326. Security to perfect appeal.

To render a notice of appeal, to the court of appeals, effectual, for any purpose, except in a case where it is specially prescribed by law, that security is not necessary, to perfect the appeal, the appellant must give a written undertaking, to the effect, that he will pay all costs and damages, which may be awarded against him on the appeal, not exceeding five hundred dollars. The appeal is perfected, when such an undertaking is given and a copy thereof, with notice of the filing thereof, is served, as prescribed in this title.

From Co. Proc., § 334.

§ 1327. Security to stay execution on judgment, etc., for money.

If the appeal is taken from a judgment for a sum of money, or from a judgment or order, directing the payment of a sum of money, it does not stay the execution of the judgment or order, until the appellant gives a written undertaking, to the effect, that if the judgment or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, he will pay the sum, recovered or directed to be paid, by the judgment or order, or the part thereof, as to which it is affirmed. But where the judgment

or order directs the payment of money in fixed instalments, the undertaking must be to the effect, that the appellant will pay each instalment, which becomes payable, pending the appeal, or the part thereof as to which the judgment or order is affirmed, not exceeding a sum specified in the undertaking, which must be fixed by a judge of the court below. The court below may, at any time afterwards, upon satisfactory proof, by affidavit, that the sum so fixed is insufficient in amount, make an order, requiring the appellant to give a further undertaking, to the same effect, in a sum and within a time, specified in the order. A failure to comply with such an order has the same effect, as if no undertaking had been given, as prescribed in this section.

From Co. Proc., § 335, first sentence.

§ 1328. Id.; on judgment, etc., for delivery of property.

If the appeal is taken from a judgment or order, directing the assignment or delivery of a document, or of personal property, it does not stay the execution of the judgment or order, until the thing directed to be assigned or delivered, is brought into the court below, or placed in the custody of an officer or receiver, designated by that court; or the appellant gives a written undertaking as prescribed in the next section.

From Id., § 336.

§ 1329. Id.; on judgment for a chattel.

If the appeal is taken from a judgment for the recovery of a chattel, it does not stay the execution of the judgment, until the appellant gives a written undertaking, in a sum fixed by the court below, or a judge thereof, to the effect, that the appellant will obey the direction of the appellate court, upon the appeal.

From Id., § 336.

§ 1330. Id.; on judgment, etc. directing conveyance.

If the appeal is taken from a judgment or order, directing the execution of a conveyance, or other instrument, it does not stay the execution of the judgment or order, until the instrument is executed, and deposited with the clerk, with whom the judgment or order is entered, to abide the direction of the appellate court.

From Id., § 337.

§ 1331. [Am'd, 1879, 1897.] Id.; on judgment, etc., for the possession of real property.

If the judgment or order directs the sale or the delivery of the possession of real property, or entitles the respondent to the immediate possession thereof, an appeal does not stay the execution of the judgment or order until the appellant gives a written undertaking to the effect that he will not, while in possession of the property, commit, or suffer to be committed, any waste thereon; and if the property is in his possession or under his control, the undertaking must also provide that if the judgment or order is affirmed or the appeal is dismissed, and there is a deficiency upon a sale, he will pay the value of the use and occupation of such property, or the part thereof as to which the judgment or order is affirmed, from the time of taking the appeal until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a specified sum fixed by a judge of the court below. If the judgment directs a sale of real property upon the foreclosure of a mortgage, and an appeal is taken by a party against whom payment of a deficiency is awarded by such judgment, the under-

taking must also provide that if the judgment is affirmed or the appeal is dismissed, the appellant will pay any deficiency which may occur upon the sale, with interest and costs, and all expenses chargeable against the proceeds of the sale, not exceeding a sum fixed by a judge of the court below.

From Co. Proc., § 338. Am'd by L. 1879, c. 542; L. 1897, c. 119 (in effect Sept. 1, 1897).

§ 1332. Construction of the last five sections.

Where the judgment or order, from which an appeal is taken to the court of appeals, affirms a judgment or order, to the effect specified in either of the last five sections, the undertaking must be the same, as if the judgment or order, from which the appeal is so taken, was to the same effect, as the judgment or order so affirmed.

New.

§ 1333. The last six sections qualified.

The last six sections do not extend to a case, where it is specially prescribed by law, that an appeal may be taken, or the execution of a judgment or order appealed from may be stayed, without security, or where the security to be given, for either purpose, is specially regulated by law.

New.

§ 1334. [Am'd, 1879.] Undertakings may be in one instrument; form and service thereof.

Where two or more undertakings are required to be given as prescribed in this title they may be contained in the same instrument, or in different instruments, at the option of the appellant. Each undertaking given as prescribed in this title must be executed by at least two sureties, and must specify the residence of each surety therein. A copy thereof, with a notice showing where it is filed, must be served on the attorney for the adverse party with the notice of appeal or before the expiration of the time of appeal.

From Co. Proc., § 340. Am'd by L. 1879, c. 542.

§ 1335. [Am'd, 1882, 1891.] Exceptions to sureties; justification.

It is not necessary that the undertaking should be approved; but the attorney for the respondent may, within ten days after the service of a copy of the undertaking with notice of the filing thereof, serve upon the attorney for the appellant, a written notice that he excepts to the sufficiency of the sureties. Within ten days thereafter, the sureties, or other sureties in a new undertaking to the same effect, must justify before the court below, or a judge thereof, or a referee appointed by the same, or a county judge. At least five days' notice of the justification must be given. A referee may be appointed upon the motion of either party, or upon the court's own motion, to take the justification of such sureties and to report the evidence upon the same to the court or judge with his opinion. The court may further direct that either party shall pay the expenses of such reference. If the court or judge finds the sureties sufficient, he must indorse his allowance of them upon the undertaking, or a copy thereof, and a notice of the allowance must be served upon the attorney for the exceptant. The effect of a failure so to justify and procure an allowance, is the same as if the undertaking had not been given. The court shall also have power, in case it shall be made

to appear to its satisfaction, upon motion, that the exception was taken unnecessarily or for purposes of vexation or delay, to set the same aside and approve the undertaking.

From Co. Proc., § 341. Am'd by L. 1882, c. 397; L. 1891, c. 369.

§ 1336. [Am'd, 1895.] Appeal from final judgment rendered after affirmance of interlocutory judgment, or denial of motion for new trial.

Where final judgment is rendered in the court below, after the affirmance, upon an appeal to the appellate division of the supreme court, of an interlocutory judgment; or after the refusal, by the appellate division, of a new trial, either upon an application, made, in the first instance, at a term thereof, or upon an appeal from an order of the special term, or of the judge before whom the issues, or questions of fact, were tried by a jury; the party aggrieved may appeal directly from the final judgment to the court of appeals, notwithstanding that it was rendered at a special term, or at a trial term, or pursuant to the directions, contained in a referee's report. But such an appeal brings up, for review, only the determination of the appellate division of the supreme court, affirming the interlocutory judgment, or refusing the new trial.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896). See § 1350, post.

§ 1337. [Am'd, 1894, 1895.] What questions are brought up for review.

An appeal to the court of appeals from a final judgment, or from an order granting or refusing a new trial in an action, where the appellant stipulates that upon affirmance judgment absolute shall be rendered against him, brings up for review in that court only questions of law; but where the justices of the appellate division from which an appeal is taken are divided upon the question as to whether there is evidence supporting, or tending to support, a finding or verdict not directed by the court, a question for review is presented. In any action on an appeal to the court of appeals, the court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to.

New. Am'd by L. 1894, c. 668; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1338. [Am'd, 1895, 1913.] When reversal presumed not to be on a question of fact.

Upon an appeal to the court of appeals from a judgment, reversing a judgment entered upon the report of a referee, upon the verdict of a jury or a decision, or a determination in the trial court; or from an order granting a new trial, upon such a reversal; it must be conclusively presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the particular question or questions of fact upon which the reversal was made or the new trial was granted are specified and referred to by number or other adequate designation in the body of the judgment or order appealed from.

From Co. Proc., §§ 268, 272. Am'd by L. 1895, c. 946; L. 1912, ch. 361 (in effect Sept. 1, 1912.)

§ 1339. [Am'd, 1895.] Preparation of a case for an appeal from a judgment rendered upon a verdict subject to the opinion of the court.

Where an appeal to the court of appeals, from a judgment, rendered by the appellate division of the supreme court, upon a verdict, subject to the opinion of the court, has been perfected, a case, containing a concise statement of the facts, of the questions of law arising thereupon, and of the determination of those

questions by the appellate division, must be prepared and settled, by or under the direction of the court below, and annexed to the judgment-roll. An exception is not necessary, to enable the court of appeals to review the determination of a question of law, arising upon the verdict. A certified copy of the case must be transmitted to the court of appeals, instead of the case upon which the judgment of the court below was rendered. The court below, or a judge thereof, may extend the time, limited by law, within which the papers must be transmitted to the court of appeals, for the purpose of enabling the appellant to procure the case to be prepared or settled.

From Co. Proc., §§ 333, 265. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

TITLE III.

Appeal to the supreme court from an inferior court.

Sec. 1340. Appeals from inferior courts.
1341. Limitation of time; security.
1342. Appeal from order.
1343. Limitation of time and stay of proceedings.
1344. Appeal, where and how heard.
1345. Judgment or order, where entered.

§ 1340. [Am'd, 1888, 1895.] Appeals from inferior courts. Except appeals from inferior and local courts heretofore heard in the court of common pleas for the city and county of New York, and the superior court of Buffalo, an appeal may be taken to the appellate division of the supreme court, from a final judgment, rendered by a county court, or by any other court of record possessing original jurisdiction, where an appeal therefrom to a court other than the supreme court is not expressly given by statute, and upon such appeal, an order granting or refusing a new trial for any of the causes mentioned in section 999 of this act, made by any of said courts, and questions of fact, may be reviewed in the same manner and to the same extent as questions of fact may be reviewed, upon appeal to the appellate division of the supreme court from a final judgment and order, granting or refusing a new trial, rendered by the same court. Appeals from inferior and local courts heretofore heard in the court of common pleas for the city and county of New York and the superior court of Buffalo, may be taken to the supreme court.

From Co. Proc., § 344. Am'd by L. 1888, c. 507; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1341. [Am'd, 1877, 1890.] Limitation of time; security. An appeal, authorized by the last section, must be taken within thirty days after service, upon the attorney for the appellant, of a copy of the judgment, and written notice of the entry thereof. Security is not required to perfect the appeal; but to stay the execution of the judgment security must be given, and the sureties may be excepted to, and must justify, as upon an appeal to the court of appeals, from a judgment of the same amount, or to the same effect.

From Co. Proc., §§ 345, 331. Am'd by L. 1877, c. 416; L. 1890, c. 450.

§ 1342. [Am'd, 1881, 1895, 1907.] Appeal from order.

An appeal may also be taken as provided by section 1340, from an order affecting a substantial right, made by the court or a judge, in an action brought in, or taken by appeal to, a court specified in said section.

From Co. Proc., § 344. Am'd by L. 1881, c. 135; L. 1895, c. 946; L. 1907, c. 579 (in effect July 15, 1907).

§ 1343. [Am'd, 1877.] Limitation of time and stay of proceedings.

An appeal, authorized by the last section, must be taken, within sixty days after service upon the attorney for the appellant, of a copy of the order, and written notice of the entry thereof. Security is not required to perfect it; but it does not stay the execution of the order from which it is taken. The appellate court, or a judge thereof, may direct such a stay, upon such terms, as to security or otherwise, as justice requires.

From Co. Proc., §§ 331, 350; L. 1876, c. 431, § 13. Am'd by L. 1877, c. 416.

§ 1344. [Am'd, 1895, 1902, 1904, 1914, 1915.] Appeal, where and how hea Appellate Term of the Supreme Court for the first and second departmen

1. An appeal taken as prescribed in this title, must be heard by t appellate division of the supreme court, except that appeals from ju ments or orders of the municipal court of the city of New York or fr judgments or orders of the city court of the city of New York may heard either by the appellate division of the supreme court or by not l than three justices of the supreme court in each of the first and seco judicial departments, who shall be designated for that purpose by t justices of the appellate division sitting in said departments and who sh be known as the appellate term of the supreme court in the first a second departments, respectively.

2. When an appeal shall have been heard and determined by appellate term constituted as herein provided, the justices thereof o justice of the appellate division in the same department may allow further appeal to be taken from that determination to said appell division.

3. Appeals from inferior courts heretofore heard by the super court of Buffalo shall be heard by the appellate division of the supre court in the fourth judicial department or by such justice or justices the supreme court as may be designated for that purpose by the justi of the appellate division of said department.

4. The provisions of title fourth of this chapter, relating to the heari of appeals taken in the supreme court and to subsequent proceedi thereupon, apply to an appeal taken as prescribed in this title, except specified in the next following section and except as otherwise provic in a statute enacted by the legislature in the year 1915, entitled "An a in relation to the municipal court of the city of New York, and repeali certain statutes affecting such court, its justices and officers."

From Co. Proc., § 346; L. 1870, c. 408, §§ 5, 6, 10. Am'd by L. 1895, c. 9 L. 1902, c. 515; L. 1904, c. 502; L. 1914, c. 349; L. 1915, c. 623 (in effect May 1915).

§ 1345. [Am'd, 1895, 1916.] Judgment or order, where entered.

A judgment or order of the appellate division rendered upon an app authorized by this title must be entered in the office of the clerk of t appellate division in the department in which the court below is locat A certified copy thereof annexed to the papers transmitted from the co below must be transmitted by the clerk, upon payment of his fees, the clerk of the county where the court from which the appeal was tak is situated, and shall constitute the judgment-roll and remain in office. The filing of the judgment-roll or the entry of the order, as p scribed in this section, is a sufficient authority for any proceeding the court below or before the judge or justice who made the order a pealed from which the judgment or order of the appellate court dire or permits. But where the execution of the judgment or order of t appellate court is stayed by an appeal to the court of appeals, the p ceedings in the court below or before the judge or justice, who ma the order, are stayed in like manner. A judgment or order of the supre court, rendered upon an appeal from a judgment of any district co or of the city court of New York, or an appeal heretofore heard by t superior court of Buffalo, must be entered in the office of the clerk of t county wherein the court below is located, and, with the papers tra mitted from the court below, forms the judgment-roll which must filed in the same office. Where the appeal is from the city court of N York, the judgment or order of the supreme court must be entered the office of the clerk of the said court. Where the appeal is from county court, the judgment must be entered by and filed in the off of the clerk of the county wherein the court below is located.

From Co. Proc., § 347. Am'd by L. 1895, c. 946; L. 1916, c. 84 (in effect March 1916).

TITLE IV.

Appeal to the appellate division of the supreme court.

Sec. 1346. Appeal from judgment.
1347. Appeal from order.
1348. Id.; when made out of court; powers of appellate division to grant orders.
1349. Appeal from interlocutory judgment.
1350. Appeal from final judgment, after affirmance of interlocutory judgment, or denial of new trial. Review in the court of appeals.
1351. Limitation of time; order to stay proceedings.
1352. Stay of proceedings without order.
1353. Upon what papers appeal to be heard.
1354. Entry of judgment or order; judgment-roll.
1355. Hearing, etc., in the supreme court.

§ 1346. [Am'd, 1895, 1914.] Appeal from judgment.

An appeal may be taken to the appellate division of the supreme court from a final judgment rendered in the supreme court as follows:

1. Where the judgment was rendered upon a trial by a referee, or by the court without a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both.

2. When the judgment was rendered upon the verdict of a jury, the appeal may be taken upon questions of law, or upon the facts, or upon both.

From Co. Proc., § 348. Am'd by L. 1895, c. 946; L. 1914, c. 351 (in effect Sept. 1, 1914).

§ 1347. [Am'd, 1895.] Appeal from order.

An appeal may be taken to the appellate division of the supreme court, from an order made prior to the first day of January, 1896, in an action upon notice, at a special term or a trial term of a superior city court, or of the supreme court, or at a term of the circuit court,[1] and from an order made at a special term or trial term of the supreme court, after said day, in either of the following cases:

1. Where the order grants, refuses, continues, or modifies a provisional remedy; or settles, or grants, or refuses an application to resettle a case on appeal or a bill of exceptions.

2. Where it grants or refuses a new trial; except that where specific questions of fact, arising upon the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose, as prescribed in section 971 of this act, an appeal cannot be taken from an order, granting or refusing a new trial, upon the merits.

3. Where it involves some part of the merits.

4. Where it affects a substantial right.

5. Where, in effect, it determines the action, and prevents a judgment, from which an appeal might be taken.

6. Where it determines a statutory provision of the State to be unconstitutional; and the determination appears from the reasons given for the decision thereupon, or is necessarily implied in the decision.

An order, made upon a summary application, after judgment, is deemed to have been made, in the action, within the meaning of this section.

From Co. Proc., § 349. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

[1] See § 969, foot-note, ante.

§ 1348. [Am'd, 1895.] Id.; when made out of court; powers of appellate division to grant orders.

An appeal may also be taken to the appellate division of the supreme court, from an order, made in an action, upon notice, by a judge or justice, out of court, in a case where an appeal might have been taken, as prescribed in the last section, if the order had been made, by the court. The appellate division shall have power to vacate or modify, without notice, or upon such notice as it shall deem proper, any order in an action or special proceeding made by a justice of the supreme court or by the court without notice to the adverse party; it may grant a stay of proceedings upon any judgment or order of the supreme court from which an appeal is pending, and may grant any order or provisional remedy which has been applied for without notice to the adverse party, and refused by the supreme court or a justice thereof.

From Co. Proc., § 350. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1349. [Am'd, 1893, 1895.] Appeal from interlocutory judgment.

An appeal may also be taken to the appellate division of the supreme court, from an interlocutory judgment rendered at a special term or trial term of the supreme court, or entered upon the report of a referee.

From Co. Proc., § 349, subd. 2. Am'd by L. 1893, c. 641; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1350. [Am'd, 1895.] Appeal from final judgment, after affirmance of interlocutory judgment, or denial of new trial. Review in the court of appeals.

Where final judgment is taken, at a special term or trial term, or pursuant to the directions of a referee, after the affirmance, upon an appeal to the appellate division of the supreme court of an interlocutory judgment; or after the refusal by the appellate division of a new trial, either upon an application, made, in the first instance, at a term of the appellate division, or upon an appeal from an order of the special term, or of the judge, before whom the issues, or questions of fact, were tried by a jury; an appeal to the appellate division from the final judgment brings up, for review, only the proceedings to take the final judgment, or upon which the final judgment was taken, including the hearing or trial of the other issues in the action, if any. If an appeal is taken, to the court of appeals, from the determination of the appellate division upon the appeal from the final judgment, the determination of the appellate division, affirming the interlocutory judgment or refusing the new trial, may, at the election of either party, be reviewed thereupon. If the respondent elects to bring it up for review, he may take a cross-appeal therefrom, notwithstanding the expiration of the time to take an original appeal therefrom.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1351. [Am'd, 1895, 1903.] Limitation of time; order to stay proceedings.

An appeal, authorized by this title, must be taken, within thirty days after service, upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice of the entry thereof. Security is not required to perfect the appeal; but, except where it is otherwise specially prescribed by law, the appeal does not stay the execution of the judgment or order appealed from; unless the court, in or from which the appeal is taken, or a judge thereof, makes an order, directing such a stay.

Such an order may be made, and may, from time to time, be modified, upon such terms, as to security or otherwise, as justice requires. If security is given, either as a condition of granting the order, or as prescribed in the next section, the provisions of title second of this chapter apply thereto, as if the appellate division of the supreme court was specified in those provisions, in place of the appellate court, and a judge of the same court, in place of a judge of the court below. Execution of a judgment for the recovery of money only shall not be stayed without security for more than thirty days after the service upon the attorney for the appellant of a copy of the judgment and written notice of the entry thereof.

From Co. Proc., §§ 332, 348, 350. Am'd by L. 1895, c. 946; L. 1906, c. 238 (in effect Sept. 1, 1903).

§ 1352. Stay of proceedings without order.

Upon an appeal from a final judgment, taken as prescribed in this title, the appellant may give the security, required to perfect an appeal to the court of appeals, from a judgment of the same amount, or to the same effect; and to stay the execution thereof. In that case, the execution of the judgment appealed from is stayed, as upon an appeal to the court of appeals, and subject to the same conditions.

From Co. Proc., § 348.

§ 1353. [Am'd, 1895.] Upon what papers appeal to be heard.

An appeal from a final judgment, taken as prescribed in this title, must be heard upon a certified copy of the notice of appeal, of the judgment-roll, and of the case or notice of exceptions, if any, filed, as prescribed by law or the general rules of practice, after the entry of the judgment, and either before or after the appeal is taken. An appeal from an interlocutory judgment, or from an order taken as prescribed in this title, must be heard upon a certified copy of the notice of appeal, and of the papers used before the court, judge or justice, upon the hearing of the demurrer, application for judgment, or motion, as the case requires. Unless the appellate division shall in a special case otherwise direct, before an appeal shall be placed upon the calendar, the appellant shall file with the clerk of the appellate division the case and exceptions or the other papers, upon which the appeal shall be heard, printed as required by the rules of practice; in case the appeal is from a judgment the printed case and exceptions must be ordered filed by the justice or referee before whom the case was tried.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1354. [Am'd, 1879.] Entry of judgment or order; judgment-roll.

Where judgment of affirmance is rendered upon the appeal, the judgment-roll consists of a copy of the judgment, annexed to the papers, upon which the appeal was heard. Where subsequent proceedings are taken, at the special term or trial term, before the entry of final judgment, the judgment-roll must also contain the proper papers relating thereto.

New. Am'd by L. 1879, c. 542.

§ 1355. [Am'd, 1895.] Hearing, etc., in the supreme court.

An appeal taken to the appellate division of the supreme court, as prescribed in this title, must be heard in the department, embracing the county, in which the judgment or order appealed

from is entered; unless an order is made, as prescribed in section 231 of this act, directing that it be heard in another department, or unless appeals pending in one department are transferred for hearing and determination to another, pursuant to article six, section one, of the constitution. The order made upon the appeal must be entered in the office of the clerk of the appellate division, and a certified copy thereof with the original case or papers upon which the appeal was heard, filed as provided in section 1353 must be transmitted by the clerk upon payment of his fees, to the clerk of the county where the judgment or order appealed from was entered, and upon such certified copy of the order and the case or papers upon which the appeal was heard, the county clerk shall enter the judgment in his office.

See Co. Proc., §§ 347, 348. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

TITLE V.

Appeal from a determination in a special proceeding.

Sec. 1856. Appeal from order made in the same court.
1857. Id.; when made by another court or judge.
1858. Preceding order may be reviewed.
1859. Limitation of time to appeal.
1860. Stay of proceedings; hearing of appeal; decision thereupon.
1861. This title qualified. Application of provisions relating to actions.

§ 1856. [Am'd, 1895, 1913.] Appeal from order made in the same court.

An appeal may be taken, to the appellate division of the supreme court, from an order, affecting a substantial right, made in a special proceeding, at a special term or a trial term of the supreme court; or made by a justice thereof, in a special proceeding instituted before him, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before him.

An appeal may also be taken to the appellate division of the supreme court from an order granting or denying an application for an alternative writ of mandamus or an alternative writ of prohibition.

From L. 1854, c. 270, § 1. Am'd by L. 1895, c. 946; L. 1913, c. 572 (in effect Sept. 1, 1913).

§ 1857. [Am'd, 1895.] Id.; when made by another court or judge.

An appeal may also be taken to the appellate division of the supreme court, from an order, affecting a substantial right, made by a court of record, possessing original jurisdiction, or a judge thereof, in a special proceeding instituted in that court, or before a judge thereof, pursuant to a special statutory provision; or instituted before another judge, and transferred to, or continued before, the judge who made the final order. But this section does not apply to a case, where an appeal from the order to a court other than the appellate division of the supreme court, is expressly given by statute.

See Co. Proc., § 344. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1858. [Am'd, 1877.] Preceding order may be reviewed.

An appeal, authorized by this title, brings up for review, any preceding order, made in the course of the special proceeding, involving the merits, and necessarily affecting the final order appealed from, which is specified in the notice of appeal.

From Co. Proc., § 329. Am'd by L. 1877, c. 416.

§ 1859. Limitation of time to appeal.

An appeal, authorized by this title, must be taken within thirty days after service of a copy of the final order, from which it is taken, with a written notice of the entry thereof, upon the appellant; or, if he appeared, upon the hearing, by an attorney at law or an attorney in fact, upon the person who so appeared for him.

From Co. Proc., § 332.

§ 1860. Stay of proceedings; hearing of appeal; decision thereupon.

The provisions of title fourth of this chapter, relating to perfecting an appeal from an order, taken as therein prescribed; to staying the execution of the order appealed from; to hearing the appeal; and to the entry and enforcement of the order made upon the appeal, apply, where an appeal is taken, as prescribed in this title except as otherwise specially prescribed by law.

New.

§ 1861. This title qualified. Application of provisions relating to actions.

This title does not confer the right to appeal from an order, in a case, where it is specially prescribed by law, that the order cannot be reviewed. The proceedings upon an appeal, taken as prescribed in this title, are governed by the provisions of this act, and of the general rules of practice, relating to an appeal in an action, except as otherwise specially prescribed by law.

New.

CHAPTER XIII.

Executions.

TITLE I.— Forms of Execution; Time and Manner of Issuing an Execution; General Duties and Liabilities of Officers.
TITLE II.— Execution Against Property.
TITLE III.— Execution Against the Person.

TITLE I.

Forms of execution; time and manner of issuing an execution; general duties and liabilities of officers.

Sec. 1362. To whom execution directed; provision where sheriff is a party.
1363. Time of receipt to be indorsed on execution.
1364. The different kinds of execution.
1365. To what counties executions may issue.
1366. General requisites of executions.
1367. Id.; when issued on filing transcript from justice's court, etc.
1368. Requisites of execution for the collection of money.
1369. Id.; against property.
1370. Id.; where a warrant of attachment has been levied by sheriff.
1371. Id.; against executor, etc.
1372. Id.; against the person.
1373. Id.; for delivery of property. How money, recovered by same judgment may be collected.
1374. Separate executions, where separate sums awarded.
1375. Execution of course, within five years.
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1378. Id.; leave, how obtained.
1379. No execution against decedent, except, etc.
1380. Execution against decedent's property.
1381. Leave, how obtained.
1382. Time of stay by order, etc., not reckoned under this title.
1383. Execution against surviving judgment debtors.
1384. Sale on execution, etc.; when and how conducted.
1385. Penalty for taking down or defacing notice of sale.
1386. Validity of sale, when not affected by sheriff's default, etc.
1387. Purchases on such sales, by certain officers, prohibited.
1388. When execution to be enforced by under-sheriff.

§ 1362. To whom execution directed; provision where sheriff is a party.

An execution must be directed to the sheriff, unless he is a party or interested; in which case it must be directed as prescribed in section 173 of this act. But the court may, in its discretion, order an execution, issued upon a judgment rendered against a sheriff, either alone or with another, to be directed to a person, designated in the order, instead of to the coroners, or a particular coroner; in which case it must be so directed. The person so designated must be of full age, a resident of the State, and not a party to the action, or interested therein. Where the execution is issued upon a judgment for a sum of money, or directing the payment of a sum of money, the order does not take effect, until the person so designated executes, and files in the clerk's office, a bond to the people, with at least two sureties, approved by a judge of the court, or a county judge, in a penal sum, fixed by the order, not less than twice the sum to be collected by virtue of the execution; conditioned for the faithful performance of his duties under the execution. A certified copy of

the order, and, where it requires a bond to be given, the clerk's certificate that a bond has been filed, as required by the order, must be attached to the execution. The person so designated is deemed an officer; and, with respect to that execution, he is subject to the obligations and liabilities, and has the power and authority of a coroner, and is entitled to fees accordingly.

From Co. Proc., § 289; 2 R. S. 364 (Part 3, c. 6, tit. 5), §§ 11, 12.

§ 1363. Time of receipt to be indorsed on execution.

The sheriff, to whom an execution is directed and delivered, must, upon the receipt thereof, indorse thereupon a memorandum of the day, hour, and minute, when he received it.

From 2 R. S. 364, § 10.

§ 1364. The different kinds of execution.

There are four kinds of execution, as follows:

1. Against property.
2. Against the person.
3. For the delivery of the possession of real property, with or without damages for withholding the same.
4. For the delivery of the possession of a chattel, with or without damages for the taking or detention thereof.

An execution is the process of the court, from which it is issued.

From Co. Proc., § 286.

§ 1365. To what counties executions may issue.

An execution against property can be issued only to a county, in the clerk's office of which the judgment is docketed. An execution against the person may be issued to any county. An execution for the delivery of the possession of real property, must be issued to the county, where the property, or a part thereof, is situated. An execution for the delivery of the possession of a chattel, may be issued to any county, where the chattel is found; or to the sheriff of the county where the judgment-roll is filed. Executions, upon the same judgment, may be issued at the same time, to two or more different counties.

See Co. Proc., § 287.

§ 1366. [Am'd, 1914.] General requisites of executions.

An execution must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the court in which, the judgment was rendered; and, if it was rendered in the supreme court, the county in which the judgment-roll is filed. It must require the sheriff to return it to the proper clerk, within sixty days after the receipt thereof. Except as otherwise prescribed in the next section, it must be made returnable to the clerk, with whom the judgment-roll is filed. When an execution has been issued against the wages, debts, earnings, salary, income from trust funds or profits due and owing to any judgment debtor, pursuant to the provisions of this chapter, it shall be the duty of the sheriff or other officer or person to whom such execution shall be delivered, from time to time, and at least once every six months from the time a levy shall be made thereunder, to account for and pay over, to the person entitled thereto, all moneys collected thereon, less his lawful fees and expenses for collecting the same. This section shall apply to all such executions now issued and outstanding.

From Co. Proc., §§ 289, 290. Am'd by L. 1914, c. 347 (in effect April 15, 1914).

§ 1367. Id.; when issued on filing transcript from justice's court, etc.

Where an execution is issued out of a court, other than that in which the judgment was rendered, upon filing a transcript of the judgment rendered in the latter court, it must also specify the clerk, with whom the transcript is filed, and the time of filing; and it must be made returnable to that clerk. If the judgment was rendered in a justice's court, it must specify the

justice's name; and it must omit the specification, respecting the filing of the judgment-roll.

New. See § 3043, post.

§ 1368. Requisites of execution for the collection of money.

An execution, issued upon a judgment for a sum of money, or directing the payment of a sum of money, must specify, in the body thereof, the sum recovered, or directed to be paid, and the sum actually due when it is issued. It may specify a day, from which interest upon the sum due is to be computed; in which case, the sheriff must collect interest accordingly, until the sum is paid. If all the parties, against whom the judgment is rendered, are not judgment debtors, the execution must show who is the judgment debtor.

From 2 R. S. 364 (Part 3, c. 6, tit. 5), § 9; L. 1844, c. 324; see Co. Proc., § 289.

§ 1369. Id.; against property.

An execution against property must, if the judgment-roll is not filed in the clerk's office of the county to which it is issued, specify the time when the judgment was docketed in that county. It must, except in a case where special provision is otherwise made by law, substantially require the sheriff to satisfy the judgment, out of the personal property of the judgment debtor; and, if sufficient personal property cannot be found, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.

From Co. Proc., § 289.

§ 1370. Id.; where a warrant of attachment has been levied by sheriff.

Where a warrant of attachment, issued in the action, has been levied by the sheriff, the execution must substantially require the sheriff to satisfy the judgment, as follows:

1. Where the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it, without the State, or otherwise than personally, pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

2. In any other case, out of the personal property attached; and, if that is insufficient, out of the other personal property of the judgment debtor; if both are insufficient, out of the real property attached; and, if that is insufficient, out of the real property, belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.

See §§ 707, 708, ante.

§ 1371. Id.; against executor, etc.

An execution against real or personal property, in the hands of an executor, administrator, heir, devisee, legatee, tenant of real property, or trustee, must substantially require the sheriff to satisfy the judgment, out of that property.

From Co. Proc., § 289, subd. 2.

§ 1372. Id.; against the person.

An execution against the person must substantially require the sheriff, to arrest the judgment debtor, and commit him to the jail of the county, until he pays the judgment, or is discharged according to law. Except where it may be issued, without the previous issuing and return of an execution against property, it must recite the issuing and return of such an execution, specifying the county to which it was issued.

From Id., § 289, subd. 3.

§ 1373. Id.; for delivery of property. How money, recovered by same judgment, may be collected.

An execution for the delivery of the possession of real property, or a chattel, must particularly describe the property, and designate the party to whom the judgment awards the possession thereof; and it must substantially require the sheriff, to deliver the possession of the property, within his county, to the party entitled thereto. If a sum of money is awarded by the same judgment, it may be collected, by virtue of the same execution; or a separate execution may be issued for the collection thereof, omitting the direction to deliver possession of the property. If one execution is issued for both purposes, it must contain, with respect to the money to be collected, the same directions as an execution against property, or against the person, as the case requires.

See Co. Proc., § 289, subd. 4.

§ 1374. Separate executions, where separate sums awarded.

Where a judgment awards different sums of money, to or against different parties, a separate execution may be issued, to collect each sum so awarded; subject to the power of the court, to control the enforcement of the executions, upon motion, where the collection of one execution will, wholly or partly, satisfy another.

New.

§ 1375. Execution of course, within five years.

Except as otherwise specially prescribed by law, the party recovering a final judgment, or his assignee, may have execution thereupon, of course, at any time within five years after the entry of the judgment.

From Co. Proc., § 283.

§ 1376. [Am'd, 1877, 1885, 1887.] Execution after death of judgment creditor.

Where the party recovering a final judgment has died, execution may be issued at any time within five years after the entry of the judgment, by his personal representatives, or by the assignee of the judgment, if it has been assigned, and the execution must be indorsed with the name and residence of the person issuing the same. And where a party or one or more of several parties against whom a judgment for the recovery of possession of real property has been obtained has died, an order granting leave to issue and execute such execution or writ of possession may be granted upon giving twenty days' notice to the occupants of the lands so recovered and to the grantees or devisees of said deceased, or if he died intestate, to the heirs at law of said de-

ceased, said notices to be served in the same manner as a summons is directed to be served in an action in the supreme court.

New. Am'd by L. 1877, c. 416; L. 1885, c. 515; L. 1887, c. 682.

§ 1377. [Am'd, 1879.] When execution may be issued after five years.

After the lapse of five years from the entry of a final judgment, execution can be issued thereupon, in one of the following cases only:

1. Where an execution was issued thereupon, within five years after the entry of the judgment, and has been returned wholly or partly unsatisfied or unexecuted.

2. Where an order is made by the court, granting leave to issue the execution.

From Co. Proc., § 284. Am'd by L. 1879, c. 542.

§ 1378. Id.; leave, how obtained.

Notice of an application for an order, granting leave to issue an execution, as prescribed in the last section, must be served personally upon the adverse party, if he is a resident of the State, and personal service can, with reasonable diligence, be made upon him therein; otherwise, notice must be given in such manner as the court directs. Where the judgment is for a sum of money, or directs the payment of a sum of money, leave shall not be granted, except on proof, by affidavit, to the satisfaction of the court, that the judgment remains wholly or partly unsatisfied.

From Co. Proc., § 284.

§ 1379. No execution against decedent, except, etc.

An execution to collect a sum of money cannot be issued, against the property of a judgment debtor, who has died since the entry of the judgment except as prescribed in the next two sections.

From 2 R. S. 368 (Part 3, c. 6, tit. 5), § 27.

§ 1380. [Am'd, 1879, 1885, 1889, 1894, 1916.] Execution against decedent's property.

After the expiration of one year from the death of a party, against whom a final judgment for a sum of money, or directing the payment of a sum of money is rendered, the judgment may be enforced by execution against any property upon which it is a lien with like effect as if the judgment debtor was still living. But such an execution shall not be issued, unless an order granting leave to issue it is procured from the court from which the execution is to be issued, and from a surrogate's court of this State, which has duly granted letters testamentary or letters of administration upon the estate of the deceased judgment debtor. Where the lien of the judgment was created as prescribed in section 1251 of this act, neither order can be made until the expiration of eighteen months after letters testamentary or letters of administration have been duly granted upon the estate of the decedent, and for that purpose such a lien existing at the decedent's death continues for two years thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment-roll. But where letters upon the estate of the decedent have not been granted within eighteen months after his death by the surrogate's court of the county in which the decedent resided at the time of his death, or if the decedent resided out of the State at the time of his death, and letters testamentary or letters of

administration have not been granted within the same time by t surrogate's court of the county in which the property on which t judgment is a lien is situated, such court may grant the order whe it appears that the decedent did not leave any personal property with the State upon which to administer. In such case the lien of the jud ment existing at the decedent's death continues for two years as afor said. Provided, however, that such judgment lien, existing at the d cedent's death, upon the decedent's real property, or some portic thereof, may be enforced and payment thereof obtained during tl said eighteen months after granting of letters testamentary, or lette of administration, in the manner prescribed by title four of chapt eighteen of this act. But this section shall not apply to real estate whi shall have been conveyed, or hereafter may be conveyed by the deceas judgment debtor during his lifetime, if such conveyance was made fraud of his creditors or any of them, and any judgment creditor of sa deceased, against whose judgment said conveyance shall have been, may hereafter be, declared fraudulent by the judgment and decree any court of competent jurisdiction, may enforce his said judgme against such real property, with like effect as if the judgment debt was living, and it shall not be necessary to obtain the leave of any cou or officer to issue such execution, and the same may be issued at an time to the sheriff of the county where such property is or may be sit ated. The person issuing such execution, however, shall annex there a description of the real estate against which the same is sought to b enforced, as aforesaid, and shall indorse on said execution the wor "issued under section 1380 of the code of civil procedure," whereupc said sheriff shall enforce said execution as therein directed, against th property so described, and not against any other property, either re or personal, and all provisions of law relating to the sale and conveyan of real estate on execution and the redemption thereof shall apply theret

From L. 1850, c. 295. Am'd by L. 1879, c. 542; L. 1885, c. 514; L. 1890, c. 51 L. 1894, c. 734; L. 1916, c. 625 (in effect May 20, 1916).

§ 1381. [Am'd, 1889.] Leave, how obtained.

Leave to issue an execution, as prescribed in the last sectio must be procured as follows:

1. Notice of the application, to the court, from which the ex cution is to be issued, for an order, granting leave to issue th execution, must be given to the person or persons, whose interes in the property will be affected by a sale by virtue of the execu tion, and also to the executor or administrator of the judgmen debtor. The general rules of practice may prescribe the manne in which the notice must be given; until provision is so mad therein, it must be served, either personally, or in such manne as the court prescribes, in an order to show cause. Leave sha not be granted, except upon proof, by affidavit, to the satisfactio of the court, that the judgment remains wholly or partly unsati fied.

2. For the purpose of procuring a decree from the surrogate' court, granting leave to issue the execution, the judgment cre itor must present to that court, a written petition, duly verifie setting forth the facts, and praying for such a decree; and tha the persons, specified in the first subdivision of this section, ma be cited, to show cause why it should not be granted. Upo the presentation of such a petition, the surrogate must issue citation accordingly, which said citation may be served in th

same manner as is provided in the first subdivision of this section for the service or giving of a notice to the parties or persons therein mentioned, and, if the general rules of practice of the supreme court do not provide for a mode of giving such notice, such citation must be served in such manner as the surrogate by order may prescribe, or as is otherwise provided by law; and, upon the return thereof, he must make such a decree in the premises as justice requires.

New. Am'd by L. 1889, c. 82.

§ 1883. Time of stay by order, etc., not reckoned under this title.

The time during which the person, entitled to enforce a judgment, is stayed from enforcing it, by the provision of a statute, or by an injunction or other order, or in consequence of an appeal, is not a part of the time, limited by this title, for issuing an execution thereupon, or for making an application for leave to issue such an execution.

New.

§ 1883. Execution against surviving judgment debtors.

The last six sections do not affect the right of a judgment creditor to enforce a judgment, against the property of one or more surviving judgment debtors, as if all the judgment debtors were living. In that case, an execution must be issued in the usual form; but the attorney for the judgment creditor must indorse thereupon, a notice to the sheriff, reciting the death of the deceased judgment debtor, and requiring the sheriff not to collect the execution, out of any property which belonged to him.

New.

§ 1884. [Am'd, 1894.] Sale on execution, etc.; when and how conducted.

A sale of real or personal property, by virtue of an execution, or pursuant to the directions contained in a judgment or order, must be made at public auction, between the hour of nine o'clock in the morning and sunset. The sheriff to whom an execution is issued shall at any time before the sale of the personal property levied on by him, on the written request of any person who is a creditor of the person against whom the writ was issued under which the sheriff levied upon the property, exhibit to such creditor the personal property so levied upon under said writ and permit an inspection thereof by such creditor or his agent.

From 2 R. S. 369 (Part 3, c. 6, tit. 5), § 36. Am'd by L. 1894, c. 739.

§ 1885. Penalty for taking down or defacing notice of sale.

A person who, before the time fixed for the sale, in a notice of the sale of property, to be made by virtue of an execution, wilfully takes down or defaces such a notice put up by the sheriff, or by his authority, forfeits fifty dollars to the judgment creditor, and the same sum to the judgment debtor; unless the notice was defaced or taken down, with the consent of the person seeking to enforce the forfeiture or the execution was previously satisfied.

From 2 R. S. 369, § 39.

§ 1886. Validity of sale, when not affected by sheriff's default, etc.

An omission by the sheriff to give notice, as required by law, or the taking down or defacing of a notice, when put up, does

not effect[1] the validity of a sale, made by virtue of an execution, to a purchaser in good faith, without notice of the omission or offence.

From Id., § 40.

§ 1387. Purchases on such sales, by certain officers, prohibited.

The sheriff, to whom an execution is directed, or the under-sheriff or deputy-sheriff, holding an execution, and conducting a sale of property by virtue thereof, shall not, directly or indirectly, purchase any of the property at the sale. A purchase made by him, or to his use, is void.

From Id., § 41.

§ 1388. When execution to be enforced by under-sheriff.

Where the sheriff, to whom an execution is delivered, dies, is removed from office, or becomes otherwise disqualified to act, before the execution is returned, his under-sheriff must proceed upon the execution, as the sheriff might have done. If there is no under-sheriff, the court, from which the execution issued, may designate a person to proceed thereupon; who may complete the same, as an under-sheriff might have done. The person so designated must give such security as the court directs. He is deemed an officer; and is subject to the same obligations and liabilities, and has the same power and authority, in relation to the object of his appointment, as a sheriff, and is entitled to fees accordingly. But this section does not apply, in a case where special provision is otherwise made by law for the enforcement of an execution, after the death, removal from office, or other disqualification, of the sheriff, or under-sheriff.

From 2 R. S. 374 (Part 3, c. 6, tit. 5), §§ 65, 66.

[1] Error in engrossing for "affect."

TITLE II.

Execution against property.

Article 1. Property exempt from levy and sale.
2. Lien of an execution upon personal property; levy upon and sale of personal property. Rights of indemnitors of sheriff.
3. Sale, redemption, and conveyance of real property; rights and liabilities of persons interested.
4. Remedies for failure of title to real property sold, and to enforce contribution.

ARTICLE FIRST.

Property exempt from levy and sale.

Sec. 1389. Certain special exemptions not affected by this article.
1390. What personal property is exempt, when owned by a householder.
1391. Additional personal property exempt in certain cases.
1392. Woman entitled to same exemption as a householder.
1393. Military pay, rewards, etc., exempt from execution and other legal proceedings.
1394 Right of action for taking, etc., exempt property.
1395. Burying ground; when exempted.
1396. How exempt burying ground designated.
1397. Homestead; when exempted.
1398. How exempt homestead designated.
1399. Married woman's homestead; when exempted.
1400. When exemption to continue after owner's death.
1401. Exemption; when not affected by temporary suspension of residence.
1402. If value of homestead exceeds $1,000, lien attaches to surplus.
1403. Id.; how proceeds to be marshalled when property is sold.
1404. Exemption of real property; how cancelled.
1404a. Exemption of exhibits at exhibitions.

§ 1389. Certain special exemptions not affected by this article.

The enumeration, in this article, of the property which is exempt from levy and sale by virtue of an execution, does not repeal any special provision of law, relating to such an exemption, which, by its terms, is applicable only to a particular class of persons, or corporations, or to a particular locality, or otherwise to a special case.

Designed to guard against a repeal by implication of provisions like L. 1847, c. 133, § 10; L. 1851, c. 122, § 19; L. 1866, c. 273, § 6; L. 1867, c. 516; and various similar statutes.

§ 1390. [Am'd, 1891.] What personal property is exempt, when owned by a householder.

The following personal property, when owned by a householder, is exempt from levy and sale by virtue of an execution; and each movable article thereof continues to be so exempt, while the family, or any of them, are removing from one residence to another:

1. All spinning wheels, weaving looms, and stoves, put up, or kept for use, in a dwelling house; and one sewing-machine, with its appurtenances.

2. The family bible, family pictures, and school-books, used by or in the family; and other books, not exceeding in value fifty dollars, kept and used as part of the family library.

3. A seat or pew, occupied by the judgment debtor, or the family, in a place of public worship.

4. Ten sheep, with their fleeces, and the yarn or cloth manufactured therefrom; one cow; two swine; the necessary food for those animals; all necessary meat, fish, flour, groceries and vege-

tables, actually provided for family use; and necessary fuel, oil, and candles, for the use of the family for sixty days.

5. All wearing apparel, beds, bedsteads, and bedding, necessary for the judgment debtor and the family; all necessary cooking utensils; one table; six chairs; six knives; six forks; six spoons; six plates; six tea cups; six saucers; one sugar dish; one milk pot; one tea pot; one crane and its appendages; one pair of andirons; one coal scuttle; one shovel; one pair of tongs; one lamp, and one candlestick.

6. The tools and implements of a mechanic, necessary to the carrying on of his trade, not exceeding in value twenty-five dollars.

From 2 R. S. 367 (Part 3, c. 6, tit. 5), § 22; L. 1860, c. 152. Am'd by L. 1891, c. 112.

§ 1391. [Am'd, 1879, 1901, 1903, 1905, 1908, 1911, 1914.] Additional personal property exempt in certain cases.

In addition to the exemptions, allowed by the last section, necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, together with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family, as a domestic or for the purchase money of one or more articles, exempt as prescribed in this or the last section. Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings salary, income from trust funds or profits are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided, but only one execution against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor shall be satisfied at one time and where more than one execution has been issued or shall be issued pursuant to the provisions of this section against the same judgment debtor, they shall be satisfied in the order of priority in which such executions are presented to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing. It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted

to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied and such payment shall be a bar to any action therefor by any such judgment debtor.[1] If such person or corporation, municipal or otherwise, to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution. Either party may apply at any time to the court from which such execution shall issue, or to any judge or justice issuing the same, or to the county judge of the county, and in any county where there is no county judge, to any justice of the city court upon such notice to the other party as such court, judge, or justice shall direct for a modification of said execution, and upon such hearing the said court, judge or justice may make such modification of said execution as shall be deemed just, and such execution as so modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided. This section, so far as it relates to wages and salary, due and owing or to become due and owing to the judgment debtor, shall not apply to judgments recovered more than ten years prior to September 1, 1908, nor to judgments heretofore or hereafter recovered upon such judgments, and any execution heretofore issued upon such judgments pursuant to an order heretofore granted under this section shall, when this act takes effect, cease to be a lien and continuing levy upon wages and salary thereafter to become due and owing to the judgment debtor.

From L. 1842, c. 157, § 1; L. 1858, c. 107, § 1; L. 1866, c. 782. Am'd by L. 1879, c. 542; L. 1901, c. 116; L. 1903, c. 461; L. 1905, c. 175; L. 1908, c. 148; L. 1911, cc. 489 and 532; L. 1914, c. 352 (in effect April 15, 1914).

§ 1392. [Am'd, 1877.] Woman entitled to same exemption as a householder.

Where the judgment debtor is a woman, she is entitled to the same exemptions, from levy and sale by virtue of an execution, subject to the same exceptions, as prescribed in the last two sections, in the case of a householder.

New. Am'd by L. 1877, c. 416.

§ 1393. [Am'd, 1895, 1897.] Military pay, rewards, etc., exempt from execution and other legal proceedings.

The pay and bounty of a non-commissioned officer, musician or private in the military or naval service of the United States or the state of New York; a land warrant, pension or other reward heretofore or hereafter granted by the United States, or by a state, for military or naval services; a sword, horse, medal, emblem or device of any kind presented as a testimonial for services rendered in the military or naval service of the United States or a state; and the uniform, arms and equipments which were used by a

[1] By Laws of 1910, c. 317, the salaries of all officers of the State and the wages of all employees thereof are "subject to all the provisions of § 1391 of the Code of Civil Procedure applicable to any wages, debts, earnings or salary, as if the State and the said wages and salary due and payable by it had been particularly designated therein."

person in that service, are also exempt from levy and sale, by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding; except that real property purchased with the proceeds of a pension granted by the United States for military or naval services, and owned by the pensioner, or by his wife or widow, is subject to seizure and sale for the collection of taxes or assessments lawfully levied thereon.

From L. 1864, c. 578, §§ 4, 5. Am'd by L. 1895, c. 663; L. 1897, c. 848 (in effect Sept. 1, 1897).

§ 1394. Right of action for taking, etc., exempt property.

A right of action to recover damages, or damages awarded by a judgment, for taking or injuring personal property, exempt by law from levy and sale, by virtue of an execution, are exempt, for one year after the collection thereof, from levy and sale, by virtue of an execution, and from seizure in any other legal proceeding.

New.

§ 1395. Burying ground; when exempted.

Land, set apart as a family or private burying ground, and heretofore designated, as prescribed by law, in order to exempt the same, or hereafter designated for that purpose, as prescribed in the next section, is exempt from sale, by virtue of an execution, upon the following conditions only:

1. A portion of it must have been actually used for that purpose.
2. It must not exceed in extent one-fourth of an acre.
3. It must not contain, at the time of its designation, or at any time afterwards, any building or structure, except one or more vaults, or other places of deposit for the dead, or mortuary monuments.

From L. 1847, c. 85, §§ 1, 2.

§ 1396. How exempt burying ground designated.

In order to designate land, to be exempted as prescribed in the last section, a notice, containing a full description of the land to be exempted, and stating that it has been set apart for a family or private burying ground, must be subscribed by the owner; acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the land is situated; and recorded in the office of the clerk or register of that county, in the proper book for recording deeds, at least three days before the sale of the land, by virtue of the execution.

From Id., § 2.

§ 1397. [Am'd, 1883.] Homestead; when exempted.

A lot of land, with one or more buildings thereon, not exceeding in value one thousand dollars, owned, and occupied as a residence, by a householder having a family, and heretofore designated as an exempt homestead, as prescribed by law, or hereafter designated for that purpose, as prescribed in the next section, is exempt from sale, by virtue of an execution, issued upon a judgment, recovered for a debt contracted after the thirtieth day of April, 1850; unless the judgment was recovered wholly for a debt or debts, contracted before the designation of the property, or for the purchase-money thereof. But no property heretofore or

after designated as an exempt homestead, as prescribed by law, y the next section, shall be exempt from taxation, or from sale ıon-payment of taxes or assessments.

m L. 1850, c. 260, §§ 1, 2. Am'd by L. 1883, c. 156.

1398. [Am'd, 1877.] How exempt homestead designated.

order to designate property, to be exempted as prescribed in ast section, a conveyance thereof, stating, in substance, that it signated to be held as a homestead, exempt from sale by virtue n execution, must be recorded, as prescribed by law; or a e, containing a full description of the property and stating it is designed to be so held, must be subscribed by the owner, owledged or proved, and certified, in like manner as a deed to ecorded in the county where the property is situated; and must ecorded in the office of the clerk of that county, in a book kept that purpose, and styled the "homestead exemption book."

m L. 1850, c. 260, § 2. Am'd by L. 1877, c. 416.

1399. Married woman's homestead; when exempted.

lot of land, with one or more buildings thereon, owned by a ried woman, and occupied by her as a residence, may be desig- d as her exempt homestead, as prescribed in the last section; the property so designated is exempt from sale, by virtue of execution, under the same circumstances, and subject to the exceptions, as the homestead of a householder, having a ly.

r.

1400. When exemption to continue after owner's death.

ıe exemption, prescribed by the last three sections, continues, the death of the person in whose favor the property was ıpted, as follows:

If the decedent was a woman, it continues, for the benefit ıer surviving children, until the majority of the youngest iving child.

If the decedent was a man, it continues, for the benefit of widow and surviving children, until the majority of the gest surviving child, and until the death of the widow.

ıt the exemption ceases earlier, if the property ceases to be pied, as a residence, by a person for whose benefit it may so nue, except as otherwise prescribed in the next section.

m L. 1850, c. 260, § 1.

1401. Exemptions; when not affected by temporary suspen- of residence.

ıe right to exemption, of a person entitled thereto, as pre- ed in the last four sections, is not affected by a suspension ıe occupation of the exempt property, as a residence, for a d not exceeding one year, which occurs in consequence of y to, or destruction of, the dwelling house upon the premises.

1402. If value of homestead exceeds $1,000, lien attaches to lus.

e exemption of a homestead, otherwise valid under the pro- ns of this article, is not void, because the value of the prop- designated as exempt, exceeds one thousand dollars. In case, the lien of a judgment attaches to the surplus, as if

the property had not been designated as an exempt homestead; but the property cannot be sold by virtue of an execution, issued upon a judgment, as against which it is exempt. After the return of such an execution, the owner of the judgment may maintain a judgment creditor's action, to procure a judgment, directing a sale of the property, and enforcing his lien upon the surplus.

New.

§ 1403. Id.; how proceeds to be marshalled when property is sold.

Where the judgment, in a judgment creditor's action, brought as prescribed in the last section, or in any other action affecting the title to an exempt homestead, directs the sale of the property, the court must so marshal the proceeds of the sale, that the right and interest of each person in the proceeds, shall correspond, as nearly as may be, to his right and interest in the property sold. Money not exceeding one thousand dollars, paid to a judgment debtor, as representing his interest in the proceeds, is exempt for one year after the payment, as the property sold was exempt; unless, before the expiration of the year, he causes real property to be designated as an exempt homestead, as prescribed in section 1398 of this act; in which case, the exemption ceases, with respect to so much of the money, as was not expended for the purchase of that property; and the exemption of the property so designated extends to every debt, against which the property sold was exempt. Where the exemption of property, sold as prescribed in this section, has been continued after the judgment debtor's death, or where he dies after the sale, and before payment to him of his proportion of the proceeds of the sale, the court may direct that portion of the proceeds, which represents his interest, to be invested, for the benefit of the person or persons, entitled to the benefit of the exemption; or to be otherwise disposed of, as justice requires.

See L. 1850, c. 260, §§ 1, 3, 4, 5, 6.

§ 1404. [Am'd, 1894.] Exemption of real property; how cancelled.

The owner of real property, exempt as prescribed in this article, may, at any time, subscribe a notice, and personally acknowledge the execution thereof, before an officer authorized by law to take the acknowledgment of a deed, to the effect that he cancels all exemptions from levy or sale by virtue of an execution affecting the property, or a particular part thereof, fully described in the notice. The cancellation takes effect when such a notice is recorded, as prescribed in this article for recording a notice to effect the exemption so canceled. Any other release or waiver, hereafter executed, of an exemption of real property, allowed by this article, or of an exemption of a homestead, or a private or family burying-ground, allowed by the provisions of law heretofore in force, is void; provided, however, that nothing herein contained shall be so construed as to prevent the husband and wife from jointly conveying or mortgaging property so exempt.

Id. Am'd by L. 1894, c. 202.

§ 1404a. [Added, 1909.] Exemption of exhibits at exhibitions.

No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon articles, goods, wares, merchandise or property of any descrip-

tion while the same is en route to or from, or while on exhibition or deposited by exhibitors at any international exhibition held under the auspices or supervision of the United States, within any city or county of this state, nor shall such property be subject to attachment, seizure, levy or sale, for any cause whatever, in the hands of the authorities of such exhibition or otherwise.

From L. 1880, c. 393, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

ARTICLE SECOND.

Lien of an execution upon personal property; levy upon and sale of personal property. Rights of indemnitors of sheriff.

Sec. 1405. Personal property bound by execution.
1406. Order of preference among executions.
1407. Id.; when attachments also are issued.
1408. Id.; when issued from court not of record.
1409. Title of bona fide purchasers before levy, not affected.
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1426. Effect of the order.
1427. Officer to whom indemnity is given, required to give notice of action.
1428. Sale of personal property; how made.
1429. Notices of sale to be posted.

§ 1405. Personal property bound by execution.

The goods and chattels of a judgment debtor, not exempt, by express provision of law, from levy and sale by virtue of an execution, and his other personal property, which is expressly declared by law, to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer, to whom an execution against property is delivered, bound by the execution, from the time of the delivery thereof to the proper officer, to be executed; but not before.

From 2 R. S. 365, (Part 3, c. 6, tit. 5), § 13.

§ 1406. Order of preference among executions.

Where two or more executions against property are issued, out of the same or different courts of record, against the same judgment debtor, the one first delivered, to an officer, to be executed, has preference, notwithstanding that a levy is first made, by virtue of an execution subsequently delivered; but if a levy upon and sale of personal property has been made, by virtue of the junior execution, before an actual levy, by virtue of the senior execution, the same property shall not be levied upon or sold, by virtue of the letter.[1]

From Id., § 14.

§ 1407. Id.; when attachments also are issued.

Where there are one or more executions, and one or more warrants of attachment, against the property of the same person, the rule prescribed in the last section prevails, in determining the preferences of the executions or warrants of attachment;

[1] Error in engrossing for "latter."

the defendant in the warrants of attachment being, for that purpose, regarded as a judgment debtor.

From Id., § 15.

§ 1408. Id.; when issued from court not of record.

But an execution, issued out of a court not of record, or a warrant of attachment, granted in an action pending in a court not of record, if actually levied, has preference over another execution, issued out of any court, of record or not of record, which has not been previously levied.

From Id., § 16.

§ 1409. Title of bona fide purchasers before levy, not affected.

The title to personal property, acquired before the actual levy of an execution, by a purchaser in good faith, and without notice that the execution has been issued, is not affected by an execution delivered, before the purchase was made, to an officer, to be executed.

From Id., § 17.

§ 1410. [Am'd, 1877.] Execution may be levied upon current money.

The officer, to whom an execution against property is delivered, must levy upon current money of the United States, belonging to the judgment debtor; and must pay it over, as so much money collected, without exposing it for sale; except that where it consists of gold coin, he must sell it, like other personal property; unless he is otherwise directed, by an order of a judge, or by the judgment in the particular cause.

See 2 R. S. 366, § 18. Am'd by L. 1877, c. 416.

§ 1411. [Am'd, 1877.] Levy upon certain evidences of debt.

The officer, to whom an execution against property is delivered, must levy upon and sell, a bill, or other evidence of debt, belonging to the judgment debtor, which was issued by a moneyed corporation to circulate as money, or a bond, or other instrument for the payment of money, belonging to the judgment debtor, which was executed and issued, by a government, state, county, public officer, or municipal or other corporation, and is in terms negotiable, or payable to the bearer or holder.

From 2 R. S. 366, § 19. Am'd by L. 1877, c. 416.

§ 1412. Interest of bailor in goods pledged may be sold.

The interest of the judgment debtor in personal property, subject to levy, lawfully pledged, for the payment of money, or the performance of a contract or agreement, may be sold, in the hands of the pledgee, by virtue of an execution against property. The purchaser at the sale acquires all the right and interest of the judgment debtor, and is entitled to the possession of the property, on complying with the terms and conditions upon which the judgment debtor could obtain possession thereof. This section does not apply to property, of which the judgment debtor is unconditionally entitled to the possession.

From 2 R. S. 366, § 20.

§ 1413. When partners may apply for release of property levied upon.

Where an officer has seized personal property of a partnership, before or after its dissolution, upon a levy upon the interest

therein of a partner, made by virtue of an execution against his individual property, the other partners, or former partners, having an interest in the property, or any of them, may, at any time before the sale, apply to a judge of the court, or to the county judge of the county, where the seizure was made, upon an affidavit, showing the facts, for an order, directing the officer to release the property, and to deliver it to the applicant.

New. See §§ 693-695, ante.

§ 1414. Undertaking to be given.

Upon such an application, the applicant must give an undertaking, with at least two sureties, approved by the judge, to the effect, that he will account to the purchaser, upon the sale to be made by virtue of the execution, of the interest of the judgment debtor in the property seized, in like manner as he would be bound to account to an assignee of such an interest; and that he will pay to the purchaser the balance, which may be found due upon the accounting, not exceeding a sum, specified in the undertaking, which must be not less than the value of the interest of the judgment debtor, in the property seized by the sheriff, as fixed by the judge. The provisions of sections 695 and 696 of this act apply to the proceedings, taken as prescribed in this and the last section.

New. See § 694, ante.

§ 1415. Provision, where a warrant of attachment has also been levied, etc.

Where a warrant of attachment has been levied upon the interest of a defendant, as a partner, in personal property of a partnership, and the attachment has been discharged as to that interest, as prescribed in sections 693 and 694 of this act, a levy, by virtue of an execution against his individual property, cannot be made upon his interest in the same property, unless the warrant of attachment has been vacated or annulled.

New.

§ 1416. When the undertaking enures to other judgment creditors.

Where personal property of a partnership has been released, upon giving an undertaking, as prescribed in the last three sections, if the execution, by virtue of which the levy was made, is set aside, or is satisfied without a sale of the interest levied upon, the undertaking enures to the benefit of each judgment creditor of the same judgment debtor, then having an execution in the hands of the same officer, or of another officer, having authority to levy upon that interest, as if it had been given to obtain a release from a seizure, made by virtue of such an execution.

New.

§ 1417. How partner's interest sold; rights, etc., of purchaser.

Where personal property of a partnership has been so released, the interest of the judgment debtor therein may be sold by the officer; and the purchaser, upon the sale, acquires all that interest, as if he was an assignee thereof. If the purchase-money exceeds the amount of all the executions and warrants of attachment, against the property of the same judgment debtor, of which the officer has notice, and of the lawful fees and charges thereon, the officer must pay the surplus into court, for the benefit of the judgment debtor, or other person entitled thereto.

New.

§ 1418. [Am'd, 1904.] Claim of property by a third person, how tried.

If personal property, levied upon as the property of the judgment debtor, is claimed by or in behalf of another person, as his property, an affidavit may be made and delivered to the sheriff, in behalf of such person, at any time while such property or the proceeds thereof are in the sheriff's possession, stating that he makes such a claim; specifying in whole or in part the property to which it relates, and in all cases stating the value of the property claimed and the damages, if any, over and above such value, which the claimant will suffer in case such levy is not released. In that case, the officer may, in his discretion, empanel a jury to try the validity of the claim.

New. See § 657, ante. Am'd by L. 1904, c. 541 (in effect Sept. 1, 1904).

§ 1419. [Am'd, 1877, 1888, 1895, 1904.] Proceedings, if claimant succeeds.

If by their inquisition the jurors find that the property belongs to the claimant, they must also determine its value and the damages above such value as specified in the last section. Thereupon the officer may relinquish the levy, unless the judgment creditor gives him an undertaking with at least two sufficient sureties, to the effect that the sureties will indemnify him to an amount therein specified, not less than twice the value of the property and damages as determined by the jury, and two hundred and fifty dollars in addition thereto, against all damages, costs and expenses, in an action to be brought against him by any person, by the claimant, his assignee, or other representative, by reason of the levy upon, detention or sale of any of the property, by virtue of the execution. If the undertaking is given, the officer must detain the property as belonging to the judgment debtor. Where an undertaking is given to indemnify an officer, he must, within two days after the giving of the said undertaking, cause the same to be filed in the office of the clerk of the court out of which the execution was issued, and serve upon the claimant, his assignee or other representative, and the judgment creditor, or the attorney whose name is subscribed to the execution, a copy of the said undertaking, with a notice of the justification of the sureties thereon. The justification must take place before a judge of the court out of which the execution was issued, at a time to be specified in the notice, which must not be less than two nor more than five days after service of said notice. For the purpose of justification, each of the sureties upon the undertaking must attend before the judge, at the time and place mentioned in the notice, and be examined on oath, on the part of the claimant, his assignee or other representative, touching his sufficiency in such manner as the judge in his discretion thinks proper. The examination may be adjourned from day to day, until it is completed, but such adjournment must always be to the next judicial day. If required by the claimant, his assignee or other representative, the examination must be reduced to writing and subscribed by the sureties. If the judge finds the sureties sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause the said undertaking, together with the examination of the sureties, to be filed with the clerk of the court. Thereupon the sheriff is released and discharged from all liability by reason of the levy upon, detention, and sale of the property seized. When any such undertaking shall have been approved and filed, as hereinbefore provided, the clerk of the court shall immediately upon the same being filed, index the same in the index book in his office, under which executions are indexed, under the title of the suit in which the execution is issued.

New. Am'd by L. 1877, c. 416; L. 1888, c. 98; L. 1895, c. 663; L. 1904, c. 541 (in effect Sept. 1, 1904). See § 658, ante.

§ 1420. Inquisition not to prejudice claimant's right.

If the property is found to belong to the defendant, the finding does not prejudice the right of the claimant, to bring an action to recover the property so levied upon, or damages by reason of the levy, detention, or sale.

New. See § 659, ante.

§ 1421. [Am'd, 1887, 1900.] In action against officer, indemnitors may be substituted as defendants.

Where an action to recover a chattel or chattels, hereafter levied upon by virtue of an execution, or several executions, or a warrant of attachment, or several warrants of attachment, or to recover damages by reason of a levy or levies upon, detention, sale or sales of personal property, hereafter made, by virtue of an execution or several executions, or a warrant of attachment, or several warrants of attachment, is brought against an officer, or against a person who acted by his command or in his aid, if a bond or bonds or written undertaking or undertakings indemnifying the officer against the levy or levies, or other act or acts, has been given in behalf of the judgment creditor or the several judgment creditors, or the plaintiff in the warrant or the plaintiffs in the several warrants, either before or after the commencement of the action, the persons or person or the several persons who gave it to them, or the survivors, if one or more are dead, may apply to the court for an order to substitute the applicant or several applicants as defendants in the action, in place of the officer or of the person so acting by his command or in his aid; and the court may, upon application of the officer, or in case of his death, upon the application of his legal representatives, grant an order substituting the indemnitors as defendants in the action, in place of the officer or of the person so acting by his command or in his aid.

New. Am'd by L. 1887, c. 452; L. 1900, c. 115 (in effect Sept. 1, 1900).

§ 1422. [Am'd, 1887.] Notice of application and proofs thereupon.

Where the application is made by the officer, notice of the application must be given to the indemnitors or their attorney, and also to the attorney for the plaintiff. If the pleadings do not sufficiently show that the case is one where the order may be granted, the facts with respect thereto must be shown by affidavit or other competent proof. Where the application is made by the indemnitors, or one of them, the motion papers must contain a written consent to be made defendant in the action executed by each person who executed the instrument or instruments of indemnity, unless proof by affidavit is furnished that those who do not consent are dead. Each consent must be acknowledged or proved and certified in like manner as a deed to be recorded in the county, and notice of the application must be given to the attorney of each party to the action, and if the defendant has not appeared, notice must be given to him personally.

New. Am'd by L. 1887, c. 452.

§ 1423. [Am'd, 1887.] Terms may be imposed.

Upon granting the order the court may, in its discretion, require the indemnitors to furnish additional security to the plaintiff and to pay the reasonable expenses of the defendant, necessarily incurred before the order is granted, or it may impose such

other terms for the security of either of the original parties as justice requires.

New. Am'd by L. 1887, c. 452.

§ 1424. [Am'd, 1887.] When indemnity related to part of property.

If the indemnity given related to a part only of the property, the court may, in a proper case, direct that the action be divided into two actions, that the indemnitors be substituted as defendants in one without affecting the other, and that the controversy in each action be limited to that part of the property in respect to which it is to be continued. Where such an order is made, a similar application may be subsequently made in the action which proceeds against the original defendant.

New. Am'd by L. 1887, c. 452.

§ 1425. [Am'd, 1887.] Application when officer is joined with indemnitors.

If the officer, or person acting by his command, or in his aid, is joined as a defendant, with all the indemnitors, he may apply for an order to strike out his name as a defendant. If he is joined as a defendant with one or more, but not all of them, he may apply for an order substituting those who are not joined with him as defendants in his place. In either case, the application is made in the same manner, and is subject to the same provisions, as if made as prescribed in section 1421 of this act.

New. Am'd by L. 1887, c. 452.

§ 1426. Effect of the order.

An order, made as prescribed in the last five sections, does not affect the merits of the cause of action, or of the defense, except so far as it limits the controversy to particular property. But if the substituted or remaining defendants recover judgment, they are entitled to single costs only. If the action is discontinued, or the complaint dismissed, a new action may be brought, as if the former action had not been brought.

New.

§ 1427. [Am'd, 1887.] Officer to whom indemnity is given, required to give notice of action.

Where an action is brought in a case where one or more persons are entitled to make an application for an order of substitution, or where one or more persons are liable to be substituted as defendants, as prescribed in section 1421 of this act, the officer to whom the instrument or instruments of indemnity was given cannot maintain an action thereupon against a person entitled to make, but who has not made, such an application, or who is liable to be, but has not been, substituted as a defendant, unless notice of the commencement of the action against the officer, or the person acting by his command or in his aid, is given before the trial thereof, or at least ten days before judgment by default is taken therein, either to attorney or several attorneys whose name is, or several names are, subscribed to the execution or several executions, or warrants of attachment or several warrants of attachment, or personally to the judgment creditor or creditors, or the plaintiff or several plaintiffs in the action in which the warrant of attachment was, or several warrants of attachment were, issued, or to one of the persons who executed the instrument or instruments of indemnity.

New. Am'd by L. 1887, c. 452.

§ 1428. Sale of personal property; how made.

Personal property must be offered for sale, in such lots and parcels, as are calculated to bring the highest price. Except where the officer is expressly authorized, by this article, to sell property not in his possession, personal property shall not be offered for sale, unless it is present, and within the view of those attending the sale.

From 2 R. S. 367 (Part 3, c. 6, tit. 5), § 23.

§ 1429. [Am'd. 1907.] Notices to be posted.

At least six days' previous notice of the time and place of a sale of personal property, by virtue of an execution, must be given, by posting conspicuously written or printed notices thereof, in at least three public places of the town or city, where the sale is made. Where perishable property has been levied upon by virtue of an execution the court may, upon the application of the officer making the levy, by order, direct the sale thereof at such a time and upon such a notice as it deems proper; and, thereupon, the property must be sold accordingly.

From Id., § 21. Am'd by L. 1907, c. 244 (in effect Sept. 1, 1907).

ARTICLE THIRD.

Sale, redemption, and conveyance of real property; rights and liabilities of persons interested.

Sec. 1430. To what leasehold property this article applies.
1431. Real property held in trust, when liable to execution.
1432. Equity of redemption; when not to be sold.
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§ 1430. To what leasehold property this article applies. The expression, "real property", as used in this and the succeeding article, includes leasehold property, where the lessee or his assignee is possessed, at the time of the sale, of at least five years' unexpired term of the lease, and also of the building or buildings, if any, erected thereupon.

From L. 1887, c. 462, § 1.

§ 1431. Real property held in trust, when liable to execution. Real property, held by one person, in trust or for the use of another, is liable to levy and sale by virtue of an execution,

issued upon a judgment recovered against the person, to whose use it is so held, in a case where it is prescribed by law, that, by reason of the invalidity of the trust, an estate vests in the beneficiary; but special provision is not otherwise made by law, for the mode of subjecting it to his debts.

From 2 R. S. 368 (Part 3, c. 6, tit. 5), § 26.

§ 1432. Equity of redemption; when not to be sold.

The judgment debtor's equity of redemption, in real property mortgaged, shall not be sold by virtue of an execution, issued upon a judgment recovered for the mortgage debt, or any part thereof.

From Id., § 31.

§ 1433. Direction to be indorsed on execution.

Where an execution against property is issued upon a judgment, specified in the last section, to the county where the mortgaged property is situated, the attorney, or other person who subscribes it, must indorse thereupon a direction to the sheriff, not to levy it upon the mortgaged property, or any part thereof. The direction must briefly describe the mortgaged property, and refer to the book and page, where the mortgage is recorded. If the execution is not collected out of the other property of the judgment debtor, the sheriff must return it wholly or partly unsatisfied, as the case requires.

From Id., §§ 32, 33.

§ 1434. [Am'd, 1896.] Notice of sale of real property; how given.

The sheriff who sells real property, by virtue of an execution, must previously give public notice of the time and place of the sale, as follows:

1. A written or printed notice thereof must be conspicuously fastened up, at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places, in the town or city where the property is situated, if the sale is to take place in another town or city.

2. A copy of the notice must be published, at least once in each of the six weeks, immediately preceding the sale, in a newspaper published in the county, or published in an incorporated village, a part of which is within the county; if there is a newspaper published in such county or village; or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published.

From Id., § 34. Am'd by L. 1896, c. 767 (In effect May 12, 1896).

§ 1435. Property, how described therein. Part may be sold.

In each notice, specified in the last section, the real property to be sold must be described with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or by some other appropriate description. The validity of a sale is not affected by the fact, that the property sold is part only of the property advertised to be sold.

From 2 R. S. 369, § 35.

§ 1436. Penalty for irregularity in sale.

A sheriff who sells real property, by virtue of an execution, without having given notice thereof, as prescribed in the last two

sections, or otherwise than as prescribed in this chapter, forfeits one thousand dollars to the party injured, in addition to the damages which the latter sustains thereby.

From Id., § 37.

§ 1437. Manner of conducting sale.

Where real property, offered for sale by virtue of an execution, consists of two or more known lots, tracts, or parcels, each lot, tract, or parcel must be separately exposed for sale. If a person who is the owner of, or is entitled by law to redeem, a distinct parcel of the property, of any other description, requires that parcel to be exposed for sale separately, the sheriff must expose it accordingly. No more real property shall be exposed for sale, than it appears to be necessary to sell, in order to satisfy the execution.

From Id., § 38.

§ 1438. Sheriff to make duplicate certificates of sale.

The sheriff, who sells real property, by virtue of an execution, must make out, subscribe, and acknowledge before an officer authorized to take the acknowledgment of a deed, duplicate certificates of the sale, containing:

1. The name of each purchaser, and the time when the sale was made.
2. A particular description of the property sold.
3. The price bid for each distinct parcel separately sold.
4. The whole consideration money paid.

From 2 R. S. 370, § 42.

§ 1439. Certificate to be recorded, etc.

The sheriff must, within ten days after the sale, file one of the duplicate certificates in the office of the clerk of the county, and deliver another to the purchaser. If there are two or more purchasers, a certificate must be delivered to each. The clerk must immediately record the certificate in a book, kept by him for that purpose, and must index the record, to the name of the judgment debtor. His fees for so doing must be paid by the sheriff, as part of the expenses of the sale.

From Id., § 43; L. 1857, c. 60, § 1.

§ 1440. [Am'd, 1881.] Title to real property not divested before deed.[1]

The right and title of the judgment debtor, or of a person holding under him, or deriving title through him, to real property, sold by virtue of an execution, is not divested by the sale, until the expiration of the period, within which it can be redeemed, as prescribed in this article, and the execution of the sheriff's deed. But if the property is not redeemed, and a deed is executed in pursuance of the sale, the grantee in the deed is deemed to have been vested with the legal estate, from the time of the sale. [And if the title of such grantee or his assigns is adjudged, for any reason or cause whatsoever, to be null and void in any action for that purpose brought by the judgment debtor or his assigns, such judgment shall have no force or effect, unless within twenty days after the entry of such judgment, the plaintiff shall pay to such grantee or his assigns the sum of money which was paid upon the sale, with interest from the time of the sale as pre-

[1] The portion of this section which is enclosed in brackets has been held by the Court of Appeals to be unconstitutional and void. Gilman v. Tucker, 128 N. Y. 190.

scribed in this article, including the costs and expenses of said defendant in defending the action in which such judgment was recovered, to be adjusted by a judge of the court in which said action is brought, and in the event of plaintiff's failure to pay such purchase-money and expenses within the time aforesaid, said title shall be valid in said grantee, and in case such judgment has heretofore been recovered and an appeal has been taken therefrom which is now pending, and such judgment shall be affirmed on final appeal, the same shall have no force or effect unless within twenty days after the entry of judgment of affirmance, the plaintiff shall pay to such grantee or his assigns the sum of money which was paid upon the sale, with interest as aforesaid, including the costs and expenses of the defendant as aforesaid, in prosecuting any appeal from such judgment, and in the event of plaintiff's failure so to do, said title shall be valid in said grantee.]

From 2 R. S. 373, § 61. Am'd by L. 1881, c. 681.

§ 1441. Rights of holder of the property during intermediate period.

The person entitled to the possession of real property, sold by virtue of an execution, as prescribed in the last section, may, during the period therein specified, use and enjoy the same as follows, without being chargeable with committing waste:

1. He may use and enjoy it in like manner, and for the like purposes, as it was used and enjoyed before the sale, doing no permanent injury to the freehold.

2. He may make necessary repairs to a building, or other erection thereupon. But this subdivision does not permit an alteration in the form or structure of the building or other erection.

3. He may use and improve the land, in the ordinary course of husbandry; but he is not entitled to a crop, growing thereon, at the expiration of the period of redemption.

4. He may apply any wood or timber on the land to the necessary reparation of a fence, building, or other erection, which was thereupon at the time of the sale.

5. If he actually occupies the land sold, he may take necessary fire-wood therefrom for use in his household.

From 2 R. S. 336 (Part 3, c. 5, tit. 5), § 22.

§ 1442. Order to prevent waste; when and how applied for.

If, at any time during the period allowed for redemption, the judgment debtor, or any other person in possession of the property sold, commits or threatens to commit, or makes preparations for committing waste thereupon, the supreme court, or any justice thereof, within the judicial district, or the county judge of the county, in which the property, or any part thereof, is situated, may, upon the application of the purchaser, or his assignee, or the agent or attorney of either, and proof, by affidavit, of the facts, grant, without notice, an order, restraining the wrongdoer from committing waste upon the property.

From Id., §§ 23, 24.

§ 1443. Proceedings to punish violation of the order.

If the person, against whom such an order is granted, commits waste in violation thereof, after the service upon him of the order, with a copy of the affidavit upon which it was granted, the court or judge, upon proof, by affidavit, of the facts, may grant

an order, requiring him to show cause, at a time and place therein specified, why he should not be punished for a contempt.

From Id., §§ 25, 26.

§ 1444. Mode and extent of punishment.

If, upon the return of the order to show cause, it satisfactorily appears, that the person, required to show cause, has violated the former order, the court or judge may either punish him, as prescribed by law for the punishment of a contempt of a court of record, other than a criminal contempt; or may grant a warrant, directed to the sheriff of the county, reciting the former order, and the violation thereof, and commanding the sheriff to commit the wrong-doer to close confinement, for a term specified therein, not more than one year. A person thus committed cannot be admitted to the liberties of the jail.

From Id., §§ 27, 28.

§ 1445. How warrant, etc., superseded.

The warrant may be superseded, and the prisoner discharged, by an order, in the discretion of the court or judge committing him, upon his executing, to the person who applied for the warrant, an undertaking, in a sum fixed, and with sureties approved, by the court or judge, to the effect, that he will pay any judgment, which the applicant, or his assignee, or other representative, may recover against him, by reason of any waste theretofore or thereafter committed on the property; and upon his paying to the applicant, for the costs and expenses of the proceedings, a sum, fixed by the court or judge.

From Id., § 29.

§ 1446. When and how real property sold may be redeemed.

Within one year after the sale of real property, by virtue of an execution, a person, specified in the next section, may redeem it, by paying to the purchaser, his executor, administrator, or assignee, or to the sheriff who made the sale, for the use of the person so entitled thereto, the sum of money which was paid upon the sale, with interest from the time of the sale, at the rate of ten per centum a year.

From 2 R. S. 370 (Part 3, c. 6, tit. 5), § 45.

§ 1447. By whom such redemption may be made.

The redemption, specified in the last section, may be made, either by the judgment debtor, whose right and title were sold, or by his heir, devisee, or grantee, who has acquired, by inheritance, devise, deed, sale, by virtue of a mortgage or of an execution, or by any other means, an absolute title to the property proposed to be redeemed; or, in a case specified in section 1458 or 1459 of this act, to a portion thereof.

From Id., § 46.

§ 1448. Such redemption avoids the sale.

Upon payment being made, by a person entitled to redeem real property, as prescribed in the last two sections, the sale of the property redeemed, and the certificates of the sale, as far as they relate thereto, become null and void.

From Id., § 49.

§ 1449. When creditor may redeem.

Real property, sold by virtue of an execution, which remains, at the expiration of one year after the sale, unredeemed by the

person or persons entitled to redeem it, as prescribed in the last three sections, may be redeemed, within three months after the expiration of the year, by the creditors specified, and upon the terms and in the manner prescribed, in the following sections of this article.

From Id., § 50.

§ 1450. What sum to be paid, etc., when creditor redeems.

In a case specified in the last section, a creditor, having in his own name, or as executor, administrator, assignee, trustee, or otherwise, a judgment rendered, or a mortgage duly recorded, at any time before the expiration of fifteen months from the time of the sale, which is a lien upon the real property sold, may redeem that property, by paying the sum of money, which was paid upon the sale thereof, with interest at the rate of seven per centum a year from the time of the sale, and executing a certificate of satisfaction, as prescribed in section 1463 of this act.

From Id., § 51; L. 1847, c. 410, §§ 1, 2.

§ 1451. Redemption by another creditor from a redeeming creditor.

Where a creditor has redeemed real property, as prescribed in the last section, any other creditor, who might have redeemed it from the purchaser, as therein prescribed, may redeem it from the first redeeming creditor, as follows:

1. He must reimburse to the first redeeming creditor, his executor, administrator, or assignee, the sum paid by him to redeem the property, with interest at the rate of seven per centum a year, from the time of his redemption.

2. He must execute a certificate of satisfaction, relating to his judgment or mortgage, in like manner as the first redeeming creditor was required to do.

3. If the judgment or mortgage, by virtue of which the first creditor redeemed, is prior to the judgment or mortgage of the second creditor, the second creditor must also pay to the first creditor, the sum specified in the certificate of satisfaction, executed by him upon his redemption, with interest at the rate of seven per centum a year, from the time of his redemption; unless the first redeeming creditor's judgment or mortgage had ceased, when he redeemed, to be a lien as against the second redeeming creditor; in which case, the latter need not pay any part of the sum, specified in the certificate.

From 2 R. S. 372, § 55.

§ 1452. Id.; when second redeeming creditor has the prior lien.

Where the lien of the second redeeming creditor's judgment or mortgage, is prior to that of the first redeeming creditor's judgment or mortgage, so that the former redeems, without paying the sum, specified in the latter's certificate of satisfaction, the latter may, without executing another certificate of satisfaction, again redeem from the former, or from any subsequent redeeming creditor, in a case, where he would have been entitled to redeem, if his first certificate had not been executed; and he has the same rights, with respect to any creditor redeeming from him, as if his first certificate had been executed, when he made his second redemption.

New.

§ 1453. Subsequent redemptions by other creditors.

A third or other creditor, who might have redeemed, as prescribed in the last four sections, may redeem from the second or any other creditor, who has redeemed, in the manner, and upon the terms and conditions, prescribed in the last two sections.

From 2 R. S. 372, § 56.

§ 1454. When creditor may redeem after fifteen months.

A creditor, who might have redeemed within fifteen months after the sale, as prescribed in the last four sections, may redeem from any other redeeming creditor, although the fifteen months have elapsed; provided that he thus redeems within twenty-four hours after the last previous redemption.

From L. 1847, c. 410, § 4.

§ 1455. When redemption must be made at sheriff's office.

A redemption, made by a creditor, on or after the last day of the fifteen months, must be made at the sheriff's office of the county. The sheriff, or his under-sheriff, or a deputy-sheriff, in his behalf, must attend at the sheriff's office, for that purpose, on the last day of the fifteen months, and on each day thereafter, in which a redemption can be made, during the time when the sheriff's office is required by law to be kept open. In the absence of the sheriff, the redemption may be made by paying the necessary money, and delivering the necessary papers, to the under-sheriff, or to any deputy-sheriff, present at the sheriff's office. If the term of office of the sheriff, who made the sale, has expired, and he, or his under-sheriff, or a deputy-sheriff authorized, in his behalf, to receive the necessary money and the necessary papers, is not present, the money may be paid, and the papers may be delivered, to the sheriff then in office, or to the under-sheriff or a deputy-sheriff of the latter.

From Id., § 3.

§ 1456. Original purchaser may redeem, when also a creditor.

If the purchaser, at the execution sale, of property, which can be redeemed by a creditor, as prescribed in this article, is also a creditor of the judgment debtor, and as such could redeem from a purchaser, or a redeeming creditor, he may avail himself of his judgment or mortgage, to redeem from any other redeeming creditor.

From 2 R. S. 372, § 57.

§ 1457. Creditor may redeem again under another judgment or mortgage.

The judgment creditor, by virtue of whose execution real property has been sold, cannot avail himself of the judgment, upon which the execution was issued, to redeem the property; nor, except as otherwise specially prescribed in this article, can a creditor, who has once redeemed, avail himself of the same judgment or mortgage, to redeem again. But if either has another judgment or mortgage, which would entitle him to redeem, he may avail himself thereof for that purpose, in the same manner and on the same terms, as any other creditor.

From 2 R. S. 373, § 58.

§ 1458. Redemption by person entitled to redeem part.

Where a person, who has an absolute title to, or a judgment or mortgage, which is a lien upon, a distinct parcel only of the

real property, sold by virtue of an execution, would be authorized, by this article, to redeem the property, if his title or lien extended to the whole, he may redeem, from a purchaser, the entire property sold, or from a prior redeeming creditor, the entire property redeemed by that creditor; except that if his title or lien extends to a distinct parcel only of one or more parts of the property, which were separately sold, he can redeem, from a purchaser, only the part or parts thus separately sold, in which his distinct parcel is included.

From 2 R. S. 372, §§ 52, 53.

§ 1459. Redemption by owners of undivided shares.

Where two or more persons own undivided shares, as joint tenants, or as tenants in common, in real property, sold by virtue of an execution, or in a distinct parcel thereof, which has been separately sold; each of them may redeem, from the purchaser, as prescribed in sections 1446 and 1447 of this act, the share or interest, belonging to him, by paying a part of the purchase-money, bid for the property, or for that distinct parcel thereof bearing the same proportion to the whole, as the share or interest, proposed to be redeemed, bears to the property, or distinct parcel separately sold, of which it is a part; together with interest on the sum so paid, from the time of the sale, at the rate of ten per centum a year.

From 2 R. S. 371, § 48.

§ 1460. Id.; by creditors having liens on undivided shares.

Where the judgment or mortgage of a creditor, entitled to redeem, is a lien upon an undivided share, specified in the last section, he may redeem, from a purchaser, that undivided share, by paying him the same proportion of the purchase-money, which the owner must have paid to redeem it, as prescribed in the last section; or he may redeem, from a prior redeeming creditor, the entire property redeemed by the latter, with like effect and in the same manner, as if his lien attached to the whole.

From 2 R. S. 372, § 54.

§ 1461. Right to redeem not affected by agreement.

The sheriff, the purchaser, the judgment creditor, or a redeeming creditor, cannot, by his agreement or other act, in any manner, impair or prejudice the right of any other person to redeem, as prescribed in this article.

New.

§ 1462. To whom money paid upon redemption.

The money required to be paid by a creditor, in order to effect a redemption of real property, as prescribed in this article, may be paid to the purchaser or creditor, from whom the property is to be redeemed, his executor, administrator, or assignee; or it may be paid, for the use of the person so entitled thereto, to the sheriff who made the sale.

From 2 R. S. 373, § 59.

§ 1463. Certificate of satisfaction required to effect redemption by creditor.

The certificate of satisfaction, required to be executed by a creditor, in order to effect a redemption of real property, must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county; must describe, with reasonable cer-

tainty, the judgment or mortgage under which he redeems, and specify the sum due thereupon; and must state, that the redemption satisfies the judgment or mortgage, in full, or to a specified amount. It must be filed in the county clerk's office, at or before the time when the money is paid to effect the redemption, unless the money is paid to the sheriff; in which case, the certificate must also be delivered, at the time of the payment, to the sheriff, who must file it in the county clerk's office, as prescribed in section 1467 of this act. The county clerk, immediately after the execution and recording of the deed, must enter, in his docket, the satisfaction, or partial satisfaction, of a judgment, specified in a certificate so filed, as required by law, when a judgment is collected, by virtue of an execution. If a mortgage, specified in the certificate, is recorded in his office, he must cancel and discharge the mortgage of record, if it is satisfied by the certificate; or, if it is only partially satisfied, he must make a minute of the partial satisfaction, upon the record thereof. If the property mortgaged is situated in a county, in which there is a register, the county clerk must transmit a certified copy of the certificate to the register, who must, in like manner, cancel and discharge the mortgage of record, or make a minute of the partial satisfaction thereof. The clerk's and register's fees, for performing the services specified in this section, must be paid by the sheriff; who may require the person entitled to a deed to pay him the amount thereof, before the deed is delivered.

New.

§ 1464. What evidence a redeeming judgment creditor must furnish.

In order to entitle a creditor by judgment to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk's office, or deliver to the sheriff, as the case requires, the following evidence of his right:

1. A copy of the docket of the judgment, under which he claims the right to redeem, duly certified by the county clerk.

2. Each assignment of the judgment, which is necessary to establish his right. An assignment so filed or delivered must be acknowledged or proved, and certified, in like manner as a deed to be recorded, or the execution thereof must be proved, by the affidavit of the creditor, or of a witness thereto; unless it has been filed, and entered, as prescribed in article third of title first of chapter eleventh of this act, in which case, a certified copy thereof must be filed or delivered.

3. An affidavit, made by him, or his attorney or agent, stating truly the sum remaining unpaid on the judgment, at the time of claiming the right to redeem.

From 2 R. S. 373, § 60.

§ 1465. Id.; as to mortgage creditor.

In order to entitle a creditor by mortgage to redeem real property, as prescribed in this article, he must, when he redeems, file in the county clerk's office, or deliver to the sheriff, the following evidence of his right:

1. A copy of the mortgage, under which he claims the right to redeem, duly certified by the clerk or register of the county.

2. Each assignment of the mortgage, which is necessary to establish his right, acknowledged or proved, and certified, as prescribed in the last section for an assignment of a judgment, unless

it has been recorded; in which case a certified copy of the record must be filed or delivered.

3. An affidavit, made by him, or by his attorney or agent, stating truly the sum remaining unpaid on the mortgage, at the time of claiming the right to redeem.

From L. 1830, c. 525, § 2.

§ 1466. Id.; as to executor or administrator.

In either of the cases specified in the last two sections, if the person, proposing to redeem, claims to be entitled so to do, by reason of his being an executor or administrator of a person, who, if living, would be entitled to redeem, he must file or deliver, with the other papers therein prescribed, a certified copy or a sworn copy of his letters testamentary, or letters of administration.

From Id., c. 525, § 2, subd. 3.

§ 1467. Officers to keep papers open to inspection; when to file them.

The sheriff, to whom one or more papers, specified in the last four sections, are delivered, must keep them open, at all reasonable times during the period allowed for redemption, to the inspection of all persons interested. He must have all those papers at the sheriff's office, at the times when he is required to attend thereat, for the purpose of enabling creditors to redeem, as prescribed by law; and he must file them in the county clerk's office, within three days after the execution of the deed.

New.

§ 1468. When redemption takes effect.

A redemption by a creditor is effected, only when he has paid all the money, required to be paid, and filed or delivered all the papers, required to be filed or delivered, as prescribed in this article; and a waiver of any of those requirements is void, as against a person who is entitled subsequently to redeem. Where a redemption is thus effected, it vests in the redeeming creditor all the right, title, and interest, which the purchaser acquired by the sale.

New.

§ 1469. Certificate to be given, when redemption made.

Where a redemption is made, as prescribed in this article, the officer or other person, to whom money is paid, or a paper is delivered, for the purpose of effecting the redemption, must execute and deliver, to the person paying the money or delivering the paper, a certificate, stating all the facts which transpired before him, with respect to the redemption.

From L. 1847, c. 410, § 5.

§ 1470. Certificate may be acknowledged and recorded.

Such a certificate may be acknowledged or proved, and certified in like manner as a deed to be recorded in the county where the property is situated. The recording thereof, in the office of the clerk or register of that county, in the book for recording deeds, has the same effect, as against subsequent purchasers and incumbrancers, as the recording of a conveyance.

From Id., § 6.

§ 1471. [Am'd, 1886.] When and by whom conveyance to be executed.

Immediately after the expiration of fifteen months from the time of[1] sale; except where a redemption has been made on the last day of the fifteen months, and, in that case, immediately after the expiration of twenty-four hours from the last redemption; the sheriff, who made the sale, must execute the proper deed or deeds, in order to convey to the person or persons entitled thereto, the part or parts of the property sold, which have not been redeemed by the judgment debtor, his heir, devisee, or assignee. The deed conveys to the grantee therein the right, title, and interest, which were sold by the sheriff. After the same shall have been recorded for twenty years in the county where the real estate is situated, it shall be presumptive evidence of the facts therein stated.

From 2 R. S. 373 (Part 3, c. 6, tit. 5), § 62; L. 1847, c. 410, § 4. Am'd by L. 1886, c. 637.

§ 1472. To whom conveyance to be executed.

If any part of the property remains unredeemed by a creditor it must be conveyed, by the sheriff, to the purchaser upon the sale, except where the certificate of sale has been assigned; in which case, it must be conveyed to the last assignee. Any part or parts of the property sold, which have been redeemed by a creditor, must be conveyed by the sheriff, to the last redeeming creditor, except where he has assigned the certificate of redemption, or has executed any other assignment of his right, title, and interest in the property redeemed by him; in which case, it must be conveyed to the last assignee.

From L. 1835, c. 189, § 1; L. 1867, c. 116, § 1.

§ 1473. When conveyance made to executor or administrator; effect thereof.

Where a person, entitled to a deed, dies before the delivery of the deed, the sheriff must execute and deliver the deed to his executor or administrator. The property so conveyed must be held, in trust for the use of the heirs or devisees of the decedent, subject to the dower of his widow, if there is one; but it may be sold, in a proper case, for the payment of his debts, in the same manner as land, whereof he died seized.

From 2 R. S. 374, §§ 63, 64.

§ 1474. Assignment must be acknowledged and filed.

Before an assignee, or his executor or administrator, is entitled to a deed, as prescribed in the last two sections, each assignment, under which the deed is claimed, must be acknowledged or proved, and certified, in like manner as a deed to be recorded in the county where the property is situated, and must be filed in the office of the clerk of that county.

From L. 1885, c. 189, § 2.

§ 1475. Under-sheriff or successor to act, if sheriff dies.

Where a sheriff dies, is removed from office, or becomes otherwise disqualified to act, at any time after making a sale of real property, by virtue of an execution, the property,[1] or a distinct parcel thereof, may be redeemed, by paying the necessary money, and delivering the necessary papers, to his under-sheriff, who must also execute and deliver the proper deed or deeds of prop-

[1] The word "the" omitted in engrossing.

erty, not redeemed by the judgment debtor, his heir, devisee, or grantee. If the under-sheriff also dies, is removed from office, or becomes otherwise disqualified to act, the property may be redeemed, by paying the necessary money, and delivering the necessary papers, to the sheriff's successor in office, who must also execute and deliver the proper deed or deeds. The under-sheriff, or the sheriff's successor, as the case requires, possesses all the powers, and is subject to all the duties and liabilities, of the sheriff who made the sale, touching the redemption and conveyance of property sold and the proceedings relating thereto; and each provision of law, regulating those proceedings, and applicable to the sheriff who made the sale, is applicable to his under-sheriff or successor. This section applies where a sale was made, either before or after this act takes effect.

From 2 R. S. 374, §§ 65, 66, 67; L. 1867, c. 116, § 1.

§ 1476. Money may be paid, etc., to under-sheriff, or deputy-sheriff, who sold property.

Where real property is sold, by virtue of an execution, by the under-sheriff or a deputy-sheriff, in behalf of the sheriff, money required to be paid, or a paper required to be delivered, to the sheriff, in order to effect a redemption, as prescribed in this article, at any time before the last day of the fifteen months from the time of the sale, may be paid or delivered, either to the sheriff, or to the under-sheriff or deputy-sheriff, who made the sale.

New.

§ 1477. Application of this article to sale by coroner, or person specially appointed, etc.

Where real property is sold, by virtue of an execution, by a person specially appointed by the court, as prescribed in section 1362 or section 1388 of this act, it may be redeemed, as prescribed in this article, as if it had been sold by the sheriff, except as follows:

1. Money, required to be paid, or a paper, required to be delivered, to the sheriff, in order to effect a redemption, as prescribed in this article, at any time before the last day of the fifteen months from the time of the sale, must be paid to the officer who made the sale; unless the person entitled to redeem, his agent or attorney, files with the clerk of the county, with the paper or papers required to be filed, or to be delivered to the sheriff, for the purpose of effecting the redemption, his affidavit, to the effect, that the officer is dead; or has been removed; or, where he is a coroner, that he is no longer in office; or that after diligent search, the affiant has been unable to find him within the county; in which case, the money may be paid into court, by paying it to the county treasurer, to the credit of the cause, with like effect, as where it is paid to the sheriff, after a sale by the latter.

2. The provisions of section 1455 of this act, apply to a redemption, upon a sale made as prescribed in this section; and the officer, who sold the property, must attend, as the sheriff is therein required to attend. If he is not present, the redemption may be effected, as prescribed in that section, for redemption in a case, where the term of office of the sheriff, who made the sale, has expired.

New.

§ 1478. Id; where coroner or person appointed dies, etc.

If, when the period for redemption expires, a coroner, or a person specially appointed, by the court, who has sold real property, by virtue of an execution, is dead, or has been removed, or, in the case of a coroner, if he is no longer in office, the court must, upon the application of a person entitled to a deed, appoint a person, to execute the deed accordingly.

New.

ARTICLE FOURTH.

Remedies for failure of title to real property sold, and to enforce contribution.

Sec. 1479. When evicted purchaser may recover purchase-money.
1480. Remedy of judgment creditor thereupon.
1481. Contribution between owners of real property.
1482. Id.; when part owner redeems.
1483. Order of contribution.
1484. Contribution, how enforced by means of original judgment.
1485. Requisites to preserve the lien.
1486. Entry upon the docket.

§ 1479. When evicted purchaser may recover purchase money.

The purchaser of real property, sold by virtue of an execution, his heir, devisee, grantee, or assignee, who is evicted from the possession thereof, or against whom judgment is rendered in an action to recover the same, may recover the purchase-money, with interest, from the person for whose benefit the property was sold, where the judgment was rendered, or the eviction occurred, in consequence, either:

1. Of any irregularity in the proceedings concerning the sale; or

2. Of the judgment, upon which the execution was issued, being vacated or reversed, or set aside for irregularity, or error in fact.

From 2 R. S. 375 (Part 3, c. 6, tit. 5), § 68.

§ 1480. Remedy of judgment creditor thereupon.

Where final judgment is rendered, against the defendant, in an action specified in subdivision first of the last section, the judgment, by virtue of which the sale was made, remains, in his favor, valid and effectual against the judgment debtor therein, his executor, administrator, heir, or devisee, for the purpose of collecting the sum paid on the sale, with interest. He may accordingly have a further execution upon that judgment; but the execution does not affect a purchaser in good faith, or an incumbrancer by mortgage, judgment, or otherwise, whose title or whose incumbrance accrued, before the actual levy thereof.

From Id., § 69.

§ 1481. Contribution between owners of real property.

Where the real property of two or more persons is liable to satisfy a judgment, and the whole of the judgment, or more than a due proportion thereof, has been collected, by a sale of the real property of one or more of them, by virtue of an execution issued upon the judgment; the person so aggrieved, or his executor or administrator, may maintain an action, to compel a just and equal contribution by all the persons, whose real property ought to contribute as prescribed in the next section but one.

From Id., § 70.

§ 1482. Id.; when part owner redeems.

Where the heir, devisee, or grantee, of a judgment debtor, having an absolute title to a distinct parcel of real property, sold by virtue of an execution, redeems, as prescribed in section 1458 of this act, the property sold, or any part or parts thereof

separately sold, which include his property; he may, in like manner, maintain an action, to compel a just and equal contribution by those who own the residue of the property thus redeemed.

From 2 R. S. 371 (Part 3, c. 6, tit. 5), § 47.

§ 1483. Order of contribution.

Where an action is brought, as prescribed in the last two sections, the real property is liable to contribution in the following order:

1. If it comprises different undivided shares or distinct parcels, which have been conveyed by the judgment debtor, they are liable in succession, commencing with the portion last conveyed.

2. If it comprises different undivided shares or distinct parcels, which have been sold by virtue of two or more executions, they are liable in succession, commencing with the portion sold under the last and youngest judgment.

3. If it comprises different undivided shares or distinct parcels, some of which have been conveyed by the judgment debtor, and some of which have been sold by virtue of one or more executions, they are respectively liable in succession, according to the order prescribed in the first and second subdivisions of this section.

From 2 R. S. 375, § 71.

§ 1484. Contribution, how enforced by means of original judgment.

For the purpose of enforcing contribution, as prescribed in the last section, the court, in which the action is brought, may, and in a proper case, must, permit the plaintiff to use the original judgment, and to collect, by an execution issued thereupon, out of any real property subject to the lien thereof, the sum which ought to be contributed by that property. For that purpose, the lien of the original judgment, upon that real property, when preserved, as prescribed in the next section, continues, for the term prescribed in sections 1251 and 1255 of this act, to the extent of the sum, which ought to be so contributed, notwithstanding the payment made by the party seeking contribution.

From Id., § 72.

§ 1485. Requisites to preserve the lien.

The lien of the original judgment may be preserved, as prescribed in the last section, by filing, in the clerk's office of the county where the real property is situated, within twenty days after the payment, for which contribution is claimed, an affidavit, in behalf of the person aggrieved, stating the sum paid, and his claim to use the judgment for the reimbursement thereof, with a notice, requiring the clerk to make the entries specified in the next section. But the lien is not preserved, as against a grantee or mortgagee in good faith, for a valuable consideration, without notice, and before the entries are actually made.

From Id., § 73.

§ 1486. Entry upon the docket.

On filing the affidavit and notice, the clerk must make, upon the docket of the judgment, an entry, stating the sum paid, and that the judgment is claimed to be a lien to that amount. Where it is desired to preserve the lien, upon property situated in two or more counties, a similar affidavit and notice must be filed with, and a similar entry made by the clerk of each county.

From Id., § 74.

TITLE III.

Execution against the person.

Sec. 1487. In what cases execution may be issued against the person.
1488. Id.; against a woman.
1489. When execution against property must be first issued.
1490. Simultaneous executions not allowed against property and person.
1491. Id.; when debtor has been taken.
1492. New execution may issue after escape.
1493. Id.; when debtor dies charged in execution.
1494. Id.; when creditor discharges debtor after thirty days.
1495. New execution not to be enforced against real property sold, etc

§ 1487. [Am'd, 1879.] In what cases execution may be issued against the person.

Where a judgment can be enforced by execution, as prescribed in section 1240 of this act, an execution, against the person of the judgment debtor, may be issued thereupon, subject to the exception specified in the next section, in either of the following cases:

1. Where the plaintiff's right to arrest the defendant depends upon the nature of the action.

2. In any other case, where an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor, where it has not been vacated.

From Co. Proc., § 288. Am'd by L. 1879, c. 542.

§ 1488. [Am'd, 1879.] Id.; against a woman.

But an execution cannot be issued against the person of a woman, unless an order of arrest has been granted and executed in the action, and, if it was executed against the judgment debtor, has not been vacated.

New. See §§ 553, 1206, ante.

§ 1489. When execution against property must be first issued.

Unless the judgment debtor is actually confined, without having been admitted to the liberties of the jail, by virtue of an execution against his person, issued in another action, or of an order of arrest or a surrender by his bail, in the same action, an execution against his person cannot be issued, until an execution against his property has been returned, wholly or partly unsatisfied. If he is a resident of the State, the execution against his property must have been issued to the county where he resides.

From Co. Proc., § 288.

§ 1490. Simultaneous executions not allowed against property and person.

An execution against the person of the judgment debtor cannot be issued, without leave of the court, while an execution against his property, issued in the same action, remains unreturned; and an execution against his property cannot be issued, without leave of the court, while an execution against his person, issued in the same action, remains unreturned.

From 2 R. S. 364 (Part 3, c. 6, tit. 5), § 6.

§ 1491. Id.; when debtor has been taken.

Where a judgment debtor has been taken, and remains in custody, by virtue of an execution against his person, another

execution cannot be issued, in the same action, against his person or his property, except in a case specially prescribed by law.

From Id., § 7.

§ 1492. New execution may issue after escape.

If a judgment debtor escapes, after having been taken, by virtue of an execution against his person, he may be retaken, by virtue of a new execution against his person; or an execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned, without his having been taken.

From Id., § 8.

§ 1493. Id.; when debtor dies charged in execution.

Where a judgment debtor, who has been taken by virtue of an execution against his person, dies while in custody, a new execution against his property may be issued, as if the execution, by virtue of which he was taken, had been returned without his having been taken.

From 2 R. S. 368 (Part 3, c. 6, tit. 5), § 28.

§ 1494. Id.; when creditor discharges debtor after thirty days.

At any time after a judgment debtor has remained in custody, by virtue of an execution against his person, for the space of thirty days, the judgment creditor may serve upon the sheriff a written notice, requiring him to discharge the judgment debtor from custody, by virtue of the execution. Whereupon the sheriff must discharge the judgment debtor, and return the execution accordingly. After service of such a notice, another execution, against the person of the judgment debtor, cannot be issued upon the judgment; but after his discharge, the judgment creditor may otherwise enforce the judgment, as if the execution, from which he was discharged, had been returned, without his having been taken.

From L. 1857, c. 427, § 1; 2 R. S. 34 (Part 2, c. 5, tit. 1), § 17.

§ 1495. New execution not to be enforced against real property sold, etc.

A new execution against property, issued in a case specified in the last two sections, cannot be enforced against an interest in real property, including a chattel real, which was purchased in good faith, from the judgment debtor, after the recovery of the judgment upon which it is issued; or which was sold by virtue of an execution, issued upon a previous or subsequent judgment.

From 2 R. S. 368 (Part 3, c. 6, tit. 5), §§ 29, 30.

CHAPTER XIV.[1]

Special Provisions Regulating Actions Relating to Property.

TITLE I.— Actions Relating to Real Property.
TITLE II.— Actions Relating to Chattels.

TITLE I.

Actions relating to real property.

Article 1. Action to recover real property.
2. Action for partition.
3. Action for dower.
4. Action to foreclose a mortgage.
5. Action to compel the determination of a claim to real property.
6. Action for waste.
7. Action for a nuisance.
8. Other actions relating to real property.
9. Provisions applicable to two or more of the actions specified in this title.

ARTICLE FIRST.

Action to recover real property.

Sec. 1486. Plaintiff may recover damages with the land.
1487. Rents and profits to be included in damages.
1488. Mortgagee cannot maintain action.
1499. Action cannot be maintained for dower.
1500. Separate action by joint tenant or tenant in common.
1501. Grantee of lands held adversely may maintain action.
1502. Against whom action to be brought.
1503. Who may be joined as defendants.
1504. When action may be brought for non-payment of rent
1505. Id.; when right of re-entry is reserved for want of distress.
1506. Action against tenant, when proceedings to be stayed.
1507. Id.; amount of rent in arrear to be stated in judgment.
1508, 1509. Id.; when possession to be restored to defendant.
1510. Id.; use of property, when set off against rent.
1511. Property claimed in action; how described in complaint.
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1514. Evidence of authority.
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1519. Verdict, etc., to state nature of plaintiff's estate.
1520. Expiration of plaintiff's title before trial.
1521. Abatement of action.
1522. Action to be divided, when different persons succeed to different parcels.
1523. Id.; when different persons succeed to real property and to rents and profits.
1524. Effect of judgment rendered after trial of issue of fact.
1525. [Repealed.]
1526. Effect of judgment by default, etc.
1527. [Repealed.]
1528. [Repealed.]
1529. Effect on possession of vacating judgment.
1530. [Repealed.]
1531. Damages recoverable; set-off by defendant.

[1] The preceding chapters of the Code were enacted by L. 1876, c. 448. The following chapters, from c. 14 to c. 22, inclusive, were not enacted until 1880 (L. 1880, c. 178). See §§ 3355, 3356, post.

§ 1496. Plaintiff may recover damages with the land.

In an action to recover real property, or the possession thereof, the plaintiff may demand in his complaint, and in a proper case recover, damages for withholding the property.

New. See Co. Proc., § 167, subd. 5.

§ 1497. Rents and profits to be included in damages.

Those damages include the rents and profits or the value of the use and occupation of the property, where either can legally be recovered by the plaintiff.

Id.

§ 1498. Mortgagee cannot maintain action.

A mortgagee, or his assignee or other representative, cannot maintain such an action, to recover the mortgaged premises.

From 2 R. S. 312 (Part 3, c. 5, tit. 1), § 57.

§ 1499. [Am'd, 1898.] Action cannot be maintained for dower.

Such an action cannot be maintained in a case where an action for dower may be maintained, as prescribed in article third of this title; or

2. Where in any city the real property consists of a strip of land not exceeding six inches in width upon which there stands the exterior wall of a building erected partly upon said strip and partly upon the adjoining lot, and a building has been erected upon land of the plaintiff abutting on the said wall, unless said action be commenced within one year after the completion of the erection of such wall or within one year after the first day of September, 1898. But an action may be maintained, if commenced within the further period of one year, for the recovery of damages by reason of the erection of such wall, and upon the satisfaction of the judgment for such damages, the title of the plaintiff to such strip of land shall thereby be transferred to and vest in the defendant. If neither an action of ejectment nor an action for the recovery of damages be brought within the period hereby limited therefor, the person in possession of such lands shall be deemed to have an easement in said strip of land so long as the said wall partly erected thereon shall stand, and no longer, and in case of the destruction of such wall the owner of such strip shall have the same right to take or recover the possession thereof as if such wall had never existed.

New. Am'd by L. 1898, c. 517 (in effect Sept. 1, 1898). See § 1604, post.

§ 1500. Separate action by joint tenant or tenant in common.

Where two or more persons are entitled to the possession of real property, as joint tenants or tenants in common, one or more of them may maintain such an action, to recover his or their undivided shares in the property, in any case where such an action might be maintained by all.

New. See Co. Proc., § 118, last clause.

§ 1501. [Am'd, 1882.] Grantee of lands held adversely may maintain action.

Such an action may be maintained by a grantee, his heir or devisee, in the name of the grantor, or his heir, where the conveyance, under which he claims, is void because the property conveyed was held adversely to the grantor. The plaintiff must be

allowed to prove the facts to bring the case within this section. In such an action a judgment against the plaintiff shall not award costs to the defendant; but where the defendant is entitled to costs as prescribed in section 3229 of this act, they may be taxed, and the person who maintained the action in the plaintiff's name may be compelled to pay the same as prescribed in section 3247 of this act.

From Co. Proc., § 111; 1 R. S. 739 (Part 2, c. 1, tit. 2), § 147. Am'd by L. 1852, c. 399.

§ 1502. Against whom action to be brought.

Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action. If it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or claiming title thereto, or an interest therein, at the time of the commencement of the action.

From 2 R. S. 304 (Part 3, c. 5, tit. 1), § 4.

§ 1503. Who may be joined as defendants.

In either of the cases specified in the last section, any other person claiming title to, or the right to the possession of, the real property sought to be recovered, as landlord, remainderman, reversioner, or otherwise adversely to the plaintiff, may be joined as defendant in an action therefor.

From Co. Proc., § 118.

§ 1504. When action may be brought for non-payment of rent.

When six months' rent or more is in arrear, upon a grant reserving rent, or upon a lease of real property, and the grantor or lessor, or his heir, devisee, or assignee, has a subsisting right by law to re-enter for the failure to pay the rent, he may maintain an action to recover the property granted or demised, without any demand of the rent in arrear, or re-entry on the property.

From 2 R. S. 505 (Part 3, c. 8, tit. 9), § 30.

§ 1505. Id.; when right of re-entry is reserved for want of distress.

Where a right of re-entry is reserved and given to a grantor or lessor of real property, in default of a sufficiency of goods and chattels whereon to distrain for the satisfaction of rent due, the re-entry may be made, or an action to recover the property demised or granted, may be maintained by the grantor or lessor, or his heir, devisee, or assignee, at any time after default in the payment of the rent; provided the plaintiff, at least fifteen days before the action is commenced, serves upon the defendant a written notice of his intention to re-enter, personally, or by leaving it at his dwelling-house on the premises with a person of suitable age and discretion; or, if the defendant cannot be found with due diligence, and has no dwelling-house on the premises, whereat a person of suitable age and discretion can be found, by posting it in a conspicuous place on the premises.

From L. 1846, c. 274, § 3.

§ 1506. Action against tenant, when proceedings to be stayed.

At any time before final judgment for the plaintiff is rendered, and the judgment-roll is filed, in an action brought as prescribed

in either of the last two sections, the defendant may pay or tender to the plaintiff or his attorney, or pay into court, all the rent then in arrear, with interest and the costs of the action to be taxed; and thereupon the complaint must be dismissed.

From 2 R. S. 505 (Part 3, c. 8, tit. 9), § 32.

§ 1507. Id.; amount of rent in arrear to be stated in judgment.

In such an action, a verdict, report, or decision in favor of the plaintiff, must fix the amount of rent in arrear to the plaintiff, or, if judgment is taken by default, the amount thereof must be ascertained by or under the direction of the court; and, in either case, it must be stated in the judgment.

New.

§ 1508. Id.; when possession to be restored to defendant.

At any time within six months after possession of the property, awarded to the plaintiff in such an action, has been delivered to him by virtue of an execution issued upon a judgment rendered therein, the defendant, or any person who has succeeded to his interest, or a mortgagee of the lease, or of any part thereof, who was not in possession when final judgment was rendered, may pay or tender to the plaintiff, or his executor, administrator, or attorney, or may pay into court, for the use of the person so entitled thereto, the amount of rent in arrear, as stated in the judgment, and the costs of the action, with interest, and all other charges incurred by the plaintiff.

From 2 R. S. 506 (Part 3, c. 8, tit. 9), §§ 33, 35.

§ 1509. The same.

Within three months after making the payment or tender, the person who made it, or his representative, may apply to the court for an order that possession of the property be delivered to him; and thereupon, upon proof of the facts, and payment of the sum due by reason of rent accruing since the judgment was rendered, and upon compliance with all other terms to be complied with by the grantee or lessee, to the time of the application, the court must make an order, directing that possession of the property be delivered to the applicant, who shall hold and enjoy the same, without any new grant or lease thereof, according to the terms of the original grant or lease. Notice of the application must be served upon the plaintiff's attorney.

Id.

§ 1510. Id.; use of property, when set off against rent.

If possession of the property recovered has been delivered to the plaintiff, by virtue of an execution issued upon a judgment in the action, the order must provide for setting off the sum which the plaintiff has made, or which he might, without wilful neglect, have made, of the property, during the possession thereof, against the rent accruing after the judgment was rendered, and for reimbursement to the applicant of the balance, if any, of the sum paid into court by him, after making the set-off prescribed in this section.

From Id., § 33.

§ 1511. Property claimed in action; how described in complaint.

The complaint must describe the property claimed with common certainty, by setting forth the name of the township or tract,

and the number of the lot, if there is any, or in some other appropriate manner; so that, from the description, possession of the property claimed may be delivered, where the plaintiff is entitled thereto.

From 2 R. S. 304 (Part 3, c. 5, tit. 1), § 8. See § 1435, ante.

§ 1512. Motion for plaintiff's attorney to produce his authority.

A defendant, in an action to recover real property or the possession thereof, may, at any time before answering, upon an affidavit that evidence of the authority of the plaintiff's attorney to commence the action has not been served upon him, apply, upon notice, to the court or judge thereof, for an order directing the attorney to produce such evidence.

From Id., §§ 17, 18.

§ 1513. Order thereupon.

Upon such an application, the court or judge must, in a proper case, make an order, requiring the plaintiff's attorney to produce, as directed therein, evidence of his authority to commence the action, and staying all proceedings therein, on the part of the plaintiff, until the evidence is produced.

From Id., § 19.

§ 1514. Evidence of authority.

Any written request of the plaintiff or his agent, to the plaintiff's attorney, to commence the action, or any written recognition of his authority so to do, verified by the affidavit of the attorney, or any other competent witness, is sufficient presumptive evidence of such authority.

From Id., § 20.

§ 1515. When ouster to be proved.

Where the action is brought by a tenant in common, or a joint tenant, against his co-tenant, the plaintiff, besides proving his right, must also prove that the defendant actually ousted him, or did some other act, amounting to a total denial of his right.

From Id., § 27.

§ 1516. Rule when there are distinct occupants.

Where there are two or more defendants, and it is alleged, in the answer of either of them, that he occupies in severalty, or that he and one or more of his co-defendants occupy jointly, one or more distinct parcels, and that one or more other defendants possess other parcels, in severalty or jointly, the court may, in its discretion, upon the application of the plaintiff, and upon such terms as justice requires, direct that the action be divided into as many actions as are necessary. If the action is not so divided, and it appears, upon the trial, that the allegation is true, the plaintiff must, before the evidence is closed, elect against which defendant or defendants he will proceed; and a judgment dismissing the complaint must thereupon be rendered, in favor of the other defendants.

From Id., § 29.

§ 1517. The last section qualified.

The last section does not apply to a case, where two or more defendants occupy different apartments in a building. In such a case, in an action to recover the building and its curtilage, the

plaintiff is entitled to judgment jointly against all the defendants who are liable to him.

New.

§ 1518. When plaintiff may recover against one defendant, subject to rights of others.

Section 1516 of this act does not apply to a case, where one or more defendants, answering as therein prescribed, hold under another defendant, and the plaintiff elects to proceed against the latter, subject to the rights and interests of the former. In such a case, the proceedings against the defendant so answering must be stayed until final judgment; and if the plaintiff recovers final judgment against the defendant, under whom they hold, the judgment operates as a transfer to the plaintiff of that defendant's right, title, and interest, and the costs of the defendant or defendants so answering are in the discretion of the court.

New.

§ 1519. Verdict, etc., to state nature of plaintiff's estate.

A verdict, report, or decision, in favor of the plaintiff, in an action specified in this article, must specify the estate of the plaintiff in the property recovered, whether it is in fee, or for life, or for a term of years, stating for whose life it is, or specifying the duration of the term, if the estate is less than a fee.

From 2 R. S. 307 (Part 3, c. 5, tit. 1), § 30, subd. 7.

§ 1520. Expiration of plaintiff's title before trial.

If the right or title of the plaintiff, in an action specified in this article, expires after the commencement of the action, but before the trial, and he would have been entitled to recover, but for the expiration, the verdict, report, or decision must be rendered according to the fact; and the plaintiff is entitled to judgment for his damages for the withholding of the property, to the time when his right or title so expired.

From 2 R. S. 308, § 31.

§ 1521. Abatement of action.

The provisions of title fourth of chapter eighth of this act, as applied to an action specified in this article, are subject to the qualification that the court may, in its discretion, proceed as prescribed either in that title or in the next two sections.

From Id., § 32; L. 1865, c. 357, § 1.

§ 1522. Action to be divided, when different persons succeed to different parcels.

Where, upon the death of a party, different persons succeed to the decedent's title to, or interest in, different distinct parcels of the property sought to be recovered, the court may, upon motion, and upon such terms as justice requires, direct that the action be divided into as many actions as are necessary; and that the successor to the title or interest of the decedent, to or in each distinct parcel, be substituted as plaintiff or defendant, as the case requires, in the action relating thereto.

New.

§ 1523. Id.; when different persons succeed to real property and to rents and profits.

Where the plaintiff seeks to recover damages for withholding the property, and, upon the death of a party, different persons succeed to the decedent's right or liability for those damages, and

to his title to or interest in the property, the court may, upon motion made upon notice to the persons to be affected, and upon such terms as justice requires, direct the action to be divided into two actions, one to recover the possession of the property, with the rents and profits thereof accruing after the decedent's death, the other to recover the damages accruing before his death; and that the successor in interest of the decedent, with respect to the cause of action in each action, be substituted as plaintiff or defendant therein, as the case requires.

New.

§ 1524. [Am'd, 1911.] Effect of judgment rendered after trial of issue of fact.

A final judgment in an action specified in this article, rendered upon the trial of an issue of fact, is conclusive, as to the title established in the action, upon each party against whom it is rendered, and every person claiming from, through or under him, by title accruing, either after the judgment-roll is filed, or after a notice of the pendency of the action is filed in the proper county clerk's office, as prescribed in article ninth of this title.

From 2 R. S. 309, § 36; L. 1862, c. 485. Am'd by L. 1911, c. 509 (in effect Sept. 1, 1911).

§ 1525. [Repealed by L. 1911, c. 509 (in effect Sept. 1, 1911).]

§ 1526. [Am'd, 1911.] Effect of judgment by default, etc.

A final judgment for the plaintiff, rendered in an action specified in this article, otherwise than upon the trial of an issue of fact, is conclusive upon the defendant, and every person claiming from, through, or under him, by title accruing, either after the judgment-roll is filed, or after a notice of the pendency of the action is filed in the proper county clerk's office, as prescribed in article ninth of this title.

From 2 R. S. 309, § 38. Am'd by L. 1911, c. 509 (in effect Sept. 1, 1911).

§§ 1527, 1528. [Repealed by L. 1911, c. 509 (in effect Sept. 1, 1911).]

§ 1529. [Am'd, 1911.] Effect on possession of vacating judgment.

Where the plaintiff has taken possession of real property by virtue of a final judgment, his possession shall not be in any way affected by the vacating of the judgment. In such a case, if the defendant thereafter recovers final judgment in the action, it must award to him the restitution of the possession of the property; and he may have an execution thereupon for the delivery of the possession to him, as if he was plaintiff.

From 2 R. S. 310, § 41. Am'd by L. 1911, c. 509 (in effect Sept. 1, 1911).

§ 1530. [Repealed by L. 1911, c. 509 (in effect Sept. 1, 1911).]

§ 1531. Damages recoverable; set-off by defendant.

In an action, brought as prescribed in this article, the plaintiff, where he recovers judgment for the property, or possession of the property, is entitled to recover, as damages, the rents and profits, or the value of the use and occupation, of the real property recovered, for a term not exceeding six years; but the dam-

ages shall not include the value of the use of any improvements made by the defendant, or those under whom he claims. Where permanent improvements have been made, in good faith, by the defendant, or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant, in reduction of the damages of the plaintiff, but not beyond the amount of those damages.

From Id., §§ 43, 49, 50.

See new Section - 1531a - added by chap 135 Laws 1920 = See also chap 417 Laws 1922

ARTICLE SECOND.

Action for partition.

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§ 1532. When action for partition may be brought.

Where two or more persons hold and are in possession of real property, as joint tenants or as tenants in common, in which either of them has an estate of inheritance, or for life, or for years, any one or more of them may maintain an action for the partition of the property, according to the respective rights of the persons interested therein; and for a sale thereof, if it appears that a partition thereof cannot be made, without great prejudice to the owners.

From 2 R. S. 317 (Part 3, c. 5, tit. 3), § 1.

§ 1533. Am'd, 1887.] Id.; by remainderman.

Where two or more persons hold as joint tenants, or as tenants in common, a vested remainder or reversion, any one or more of them may maintain an action for the partition of the real property to which it attaches, according to their respective shares therein, subject to the interest of the person holding the particular estate therein, but no sale of the premises in such an action shall be made except by and with the consent in writing, to be acknowledged or proved and certified in like manner as a deed to be recorded, by the person or persons owning and holding such particular estate or estates; and if in such an action it shall appear in any stage thereof that partition or sale cannot be made without great prejudice to the owners, the complaint must be dismissed. The dismissal of the complaint, as herein provided, shall not affect the right of any party to bring a new action, after the determination of such particular estate.

New. Am'd by L. 1887, c. 688.

§ 1534. Id.; by an infant.

An action for the partition of real property shall not be brought by an infant, except by the written authority of the surrogate of the county in which the property, or a part thereof, is situated. The authority shall not be given, unless the surrogate is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action. A judgment for a partition or sale shall not be rendered in such an action, unless the court is satisfied that the interests of the infant will be promoted thereby, and that fact is expressly recited in the judgment.

From L. 1852, c. 277, §§ 1, 2.

§ 1535. Guardian ad litem; how appointed.

A guardian ad litem for an infant party, in an action for partition, can be appointed only by the court.

From Id., and 2 R. S. 317, § 2.

§ 1536. [Am'd, 1884.] Security.

The security to be given by the guardian ad litem for an infant party, in an action for partition, must be a bond to the people of this State, executed by him and one or more sureties, as the court directs, in a sum fixed by the court, conditioned for the faithful discharge of the trust committed to him as guardian, and to render a just and true account of his guardianship, in any court or place, where thereunto required. The bond must be filed with the clerk, before the guardian enters upon the execution of his duties; and it cannot be dispensed with, although he is the general guardian of the infant.

From 2 R. S. 317, § 4. Am'd by L. 1884, c. 404.

§ 1537. When heir may maintain action for partition of devised property. A person claiming to be entitled, as a joint tenant or a tenant in common, by reason of his being an heir of a person who died, holding and in possession of real property, may maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent, and possession under such a devise. But in such an action, the plaintiff must allege and establish that the apparent devise is void.

From L. 1853, c. 238, § 2.

§ 1538. [Am'd, 1880, 1896, 1897, 1898, 1905, 1909.] Who must be parties. Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the curtesy, or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate therein; every person who, by any contingency contained in a devise or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof, provided that where a future estate or interest is limited in any contingency to the persons who shall compose a certain class upon the happening of a future event, it shall be sufficient to make parties to the action the persons who would have been entitled to such estate or interest if such event had happened immediately before the commencement of the action: every person having an inchoate right of dower in an undivided share in the property; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be made a party to an action for a partition. But no person, other than a joint tenant, or a tenant in common of the property, shall be a plaintiff in the action. Whenever an action for the partition of real property shall be brought before the expiration of three years from the time when letters of administration or letters testamentary, as the case may be, shall have been issued upon the estate of the decedent from whom the plaintiff's title is derived, the executors or administrators, as the case may be, if any, of the estate of said decedent, shall be made parties defendant. In case no executor or administrator of such decedent shall have been appointed at the time said action is begun, that fact shall be alleged in the complaint. The executors or administrators, if any, as the case may be, of a deceased person, who, if living, should be a party to such action, shall be made parties defendant therein, and in case no executor or administrator of such deceased person shall have been appointed, that fact shall be alleged in the complaint. Where the interlocutory judgment directs a sale of the premises sought to be partitioned, or of some part thereof, the judgment may, in the discretion of the court, direct that the premises so sold pursuant to such interlocutory judgment shall be free from the lien of every debt of such decedent or decedents, except debts which were a lien upon the premises before the death of such decedent or decedents. When the action is brought before three years have elapsed from the granting of such letters of administration or letters testamentary, as the case may be, upon the estate of the decedent from whom the plaintiff derived his title, and the interlocutory judgment directs, as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the proceeds of the sale remaining after the payment of the costs, referee's fees, expenses of sale, taxes, assessments, water rates, and liens established before the death of the decedent, including any sum allowed to a widow in satisfaction of her right of dower, therein directed to be paid, be forthwith paid into court by the referee making such sale by depositing the same with the county treasurer of the county, in which the trial of the action is placed, to the credit of the parties entitled thereto, to await the further order in the premises. Where the action is brought before three years have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of a deceased person, who, if living, should

be a party to the action, and the interlocutory judgment directs, as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the share of the proceeds of such sale, which would have been his, if living, be paid into court by such referee, by depositing the same with such county treasurer, to await the further order in the premises. Upon the certificate of the surrogate of the county of which the decedent was, at the time of his death, a resident, showing that three years have elapsed since the issuing of letters testamentary or letters of administration, as the case may be, upon the estate of said decedent, and that no proceedings for the mortgage, lease or sale of the real property of said decedent for the payment of his debts or funeral expenses, or both, is pending, and upon the certificate of the county clerk of the county where the real property sold under the interlocutory judgment is located, showing that no notice provided for in section 2751 of the code of civil procedure has been filed in his office, the court, wherein the final judgment was made shall, upon the application of any party to said action, make an order directing the county treasurer to pay to said party from said deposit, the amount to which he is entitled under the said final judgment, with the accumulation thereon, if any, less the fees of said county treasurer. Any party to such action may, at any time after final judgment, upon notice to the executors or administrators of the decedent from whom the party applying derived his share or interest, apply to the court in which said action is pending for leave to withdraw the deposit or the share of the deposit, adjudged in the final judgment to belong to him; and, upon said application, the court may, in its discretion, make an order directing the county treasurer to pay over to said party the deposit, or the share of the deposit, adjudged in the final judgment to belong to him, but said order shall not be made until said party so applying shall have furnished a bond to the people of the state of New York in the penalty of twice the amount of the deposit sought to be withdrawn, with two or more good and sufficient sureties, approved by the judge or justice of the court making such order, and filed with such approval, in the office of the clerk of the county in which such action is pending, to the effect that the said party so withdrawing said deposit will pay any and all claims, not exceeding the amount of said deposit, when thereunto required by order of the court or by order of the surrogate or of the surrogate's court in a proceeding to mortgage, lease or sell the real property of such decedent. Where a final accounting has been had in the estate of said decedent in a surrogate's court, and certified copies of the account and decree of final settlement, showing that all of the debts of the decedent have been paid in full, is filed with the court having jurisdiction of the fund, the court may dispense with the giving of a bond and direct the immediate payment of the fund to the parties entitled thereto, subject to the provisions of article second, title three, chapter fifteen of the code of civil procedure. But where final judgment shall be rendered in any action for partition after three years have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of the decedent from whom the plaintiff derived title, and the premises shall have been sold, free from the lien of debts, as above provided, then, upon producing to the court the certificate of the surrogate of the county of which the decedent was at the time of his death a resident, showing that three years have elapsed since the issuing of letters of administration or letters testamentary as the case may be upon the

estate of said decedent and that no proceeding for the mortgage, lease or sale of the real property of the decedent for the payment of his debts or funeral expenses or both is pending and upon the certificate of the clerk of the county where the real property sold under the interlocutory judgment is located showing that no notice provided for in section 2751 of the code of civil procedure has been filed in his office the court rendering the final judgment shall direct the payment of the different shares to the several parties entitled thereto; except that the share of a deceased person, who if living, should be a party to the action shall be paid into court as above provided, unless three years have also elapsed since the granting of letters of administration or letters testamentary, as the case may be, upon the estate of said last mentioned deceased person, and like certificates of the surrogate and county clerk are produced to the court.

From 2 R. S. 317 (Part 3, c. 5, tit. 3), § 6. Am'd by L. 1890, c. 509; L. 1896, c. 277; L. 1897, c. 726; L. 1898, c. 78; L. 1905, c. 662; L. 1909, c. 428 (in effect Sept. 1, 1909).

§ 1539. [Am'd, 1892.] Who may be made parties.

The plaintiff may, at his election, make a tenant, by the curtesy, for life, or for years, of the entire property, or whoever may be entitled to a contingent or vested remainder or reversion in the entire property, or a creditor, or other person, having a lien or interest, which attaches to the entire property, a defendant in the action. In that case, the final judgment may either award to such party his or her entire right and interest, or the proceeds thereof, or where the right or interest is contingent, direct that the proceeds or share thereof be substituted for the property and invested for whoever may eventually be entitled thereto, or may reserve and leave unaffected his or her right and interest, or any portion thereof. A person specified in this section, who is not made a party, is not affected by the judgment in the action.

From 2 R. S. 323, § 36. Am'd by L. 1892, c. 681.

§ 1540. Id.; as to persons having liens.

The plaintiff may, at his election, make a creditor, having a lien on an undivided share or interest in the property, a defendant in the action. In that case, he must set forth the nature of the lien, and specify the share or interest to which it attaches. If partition of the property is made, the lien, whether the creditor is or is not made a party, shall thereafter attach only to the share or interest assigned to the party upon whose share or interest the lien attached; which must be first charged with its just proportion of the costs and expenses of the action, in preference to the lien.

From 2 R. S. 318, §§ 8, 9; L. 1889, c. 320, § 41.

§ 1541. [Am'd, 1914.] Provision where a party is unknown.

Where a defendant having a share or interest in the property is unknown, or where his name or part of his name is unknown, and the summons is served upon him by publication, pursuant to an order for that purpose, as prescribed in article second of title first of chapter fifth of this act, the notice subjoined to the copy of the summons as published must, in addition to the matters required in that article, state briefly the object of the action, and contain a brief description of the property.

From 2 R. S. 319, § 12. Am'd by L. 1914, c. 346 (in effect Sept. 1, 1914).

§ 1542. Complaint to state interest of parties.

The complaint must describe the property with common certainty, and must specify the rights, shares, and interests therein of all the parties, as far as the same are known to the plaintiff. If a party, or the share, right, or interest of a party, is unknown to the plaintiff; or if a share, right, or interest is uncertain or contingent; or if the ownership of the inheritance depends upon an executory devise; or if a remainder is a contingent remainder, so that the party cannot be named; that fact must also be stated in the complaint.

From Id., § 5 (subds. 1, 2), and § 7.

§ 1543. Title of parties may be tried.

The title or interest of the plaintiff in the property, as stated in the complaint, may be controverted by the answer. The title or interest of any defendant in the property, as stated in the complaint, may also be controverted by his answer, or the answer of any other defendant; and the title or interest of any defendant, as stated in his answer, may be controverted by the answer of any other defendant. A defendant, thus controverting the title or interest of a co-defendant, must comply with section 521 of this act. The issues, joined as prescribed in this section, must be tried and determined in the action.

From 2 R. S. 320, §§ 18, 19. See §§ 521, 1204, ante.

§ 1544. Issues of fact triable by jury.

An issue of fact joined in the action is triable by a jury. Unless the court directs the issues to be stated, as prescribed in section 970 of this act, the issues may be tried upon the pleadings.

New.

§ 1545. When title to be ascertained by the court.

Where a defendant has made default in appearing or pleading, or where a party is an infant, the court must ascertain the rights, shares, and interests of the several parties in the property, by a reference or otherwise, before interlocutory judgment is rendered in the action.

From 2 R. S. 321 (Part 3, c. 5, tit. 3), §§ 22, 23.

§ 1546. Interlocutory judgment.

The interlocutory judgment must declare what is the right, share, or interest of each party in the property, as far as the same has been ascertained, and must determine the rights of the parties therein. Where it is found, by the verdict, report, or decision, or where it appears to the court, upon an application for judgment in favor of the plaintiff, that the property, or any part thereof, is so circumstanced that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment, except as otherwise expressly prescribed in this article, must direct that the property, or the part thereof which is so circumstanced, be sold at public auction. Otherwise, an interlocutory judgment in favor of the plaintiff, must direct that partition be made between the parties, according to their respective rights, shares, and interests.

From Id., §§ 23, 24, 81.

§ 1547. Partial partition; when made.

Where the right, share, and interest of a party has been ascertained and determined, and the rights, shares, or interests of the other parties, as between themselves, remain unascertained

or undetermined, an interlocutory judgment for a partition, rendered as prescribed in the last section, must direct a partition, as between the party whose share has been so determined and the other parties to the action. Where the rights, shares, and interests of two or more parties have been thus ascertained and determined, the interlocutory judgment may also direct the partition among them of a part of the property, proportionate to their aggregate shares. In either case, the court may, from time to time, as the other rights, shares, and interests are ascertained and determined, render an interlocutory judgment, directing the partition, in like manner, of the remainder of the property. Where an interlocutory judgment is rendered, in a case specified in this section, the court may direct the action to be severed, and final judgment to be rendered with respect to the portion of the property set apart to the parties, whose rights, shares, and interests are determined, leaving the action to proceed as against the other parties, with respect to the remainder of the property; and if necessary, the court may direct that one of those parties be substituted as plaintiff.

From L. 1847, c. 430, §§ 1, 2.

§ 1548. Shares may be set off in common.

Where two or more parties, to an action for partition, make it appear to the court, that they desire to enjoy their shares in common with each other, the interlocutory judgment may, in the discretion of the court, direct partition to be so made, as to set off to them their shares of the real property partitioned, without partition as between themselves, to be held by them in common.

From L. 1847, c. 430, § 4.

§ 1549. Appointment of commissioners.

Where the interlocutory judgment, in an action for partition, directs a partition, it must designate three reputable and disinterested freeholders as commissioners, to make the partition so directed.

From 2 R. S. 321, § 25.

§ 1550. Commissioners to be sworn, etc.

Each of the commissioners must, before entering upon the execution of his duties, subscribe and take an oath before an officer specified in section 842 of this act, to the effect that he will faithfully, honestly and impartially discharge the trust reposed in him. Each commissioner's oath must be filed with the clerk, before he enters upon the execution of his duties. The court may, at any time, remove either of the commissioners. If either of them dies, resigns, neglects or refuses to serve, or is removed, the court may, from time to time, by order, appoint another person in his place.

From Id., §§ 26, 27. See § 1608, post.

§ 1551. Id.; when to make partition.

The commissioners must forthwith proceed to make partition, as directed by the interlocutory judgment, unless it appears to them, or a majority of them, that partition thereof, or of a particular lot, tract, or other portion thereof, cannot be made, without great prejudice to the owners; in which case, they must make a written report of that fact to the court.

From Id., §§ 28, 37. See § 1560, post.

§ 1552. Partition; how made.

In making the partition, the commissioners must divide the property into distinct parcels, and allot the several parcels thereof to the respective parties, quality and quantity being relatively considered, according to the respective rights and interests of the parties, as fixed by the interlocutory judgment. They must designate the several parcels by posts, stones, or other permanent monuments. They may employ a surveyor, with the necessary assistants, to aid them in so doing.

From Id., § 29.

§ 1553. Provision where there is a particular estate.

Where a party has a right of dower in the property, or a part thereof, which has not been admeasured, or has an estate by the curtesy, for life or for years, in an undivided share of the property, the commissioners may allot to that party his or her share of the property, without reference to the duration of the estate. And they may make partition of the share so allotted to that party, among the parties, who are entitled to the remainder or reversion thereof, to be enjoyed by them upon the determination of the particular estate, where, in the opinion of the commissioners, such a partition can be made without prejudice to the rights of the parties.

From L. 1847, c. 430, § 5.

§ 1554. Report of commissioners.

All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met are valid. They, or a majority of them, must make a full report of their proceedings, under their hands, specifying therein the manner in which they have discharged their trust, describing the property divided, and the share or interest in a share, allotted to each party, with the quantity, courses, and distances, or other particular description of each share, and a description of the posts, stones, or other monuments; and specifying the items of their charges. Their report must be acknowledged or proved, and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk.

From 2 R. S. 322, §§ 30, 31, 33.

§ 1555. Fees and expenses.

The fees and expenses of the commissioners, including the expense of a survey, when it is made, must be taxed under the direction of the court; and the amount thereof must be paid by the plaintiff, and allowed as part of his costs.

From Id., § 32.

§ 1556. Confirming or setting aside report.

The court must confirm or set aside the report, and may, if necessary, appoint new commissioners, who must proceed as directed in this article.

From Id., § 34.

§ 1557. Final judgment on report; effect thereof.

Upon the confirmation, by the court, of the report of the commissioners making partition, final judgment, that the partition be firm and effectual forever, must be rendered, which is binding and conclusive upon the following persons:

1. The plaintiff; each defendant upon whom the summons was served, either personally, or without the State, or by publication,

pursuant to an order obtained for that purpose, as prescribed in chapter fifth of this act; and the legal representatives of each party, specified in this subdivision. So much of section 445 of this act, as requires the court to allow a defendant to defend an action, after final judgment, does not apply to an action for partition.

2. Each person claiming from, through, or under such a party, by title accruing after the filing of the judgment-roll, or after the filing, in the proper county clerk's office, of a notice of the pendency of the action, as prescribed in article ninth of this title.

3. Each person, not in being when the interlocutory judgment is rendered, who, by the happening of any contingency, becomes afterwards entitled to a beneficial interest attaching to, or an estate or interest in, a portion of the property, the person first entitled to which, or other virtual representative whereof, was a party specified in the first subdivision of this section.

But this section does not apply to a party, whose right and interest are expressly reserved and left unaffected, as prescribed in section 1539 of this act, or to a person claiming from, through, or under such a party.

From 2 R. S. 322, § 35.

§ 1558. Judgment must direct delivery of possession.

The final judgment must also direct that each of the parties, who is entitled to possession of a distinct parcel allotted to him, be let into the possession thereof, either immediately, or after the determination of the particular estate, as the case requires.

New.

§ 1559. Costs; how awarded. Id.; against unknown parties.

The final judgment for the partition of the property, must also award, that each defendant pay to the plaintiff his proportion of the plaintiff's costs, including the extra allowance. The sum to be paid by each must be fixed by the court, according to the respective rights of the parties, and specified in the judgment. If a defendant is unknown, his proportion of the costs must be fixed and specified in like manner. An execution against an unknown defendant may be issued to collect the costs awarded against him, as if he was named in the judgment; and his right, share, or interest in the property may be sold by virtue thereof, as if he was named in the execution.

From 2 R. S. 328, § 72.

§ 1560. Sale of property; when directed.

If the commissioners, or a majority of them, report that the property, or a particular lot, tract, or other portion thereof, is so circumstanced, that a partition thereof cannot be made, without great prejudice to the owners thereof, the court, if it is satisfied that the report is just and correct, may thereupon, except as otherwise expressly prescribed in this article, modify the interlocutory judgment, or render a supplemental interlocutory judgment, reciting the facts, and directing that the property, or the distinct parcel thereof so circumstanced, be sold by a referee, designated in the judgment, or by the sheriff.

From 2 R. S. 323, 329. §§ 37, 81.

§ 1561. Reference to inquire as to creditors.

Before an interlocutory judgment for the sale of real property is rendered, in an action for partition, the court must, either with

or without application by a party, direct a reference, to ascertain whether there is any creditor, not a party, who has a lien on the undivided share or interest of any party. But the court may direct or dispense with such a reference, in its discretion, where a party produces a search, certified by the clerk, or by the clerk and register, as the case requires, of the county where the property is situated; and it appears therefrom, and by the affidavits, if any, produced therewith, that there is no such outstanding lien.

From 2 R. S. 324, § 42; L. 1880, c. 320.

§ 1562. [Am'd, 1887.] Duty of referee.

Where a reference is directed, as prescribed in the last section, the referee must cause a notice to be published, once in each week for six successive weeks, in such newspaper published in the county wherein the place of trial is designated, as shall be designated by the court directing said reference, and also in a newspaper published in each county wherein the property is situated, requiring each person, not a party to the action, who, at the date of the order, had a lien upon any undivided share or interest in the property, to appear before the referee, at a specified place, and on or before a specified day, to prove his lien, and the true amount due or to become due to him by reason thereof. The referee must report to the court, with all convenient speed, the name of each creditor, whose lien is satisfactorily proved before him, the nature and extent of the lien, the date thereof, and the amount due or to become due thereupon.

From 2 R. S. 324, § 43. Am'd by L. 1887, c. 686.

§ 1563. Money to be paid into court.

If it appears by the pleadings, or by the evidence in the action, or by the report, that there was, at the date of the order, any existing lien upon the share or interest of a party in the property, the interlocutory judgment, directing the sale, must also direct the officer making it to pay into court the portion of the money, arising from the sale of the share or interest of that party, after deducting the portion of the costs and expenses for which it is liable.

From 2 R. S. 324, § 44.

§ 1564. Application for money.

Where money is paid into court, in a case specified in the last section, the party may apply to the court for an order directing that the money, or such part thereof as he claims, be paid to him. Upon such an application, he must produce the following papers:

1. An affidavit, made by himself, or, if a sufficient excuse is shown, by his agent or attorney, stating the true amount actually due on each incumbrance, and the name and residence of the owner of the incumbrance, as far as they are known, or can be ascertained with due diligence.

2. An affidavit, showing service of a notice of the application upon each owner of an incumbrance. Service of the notice, within the State, must be personal, or by leaving it at the owner's residence, with some person of suitable age and discretion, at least fourteen days previous to the application. Service, without the State, if personal, must be made at least twenty days previous to the application. If the owner of the incumbrance resides without the State, and the place of his abode cannot be ascertained, with reasonable diligence, notice may be served upon him

by publishing it in the newspaper printed at Albany, in which legal notices are required to be published, once in each week for the four weeks immediately preceding the application.

Upon the application, the court must make such an order as justice requires.

From Id., §§ 45, 46.

§ 1565. Payment of incumbrances.

When the whole amount of the unsatisfied liens upon an undivided share, which were existing at the date of the order of reference, has been ascertained, the court must order the portion of the money so paid into court, on account of that share, to be distributed among the creditors having the liens, according to the priority of each of them. Where the incumbrancer is not a party to the action, the clerk or other officer, by whom a lien is paid off, must procure satisfaction thereof to be acknowledged or proved, as required by law, and must cause the incumbrance to be duly satisfied or cancelled of record. The expense of so doing must be paid out of the portion of the money in court, belonging to the party, by whom the incumbrance was payable.

From 2 R. S. 325, §§ 47, 48.

§ 1566. Other parties not to be delayed.

The proceedings to ascertain and settle the liens upon an undivided share, as prescribed in the last three sections, shall not affect any other party to the action, or delay the paying over or investing of money, to or for the benefit of any other party, upon whose share or interest in the property there does not appear to be any existing lien.

From Id., § 49.

§ 1567. Sale of dower interest.

Where a party has an existing right of dower in the entire property directed to be sold, at the time when an interlocutory judgment for a sale is rendered in an action for partition, the court must consider and determine whether the interests of all the parties require, that the right of dower should be excepted from the sale, or that it should be sold.

From Id., § 50.

§ 1568. Purchaser to hold the property free therefrom.

If a sale of the property, including the right of dower, is directed, the interest of the party entitled to the right of dower shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim, by virtue of that right. In that case, the dowress is entitled to receive, from the proceeds of the sale of the whole property, a gross sum, in satisfaction of her right of dower, or to have one-third of those proceeds paid into court, for the purpose of being invested for her benefit, as prescribed in the next section with respect to the dowress of an undivided share.

From Id., § 51.

§ 1569. [Am'd, 1913.] Gross sum to be paid to or invested for tenant in dower, etc.

A party to an action for partition, who has a right of dower, or is a tenant for life, or for years, in or of an undivided share of the property sold, is entitled to receive, from the proceeds of the sale, a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of his or her estate or interest. The written consent of the party to receive such a gross sum, acknowledged or proved, and certified, in like manner as a deed to be recorded, must be filed, at the time of, or before, the filing of the report of sale; otherwise, the court must direct that, out of the proceeds of the sale, which belong to the undivided share

to which the estate or interest attaches, one-third, in case of a dowress, and in any other case arising under this section, the entire proceeds, or such a proportion thereof as fairly represents the interest of the holder of the particular estate, be paid into court, for the purpose of being invested for his or her benefit. If it shall appear to the court that the tenant for life or for years, or the widow, is an infant, lunatic or otherwise incompetent, and that a general guardian or committee has been duly appointed, upon proof that it will be for the best interest and advantage of the estate of such infant or lunatic or incompetent person, the court may authorize and direct such guardian or committee, in the name of such infant, lunatic or incompetent person, having such estate for life, or years or dower right, to execute an instrument under seal, acknowledged or proved and certified in like manner as a deed to be recorded, whereby such guardian or committee shall consent to accept in lieu of such estate or dower, a sum, to be ascertained by the court as above provided, according to the principles applicable to life annuities; and upon presentation of such an instrument to the court, the value of the estate for life or for years or dower so ascertained by it shall be paid to such guardian or committee. Such instrument shall have the same force and effect as a deed or instrument executed and acknowledged by a competent person or a person of full age.

From 2 R. S. 325, 326, §§ 52, 53, 54. Am'd by L. 1913, c. 450 (in effect Sept. 1, 1913).

§ 1570. [Am'd, 1892.] Interests of owners of future estates to be protected.

Where it appears that a party to the action has an inchoate right of dower or any other future right or estate vested or contingent, or that any person or persons not in being who may by any contingency become entitled to any interest or estate in the property sold, the court must fix the proportional value of the right or estate according to the law applicable to annuities and survivorships, or set aside so much of the proceeds of sale to which the contingency attaches, and must direct that proportion of the proceeds of sale to be invested, secured or paid over in such manner as it deems calculated to protect the rights and interests of the parties.

From L. 1840, c. 177, § 1. Am'd by L. 1892, c. 581.

§ 1571. Married woman may release her interest.

A married woman may release to her husband her inchoate right of dower, in the property directed to be sold, by a written instrument, duly acknowledged by her and certified, as required by law with respect to the acknowledgment of a conveyance to bar her dower; which must be filed with the clerk. Thereupon, the share of the proceeds of the sale, arising from her contingent interest, must be paid to her husband.

From L. 1840, c. 177, § 2.

§ 1572. Unknown owners.

If a person, entitled to an estate or interest in the property sold, is made a party as an unknown defendant, the court must provide for the protection of his rights, as far as may be, as if he was known and had appeared.

From 2 R. S. 326, § 55. See §§ 1541, 1557, subd. 1, ante.

§ 1573. Sale; terms of credit thereupon.

The court must, in the interlocutory judgment for a sale, direct the terms of credit which may be allowed for any portion of the purchase-money, of which it thinks proper to direct the investment, and for any portion of the purchase-money, which is required to be invested for the benefit of a person, as prescribed in this article.

From 2 R. S. 323, § 38.

§ 1574. Credit; how secured.

The portion of the purchase-money, for which credit is so allowed, must always be secured at interest, by a mortgage upon the property sold, with a bond of the purchaser; and by such additional security, if any, as the court prescribes.

From Id., § 39.

§ 1575. Separate securities.

The officer making the sale may take separate mortgages and other securities in the name of the county treasurer of the county in which the property is situated, for such convenient portions of the purchase-money, as are directed by the court to be invested; and in the name of the owner, for the share of any known owner of full age, who desires to have it invested.

From 2 R. S. 328, § 40.

§ 1576. Report of sale.

Immediately after completing the sale, the officer making it must file with the clerk his report thereof under oath, containing a description of each parcel sold, the name of the purchaser thereof, and the price at which it was sold.

From Id., § 59.

§ 1577. Final judgment; effect thereof.

If the sale is confirmed by the court, a final judgment must be entered, confirming it accordingly; directing the officer making it to execute the proper conveyances, and take the proper securities pursuant to the sale; and also directing concerning the application of the proceeds of the sale. Such a final judgment is binding and conclusive upon the same persons, upon whom a final judgment for partition is made binding and conclusive by section 1557 of this act; and it effectually bars each of those persons, who is not a purchaser at the sale, from all right, title and interest in the property sold.

From Id., §§ 60, 61a, 61b.

§ 1578. [Am'd, 1883.] Id.; effect thereof upon incumbrancers.

Such a final judgment is also a bar against each person, not a party, who has, at the time when it is rendered, a general lien by judgment or decree on the undivided share or interest of a party, if notice was given to appear before the referee, and make proof of liens, as prescribed in section 1562 of this act, and also against each person made a party, who then has a specific lien on any such undivided share or interest; but a person having any such specific lien appearing of record at the time of the filing of the notice of the pendency of the action, who is not made a party, is not affected by such judgment.

From Id., § 61 b; L. 1830, c. 320, § 45. Am'd by L. 1883, c. 393

§ 1579. Costs and expenses; how paid.

Where final judgment, confirming a sale, is rendered, the costs of each party to the action, and the expenses of the sale, including the officer's fees, must be deducted from the proceeds of the sale, and each party's costs must be paid to his attorney. But the court may, in its discretion, direct that the costs and expenses of any trial, reference, or other proceeding in the action, be paid out of the share of any party in the proceeds, or may render judgment against any party therefor. Where a proportion of the proceeds is to be paid to, or invested for the benefit of any person, as prescribed in any provision of this article, the amount thereof must be determined by the residue of the entire proceeds, remaining after deducting the costs and expenses chargeable against them.

From 2 R. S. 326, 328, §§ 63, 72.

§ 1580. [Am'd, 1908.] Distribution of proceeds.

The proceeds of a sale, after deducting therefrom the costs and expenses chargeable against them, must be awarded to the parties whose rights and interests have been sold, in proportion thereto. The sum chargeable upon any share, to satisfy a lien thereon, must be paid to the creditor, or retained, subject to the order of the court; and the remainder, except as otherwise prescribed in this article, must be paid, by the officer making the sale, to the party owning the share, or his legal representatives, or into court for his use. Within sixty days after the entry of final judgment, unless such time be extended by an order of the court entered in the office of the clerk within said sixty days, the officer making the sale must file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to be made.

From 2 R. S. 326, § 63. Am'd by L. 1908, c. 294 (in effect Sept. 1, 1908).

§ 1581. [Am'd, 1887, 1892, 1897.] Shares of infants.

Where a party entitled to receive a portion of the proceeds is an infant, the court may direct it to be invested in permanent securities in the name and for the benefit of the infant, or it may direct it to be paid over to the general guardian of the said infant when the guardian shall have executed to such infant a bond with two sureties which shall be approved by the court; or, if any of the moneys arising from the proceeds of such sale shall have been paid to the county treasurer, and on due proof that such money has remained uninvested in permanent securities for the space of three months, may direct the same to be paid to the general guardian of such infant upon his giving an undertaking in an amount and with securities satisfactory to the court for the faithful execution of his trust. In the case of an infant residing without the state, and having in the state or country where he or she resides a general guardian or person duly appointed under the laws of such state or country, to the control and entitled, by the laws of such state or country, to the custody of the money of such infant, the court, upon satisfactory proof of such facts and of the sufficiency of the bond or security given by such general guardian or person in such state or country by the certificate of a judge of a court of record of such state or country, or otherwise, may direct that the portion of such infant arising upon such sale shall be paid over to such general guardian or person.

From Id., § 64. Am'd by L. 1887, c. 482; L. 1892, c. 556; L. 1897, c. 602 (in effect Sept. 1, 1897).

§ 1582. [Am'd, 1889, 1891, 1893.] Id.; of unknown and absent owners.

Where a person has been made a defendant as an unknown person, or where the name of a defendant is unknown, or where the summons has been served upon a defendant without the state, or by publication, and he has not appeared in the action, the court must direct his portion to be invested in permanent securities, at interest, for his benefit, until claimed by him or his legal representatives, but after the lapse of twenty-five years from the time of the payment into court, or to the treasurer of any county, of any portion of the proceeds of the sale of real property, for unknown heirs, heretofore or hereafter to be made in any action of partition, without any claim therefor having been made by any person entitled thereto, and upon there being made and presented to the court, at a special term thereof, proof, by petition or otherwise, showing to the satisfaction of the court that due inquiry for such unknown heirs, or their representatives, has been made and that they cannot be found, and that no claim has

been made for such portion of said proceeds by any person entitled thereto, proceedings shall thereupon be taken in said court, and an investigation had therein as to the heirship, death or whereabouts of such unknown heirs or their representatives, and as to the known heirs of the ancestor of such unknown heirs, the next of kin, representatives and distributees of such known heirs, and as to all persons interested in such proceeds, and their respective interests therein, and the said court shall, by an order made in the action, direct that a notice entitled in the action and signed by the petitioner, or his attorney, and directed to such unknown heirs or their representatives, and to known heirs, their next of kin, representatives or distributees, and all persons interested in such proceeds, be served upon them by the publication thereof, the same to be published once in each week for six successive weeks in a newspaper published in the county where the action was brought, and in such other newspapers as the court may direct, ordering and requiring such unknown heirs, or their representatives, and all known heirs, their next of kin, or representatives, and all persons interested in such proceeds, and each of them to be and appear in said court at a special term thereof, at a time and place to be specified in said order and notice, and at least six weeks from the date of the first publication of such notice, to then and there establish their heirship and identity, kinship and interest, and submit any proof, as to such unknown heirs, or their representatives, and the known heirs, their next of kin, representatives or distributees, and all persons interested and their interest in such proceeds, they may desire, and that in case of their default in so doing, that the said proceeds will be distributed and paid over to the known heirs of the ancestor from whom such unknown heirs derived title thereto, and to their heirs, next of kin, representatives, distributees and assigns, and that they and each of them shall thereafter be forever barred of and from all and every cause or causes of action for such proceeds, or on account thereof, or growing out of the distribution thereof, and of and from all right, title, claim and interest in and to such proceeds, and shall be deemed to have surrendered all right, claim and interest in and to such proceeds. The order must contain a direction that a copy of the notice must be served on each of the persons named in the order, if within the state, in the manner prescribed for the service of a summons on a defendant in an action in the supreme court, at least twenty days before the time specified in the notice. The publication of such notice, as required by said order, is hereby made and shall be deemed and taken for all purposes to be due and complete service upon each and every of such unknown heirs or their representatives, and the known heirs, their next of kin, and representatives, and all persons interested in such proceeds, of due notice of the proceedings to distribute and pay out such proceeds, and shall be conclusive upon each and all of them. Proof of such personal service may be made by the affidavit of the person making the same, and proof of the publication of such notice may be made by affidavit of the publisher of such paper or papers. At the time and place specified in the said order and notice, such unknown heirs or their representatives, and all known heirs, their next of kin, representatives or distributees, devisees, and all persons interested in such proceeds, shall appear in court, in person or by attorney, and make proof establishing their heirship and identity, kinship and interest in such proceeds, and upon proof being made to the satisfaction of the court of the heirship and identity of the unknown heirs, the proceeding for distribution shall be dismissed. And if such un-

the time and place specified in such notice and order, to establish their heirship and identity, kinship or interest, they and each of them, and every person claiming under or through them, shall thereafter be forever barred of and from all and every cause or causes of action for such proceeds, or on account thereof, or growing out of the distribution of such proceeds, and of and from all right, title, claim and interest in and to such proceeds, and shall be deemed to have surrendered all right, claim and interest in and to such proceeds. And upon proofs being made of such publication, and showing to the satisfaction of the court that such unknown heirs or their representatives can not be found, or are dead, the said court shall have power to decree accordingly, and to decree that the share or interest of such unknown heirs in such real property was vested, at the time of such sale, in the known heirs of the ancestor from whom such unknown heirs derived title thereto, and to decree that the unclaimed portion of such proceeds was vested at the time of such payment in such known heirs, and that such heirs, their heirs, next of kin, representatives, distributees, devisees and assigns, are entitled thereto; and the said court shall make an order in such action, directing the payment to them, or their assigns, of the respective shares or portions of, or interest in such proceeds to which they are entitled; and which order shall be entered in the office of the clerk of the county where the original action was brought, and after having been so entered for three months, shall be conclusive evidence of the regularity of the proceedings upon which it is based, and of all the facts set forth therein; and, upon serving upon the county treasurer a certified copy of such order, the treasurer shall so pay over and distribute such proceeds, after deducting his lawful commissions, and shall thereupon be exempt from all liability on account thereof; and if any such proceeds shall have been paid over by any county treasurer to the treasurer of the state of New York, under the provisions of section 753 of this act, due notice of said applications and proceedings shall be given to the comptroller of the state of New York, and the said proceeds shall be paid out by the treasurer of the state of New York, as provided by sections 751 and 753 of this act, and upon such payment he shall thereupon be exempt from all liability on account thereof.

From 2 R. S. 327, § 65. Am'd by L. 1889, c. 39; L. 1891, c. 365; L. 1893, c. 208.

§ 1583. Id.; of tenants of particular estates.

Where a portion of the proceeds representing an undivided share or interest, is invested for the benefit of a tenant for life, or for years, or of a widow, as prescribed in the foregoing provisions of this article, the court must cause it to be invested in permanent securities, at interest, and the interest to be paid, from time to time as it accrues, to the person for whose benefit it is invested, while his or her right continues.

From 2 R. S. 327, § 66.

§ 1584. Court may require security to refund.

The court may, in its discretion, require any person, before he receives his portion of the proceeds of the sale, to give such security as it directs, to the people, or to such parties or other persons, as it prescribes, to refund the same, or a portion thereof, with interest, if it thereafter appears that he was not entitled thereto.

From Id., § 67.

§ 1585. Security to be taken in name of county treasurer.

A security taken under any provision of this article, except as otherwise specially prescribed therein, must be taken in the name and official title of the county treasurer of the county in which the property sold is situated. He, and his successors in office, must hold the same for the use and benefit of the persons interested, subject to the order of the court.

From Id., § 68; L. 1848, c. 277, § 1.

§ 1586. Action thereupon.

The court may in its discretion, and upon such terms and conditions as justice requires, make an order, allowing a person interested in a security specified in the last section, to maintain an action thereupon in the name of the county treasurer.

From 2 R. S. 328, § 71.

§ 1587. Compensation to equalize partition.

Where it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights or interests of some of them, the final judgment may award compensation to be made by one party to another for equality of partition. But compensation cannot be so awarded against a party who is unknown, or whose name is unknown. Nor can it be awarded against an infant, unless it appears, that he has personal property sufficient to pay it, and that his interests will be promoted thereby.

From 2 R. S. 330, § 83.

§ 1588. Proceedings on death of parties.

If, upon the death of one of two or more plaintiffs, or one of two or more defendants, in an action for partition, the interest of the decedent in the property passed to a person, not a party to the action, the latter may be made defendant by the order of the court; and a supplemental summons may be issued, to bring him in accordingly.

From 2 R. S. 387 (Part 3, c. 7, tit. 1), §§ 6, 7.

§ 1589. Rents, etc., may be adjusted.

Nothing contained in this article prevents the court from adjusting, in the interlocutory or final judgment, or otherwise, as the case requires, the rights of one or more of the parties, as against any other party or parties, by reason of the receipt, by the latter, of more than his or their proper proportion of the rents or profits of a share, or part of a share.

New. See 48 N. Y. 106.

§ 1590. [Am'd, 1895, 1905.] Partition by guardian of infant; committee of lunatic, etc.

Where an infant, idiot, lunatic, or habitual drunkard, holds real property, in joint tenancy or in common, the general guardian of the infant, or the committee of the idiot, lunatic, or habitual drunkard, may apply to the supreme court or to the county court of the county, wherein the real property is situated, for authority to agree to a partition of the real property. Where such application affects the interests of an incompetent person who has been committed to a state institution, and is an inmate thereof, notice of such application must be given to the superintendent, acting superintendent, or state officer having special jurisdiction over the institution where the incompetent person is confined.

From 2 R. S. 330, 331, §§ 86, 89. Am'd by L. 1895, c. 946; L. 1905, c. 431 (in effect Sept. 1, 1905).

§ 1591. Contents of petition.

Such an application must be by a petition, which must describe the real property proposed to be partitioned; must state the rights and interests of the several owners thereof; must specify the particular partition proposed to be made; and must be verified by affidavit. The court may order notice of the application to be given to such persons as it thinks proper.

From 2 R. S. 330, § 87.

§ 1592. [Am'd, 1886.] Court may authorize partition.

If, after due inquiry into the merits of the application, by a reference or otherwise, the court is of the opinion that the interests of the infant, or of the idiot, lunatic, or habitual drunkard will be promoted by the partition, it may make an order authorising the petitioner to agree to the partition proposed, and in the name of the infant, or of the idiot, lunatic, or habitual drunkard, to execute releases of his right and interest in and to that part of the property which falls to the shares of the other joint-tenants or tenants in common. The court may, in its discretion, for the furtherance of the interests of said infant, idiot, lunatic, or habitual drunkard, direct partition to be so made as to set off to him or them his or their share in common with any of the other owners, provided the consent in writing thereto of such owners shall be first obtained.

From 2 R. S. 330, 331, §§ 87, 90. Am'd by L. 1886, c. 208.

§ 1593. Effect of releases.

Releases so executed have the same validity and effect, as if they were executed by the person in whose behalf they are executed, and as if the infant was of full age, or the idiot, lunatic, or habitual drunkard was of sound mind, and competent to manage his affairs.

From 2 R. S. 331, §§ 88a, 91.

§ 1594. [Am'd, 1911, 1916.] When the State is interested.

The people of the state may be made a party defendant to an action for the partition of real property, in the same manner as a private person. In such a case, the summons must be served upon the attorney-general, who must appear in behalf of the people, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure detailed facts showing the nature and extent of the interest in or lien on the said real property of the people of the state of New York and the reason for making the people a party. Upon failure to state such facts, the complaint shall be dismissed, as to the people of the state of New York. The commissioners of the land office, whenever they deem it for the best interests of the state, may order the treasurer on the warrant of the comptroller to pay off and cancel any mortgage, tax, or other encumbrance, or any amount due thereon, or to acquire any undivided interest, adverse to the state, existing on any lands belonging to the state, or in which the state has an interest, to perfect in the state a title to any such lands or to protect the state's interest therein, and the plaintiff shall not be entitled to costs in an action wherein the people of the state are made a party defendant, unless the commissioners of the land office, after a full presentation of the facts to them shall have determined before the action of partition is brought against the state that the interests of the state did not warrant their making an order for the payment or cancellation of said mortgage, lien or encumbrance, or any amount due thereon, or for the acquisition of any outstanding undivided interest adverse to the state, or unless the commissioners of the land office shall have failed to make such determination within three months after such full presentation of facts shall have been made to them by a verified statement in writing, and filed with the secretary of said commissioners at his office in the city of Albany, nor unless a certified copy of the commissioners' report of partition, and of the referee's or sheriff's report of sale, in case of a sale, filed in the action shall have first been duly served upon the attorney-general; nor in any event shall an additional allowance under sections 3252 or 3253 of this act be made to the plaintiff, in an action wherein the people of the state of New York are made a party defendant.

From Id., §§ 92, 93. Am'd by L. 1911, c. 26; L. 1916, c. 330 (in effect Sept. 1, 1916).

§ 1595. Exemplified copy of judgment may be recorded.

An exemplified copy of the judgment-roll, or of the final judgment, in an action for partition, may be recorded, in the office for recording deeds, in each county in which any real property affected thereby is situated.

From L. 1846, c. 182, § 2.

ARTICLE THIRD.

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§ 1596. [Am'd, 1882.] Limitation of action for dower.

An action for dower must be commenced by a widow, within twenty years after the death of her husband; but if she is, at the time of his death, either:

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life;

The time of such a disability is not a part of the time limited by this section. And if, at any time before such claim of dower has become barred by the above lapse of twenty years, the owner or owners of the lands subject to such dower, being in possession, shall have recognized such claim of dower by any statement contained in a writing under seal, subscribed and acknowledged in the manner entitling a deed of real estate to be recorded, or if by any judgment or decree of a court of record within the same time and concerning the lands in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband, and previous to such acknowledgment in writing or such recognition by judgment or decree, is not a part of the time limited by this section.

From 1 R. S. 742 (Part 2, c. 1, tit. 3), § 18. Am'd by L. 1882, c. 277.

§ 1597. Against whom action to be brought.

Where the property, in which dower is claimed, is actually occupied, the occupant thereof must be made defendant in the action. Where it is not so occupied, the action must be brought against some person exercising acts of ownership thereupon, or

claiming title thereto, or an interest therein, at the time of the commencement of the action.

New. See § 1502, ante.

§ 1598. [Am'd, 1913.] Who may be joined as defendants.

1. In either of the cases specified in the last section, any other person, claiming title to, or the right to the possession of, the real property in which dower is claimed, may be joined as defendant in the action.

2. The people of the state of New York may be made a party defendant in an action for dower where the people of the state of New York have an interest in or a lien upon the lands affected thereby, in the same manner as a private person. In such a case the summons must be served upon the attorney-general, who must appear in behalf of the people. But where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure, detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York and the reason for making the people a party defendant. Upon failure to state such facts the complaint shall be dismissed as to the people of the state of New York.

New. Am'd by L. 1913, c. 773 (in effect September 1, 1913). See § 1503, ante.

§ 1599. Id.; where defendants claim in severalty.

In an action to recover dower, in a distinct parcel of real property of which the plaintiff's husband died seized, or in all the real property which he aliened by one conveyance, all the persons in possession of, or claiming title to, the property, or any part thereof, may be made defendants, although they possess or claim title to different portions thereof in severalty.

New. See Ellicott v. Mosier, 11 Barb. 574, 7 N. Y. 201.

§ 1600. Damages may be recovered; how estimated.

Where a widow recovers, in an action therefor, dower in property, of which her husband died seized, she may also recover, in the same action, damages for withholding her dower, to the amount of one-third of the annual value of the mesne profits of the property, with interest; to be computed, where the action is against the heir, from her husband's death, or, where it is against any other person, from the time when she demanded her dower of the defendant; and in each case, to the time of the trial, or application for judgment, as the case may be; but not exceeding six years in the whole. The damages shall not include any thing for the use of permanent improvements, made after the death of the husband.

From 1 R. S. 742 (Part 2, c. 1, tit. 3), §§ 19, 20, 21.

§ 1601. Id.; in action against alienee of husband.

Where a widow recovers dower, in a case not specified in the last section, she may also recover, in the same action, damages for withholding her dower, to be computed from the commencement of the action; but they shall not include any thing for the use of permanent improvements, made since the property was aliened by her husband. In all other respects, the same must be computed as prescribed in the last section.

New.

§ 1602. Id.; where several parcels, etc.

The last two sections do not authorize the recovery, against a defendant who is joined with others, of damages for withholding dower, in any portion of the property not occupied or claimed by him.

New.

§ 1603. Id.; against heirs, etc., aliening land.

Where a widow recovers dower in real property aliened by the heir of her husband, she may recover, in a separate action against him, her damages for withholding her dower, from the time of the death of her husband to the time of the alienation, not exceeding six years in the whole. The sum recovered from him must be deducted from the sum, which she would otherwise be entitled to recover from the grantee; and any sum recovered

as damages from the grantee, must be deducted from the sum, which she would otherwise be entitled to recover from the heir.

From 1 R. S. 748, § 22.

§ 1604. Action barred by assignment of dower.

The acceptance by a widow, of an assignment of dower, in satisfaction of her claim upon the property in question, bars an action for dower, and may be pleaded by any defendant.

From Id., § 23.

§ 1605. Collusive recovery not to prejudice infant.

Where a widow, not having a right to dower, recovers dower against an infant, by the default or collusion of his guardian, the infant shall not be prejudiced thereby; but when he comes of full age, he may bring an action of ejectment against the widow, to recover the property so wrongfully awarded for dower, with damages from the time when she entered into possession, although that is more than six years before the commencement of the action.

From Id., § 24.

§ 1606. Complaint.

The complaint, in an action for dower, must describe the property, as prescribed in section 1511 of this act; and must set forth the name of the plaintiff's husband.

From 2 R. S. 304 (Part 3, c. 5, tit. 1), § 10.

§ 1607. Interlocutory judgment for admeasurement.

If the defendant makes default in appearing or pleading; or if the right of the plaintiff to dower is not disputed by the answer; or if it appears, by the verdict, report, or decision upon a trial, that the plaintiff is entitled to dower in the real property described in the complaint, an interlocutory judgment must be rendered; which, except as otherwise prescribed in this article, must direct that the plaintiff's dower in the property, particularly describing it, be admeasured by a referee, designated in the judgment, or by three reputable and disinterested freeholders, designated therein, as commissioners for that purpose.

Based on 2 R. S. 311, § 55; Id. 489, §§ 9, 10.

§ 1608. Oath of commissioners, etc.; removal; filling vacancy.

Each of the commissioners, or the referee, as the case requires, must, before entering upon the execution of his duties, subscribe and take an oath, before an officer specified in section 842 of this act, to the effect, that he will faithfully, honestly and impartially discharge the trust reposed in him. The oath must be filed with the clerk, before a commissioner or a referee enters upon the execution of his duties. The court may, at any time, remove the referee, or either of the commissioners. If either of them dies, resigns, or neglects or refuses to serve, or is removed, the court may, from time to time, appoint another person in his place.

From 2 R. S. 489, §§ 11, 12.

§ 1609. Dower, how admeasured.

The referee or the commissioners must execute their duties in the following manner:

1. They must, if it is practicable, and, in their opinion, for the best interests of all the parties concerned, admeasure and

lay off, as speedily as possible, as the dower of the plaintiff, a distinct parcel, constituting the one-third part of the real property of which dower is to be admeasured, designating the part so laid off by posts, stones, or other permanent monuments.

2. In making the admeasurement, they must take into consideration any permanent improvements, made upon the real property, after the death of the plaintiff's husband, or after the alienation thereof by him; and, if practicable, those improvements must be awarded within the part not laid off to the plaintiff; or, if it is not practicable so to award them, a deduction must be made from the part laid off to the plaintiff, proportionate to the benefit which she will derive from so much of those improvements, as is included in the part laid off to her.

3. If it is not practicable, or if, in the opinion of the referee or commissioners, it is not for the best interests of all the parties concerned, to admeasure and lay off to the plaintiff a distinct parcel of the property, as prescribed in the foregoing subdivisions of this section, they must report that fact to the court.

4. They may employ a surveyor, with the necessary assistants, to aid in the admeasurement.

From 2 R. S. 489, §§ 13, 16; L. 1869, c. 433, § 1.

§ 1610. Report thereupon.

All the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met are valid. The referee, or the commissioners, or a majority of them, must make a full report of their proceedings, specifying therein the manner in which they have discharged their trust, with the items of their charges, and a particular description of the portion admeasured and laid off to the plaintiff; or, if they report that it is not practicable, or, in their opinion, it is not for the best interests of all the parties concerned, to admeasure and lay off a distinct parcel of the property, of which dower is to be admeasured, they must state the reasons for that opinion, and all the facts relating thereto. The report must be acknowledged or proved, and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk.

From 2 R. S. 489, § 13, subd. 2; L. 1869, c. 433, § 2.

§ 1611. Setting aside report.

Upon the application of any party to the action, and upon good cause shown, the court may set aside the report, and, if necessary, may appoint new commissioners, or a new referee, who must proceed, as prescribed in this title, with respect to those first appointed.

From 2 R. S. 489, §§ 16, 17.

§ 1612. Fees and expenses.

The fees and expenses of the commissioners, or of the referee, including the expense of a survey, when it is made, must be taxed under the direction of the court; and the amount thereof must be paid by the plaintiff, and allowed to her, upon the taxation of her costs.

See Id., § 25.

§ 1613. Final judgment.

Upon the report being confirmed by the court, final judgment must be rendered. If the referee or commissioners have admeasured and laid off to the plaintiff a distinct parcel of the property, the judgment must award to her, during her natural life, the pos-

session of that parcel, describing it, subject to the payment of all taxes, assessments, and other charges, accruing thereupon after she takes possession. If the referee or the commissioners report, that it is not practicable, or that, in his or their opinion, it is not for the best interests of all the parties concerned, so to admeasure and lay off a distinct parcel of the property, the final judgment must direct, that a sum, fixed by the court, and specified therein, equal to one-third of the rental value of the real property, as ascertained by a reference or otherwise, be paid to the plaintiff, annually or oftener, as directed in the judgment, during her natural life, for her dower in the property; and that the sum so to be paid, be and remain a charge upon the property, during her natural life. The final judgment may also award damages for the withholding of dower.

From 2 R. S. 489, § 18; L. 1869, c. 433, § 3.

§ 1614. Plaintiff may recover sum awarded; court may modify judgment.

The plaintiff may, from time to time, maintain an action against the owner, or a person who was the owner of the property, to recover any instalment of the sum, so awarded to her for her dower, which became due during his ownership, and remains unpaid. Or, if an instalment remains due and unpaid, she may maintain an action to procure a sale of the property, and enforce the payment of the instalments, due and to become due, out of the proceeds of the sale. Such an action must be conducted, as if the charge upon the real property was a mortgage to the same effect. If, at any time, it is made to appear to the court, that the rental value of the real property has materially increased or diminished, the court may, by an order, to be made upon notice to all the persons interested, modify the final judgment, by increasing or diminishing the sum to be paid to the plaintiff.

From L. 1869, c. 433, § 3.

§ 1615. Junior incumbrancers; not affected by admeasurement.

Where a portion of the property is admeasured and laid off to the plaintiff as her dower, a lien, which is inferior to the plaintiff's right of dower, attaches, during the life of the plaintiff, to the residue, or to the portion or share of the residue which was subject to it, as if the portion laid off to the plaintiff had not been a part of the property.

From L. 1874, c. 258.

§ 1616. Appeal not to stay execution, if undertaking is given.

An appeal from a final judgment, awarding to the plaintiff possession of the part admeasured and laid off to her, does not stay the execution thereof, unless the court, or a judge thereof, grants an order directing such a stay. Such an order shall not be granted, if an undertaking is given on the part of the respondent, with one or more sureties, approved by the court, or a judge thereof, to the effect that, if the judgment appealed from is reversed or modified, and restitution is awarded, she will pay, to the person entitled thereto, the value of the use and occupation of the part so admeasured and laid off to her, or of the portion, restitution of which is awarded, during the time she holds possession thereof, by virtue of the judgment.

From L. 1869, c. 433, § 4.

§ 1617. Plaintiff may consent to receive a gross sum.

In an action for dower, the plaintiff may, at any time before an interlocutory judgment is rendered, by reason of the defendant's default in appearing or pleading, or, where an issue of fact is joined, at any time before the commencement of the trial, file with the clerk, a consent to accept a gross sum, in full satisfaction and discharge of her right of dower in the real property described in the complaint. Such a consent must be in writing, and acknowledged or proved, and certified, in like manner as a deed to be recorded. A copy thereof, with notice of the filing, must be served upon each adverse party who has appeared, or who appears after the filing.

From L. 1870, c. 717, § 1.

§ 1618. Defendant may consent to pay it; proceedings thereupon.

At any time after a consent is filed, as prescribed in the last section, and before an interlocutory judgment is rendered, any defendant may apply to the court, upon notice, for an order granting him leave to pay such a gross sum. Thereupon the court may, in its discretion, and upon such terms as justice requires, ascertain the value of the plaintiff's right of dower in the property, by a reference or otherwise, and make an order, directing payment, by the applicant, of the sum so ascertained, within a time fixed by the order, not exceeding sixty days after service of a copy thereof; and directing the execution by the plaintiff of a release of her right of dower, upon receipt of the money. Obedience to the order may be enforced, either by punishment for contempt, or by striking out the pleading of the offending party, and rendering judgment against him or her or in both modes.

New.

§ 1619. Interlocutory judgment for sale.

Where the plaintiff's consent has been filed, as prescribed in the last section but one, and she is entitled to an interlocutory judgment in the action, the court must, upon the application of either party, ascertain, by reference or otherwise, whether a distinct parcel of the property can be admeasured and laid off to the plaintiff, as tenant in dower, without material injury to the interests of the parties. If it appears to the court, that a distinct parcel cannot be so admeasured and laid off, the interlocutory judgment must, except in the case specified in the next section, direct that the property be sold by the sheriff, or by a referee designated therein; and that, upon the confirmation of the sale, each party to the action, and every person deriving title from, through, or under a party, after the filing of the judgment-roll, or of a notice of the pendency of the action, as prescribed in article ninth of this title, be barred of and from any right, title, or interest in or to the property sold.

From L. 1870, c. 717, §§ 1, 3.

§ 1620. Id.; directing a part to be laid off.

In a case specified in section 1617 of this act, where the property, or a part thereof, consists of one or more vacant or unimproved lots, the plaintiff's consent may contain a stipulation to take a distinct parcel, out of those lots, in lieu of a gross sum. In that case, the interlocutory judgment, instead of directing a sale, may direct if it appears to be just so to do, that commissioners be appointed to admeasure and lay off to the plaintiff a

distinct parcel, out of the vacant or unimproved lots; and, if there is any other property, that it be sold, and a gross sum be paid to her out of the proceeds thereof, as prescribed in the next three sections. The plaintiff's title to each distinct parcel, admeasured and laid off to her, as prescribed in this section, is that of an estate of inheritance in fee simple. In admeasuring and laying off the same, the commissioners must consider quantity and quality relatively, according to the value of the plaintiff's right of dower in the vacant or unimproved lots, out of which the admeasurement is to be made; which must be ascertained, in proportion to the value of those lots, as prescribed, in the next three sections, for fixing a gross sum to be paid to her out of the proceeds of a sale.

From Id., § 6.

§ 1621. [Am'd, 1914.] Liens to be ascertained.

Before an interlocutory judgment is rendered for the sale of the property, the court must direct a reference to ascertain whether any person, not a party, has a lien upon the property, or any part thereof. But the court may direct or dispense with such reference, in its discretion, where a party produces a search, certified by the clerk, or by the clerk and register as the case requires, of the county where the property is situated; and it appears therefrom, and by the affidavits, if any, produced therewith, that there is no such outstanding lien. Except as otherwise expressly prescribed in this article, the proceedings upon and subsequent to the reference must be the same, as prescribed in article second of this title, where a reference is made as prescribed in section 1561 of this act.

From L. 1874, c. 258. Am'd by L. 1914, c. 348 (in effect Sept. 1, 1914).

§ 1622. Id.; payment of; or sale subject to.

Where the interlocutory judgment directs a sale, if the right of dower of the plaintiff is inferior to any other lien upon the property, the judgment may, in the discretion of the court, direct that the property be sold either subject to the lien, or discharged from the lien; and, in the latter case, that the officer making the sale pay the amount of the lien, out of the proceeds of the sale.

From L. 1870, c. 717, § 4.

§ 1623. Report of sale.

Immediately after completing the sale, and executing the proper conveyance to the purchaser, the officer making the sale must make and file with the clerk a report thereof, showing the name of the purchaser, and the purchase-price paid by him, or, if the property was sold in parcels, the name of each purchaser, and the price and a description of the parcel sold to him; the sums which the officer has paid out of the proceeds of the sale, pursuant to the interlocutory judgment; the purpose for which each payment was made; the amount and items of his fees and expenses; and the net amount of the proceeds, after deducting the payments.

From Id., § 5.

§ 1624. Final judgment thereon.

Upon confirming the sale, the court must ascertain, by a reference or otherwise, the rights and interests of each of the parties in and to the proceeds of the sale, and also what gross sum of money is equal to the value of the plaintiff's dower in the net proceeds of the sale, calculated upon the principles applicable to life annuities. The court must thereupon render final judgment, confirming the sale, and directing that the gross sum so ascertained be paid to the plaintiff, in full satisfaction of her right of

dower; and that the remainder of the proceeds of the sale be distributed among the persons entitled thereto.

From Id., § 5.

§ 1625. Certain provisions of article second made applicable.

The provisions of article second of this title, relating to a sale made as prescribed in that article, and to the distribution, investment, and care of the proceeds, apply, as far as they are applicable, to a sale made as prescribed in this article, and to the distribution of the proceeds of a sale, as prescribed in the last section.

New.

ARTICLE FOURTH.

Action to foreclose a mortgage.

Sec. 1626. Final judgment; what to contain.
1627. Person liable for mortgage debt may be made defendant, etc.
1628. Other actions for mortgage debt, when prohibited.
1629. Complaint to state whether such action brought.
1630. If judgment rendered therein, execution must be returned.
1631. Notice of pendency of action to be filed.
1632. Effect of conveyance upon sale.
1633. Disposition of surplus.
1634. When complaint to be dismissed on payment of sum due.
1635. Payment after judgment; when proceedings to be stayed.
1636. When part only of the property to be sold.
1637. When the whole property may be sold.

§ 1626. Final judgment; what to contain.

In an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, it must direct the sale of the property mortgaged, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action.

From 2 R. S. 191 (Part 3, c. 1, tit. 2), § 151.

§ 1627. [Am'd, 1899, 1908, 1911, 1912, 1916.] Person liable for mortgage debt may be made defendant, etc.

1. Any person who is liable to the plaintiff for the payment of the debt secured by the mortgage may be made a defendant in the action; and if he has appeared or has been personally served with the summons, the final judgment may award payment by him of the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds, pursuant to the directions contained therein.

2. The people of the state of New York may be made a party defendant to an action for the foreclosure of a mortgage on real property, where the people of the state of New York have an interest in or a lien on the said real property subsequent to the lien of the mortgage sought to be foreclosed in said action, in the same manner as a private person. In such a case, the summons must be served upon the attorney-general, who must appear in behalf of the people, but where the people of the state of New York are made a party defendant, as herein provided, the complaint shall set forth, in addition to the other matters required to be set forth by the code of civil procedure detailed facts showing the particular nature of the interest in or the lien on the said real property of the people of the state of New York, and the reason for making the people a party defendant. Upon failure to state such facts, the complaint shall be dismissed as to the people of the state of New York. The commissioners of the land office, whenever they deem it for the best interests of the state may order the treasurer, on the warrant of the comptroller, to pay off and cancel any mortgage, or encumbrance or any amount due thereon existing on any lands belonging to the state, or in which the state has an interest, to perfect in the state a title to any such lands or to protect the state's interests therein. And the plaintiff shall not be entitled to costs in an action wherein the people of the state are made a party defendant, unless the commissioners of the land office, after a full presentation of the facts to them, shall have determined before the action of foreclosure is brought against the state that the interests of the state did not warrant their making an order for the payment or

cancellation of said mortgage, or encumbrance, or any amount due thereon, or unless the commissioners of the land office shall have failed to make such determination within three months after such full presentation of facts shall have been made to them by verified statement in writing, and duly filed with the secretary of said commissioners at his office in the city of Albany, nor unless a certified copy of the referee's or sheriff's report of sale filed in the action shall have first been duly served upon the attorney-general; nor in any event shall an additional allowance under sections 3252 or 3253 of this act be made to the plaintiff, in an action wherein the people of the state of New York is made a party defendant.

3. In all cases where, prior to September first, 1908, the attorney-general shall have appeared in behalf of the people of this state, in an action for the foreclosure of a mortgage, such appearance shall be as valid and effectual as though chapter 284 of the laws of 1908 had been in force at the time of such appearance, whether such actions were pending or concluded when such chapter took effect, anything in such chapter to the contrary notwithstanding, provided, however, that nothing herein contained shall affect the right or title of any person claiming such real property under letters patent issued by the people of the state, for a valuable consideration before this act shall take effect.

From Id., §§ 152, 154; Co. Proc., § 167. Am'd by L. 1899, c. 528; L. 1908, c. 284; L. 1911, c. 25; L. 1912, c. 388; L. 1916, c. 331 (in effect Sept. 1, 1916).

§ 1628. Other actions for mortgage debt, when prohibited.

While an action to foreclose a mortgage upon real property is pending, or after final judgment for the plaintiff therein, no other action shall be commenced or maintained, to recover any part of the mortgage debt, without leave of the court in which the former action was brought.

From 2 R. S. 191, § 153.

§ 1629. Complaint to state whether such action brought.

The complaint, in an action to foreclose a mortgage upon real property, must state, whether any other action has been brought to recover any part of the mortgage debt, and, if so, whether any part thereof has been collected.

From Id., § 155.

§ 1630. If judgment rendered therein, execution must be returned.

Where final judgment for the plaintiff has been rendered, in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued, upon the judgment, to the sheriff of the county where he resides, if he resides within the State, or, if he resides without the State, to the sheriff of the county where the judgment-roll is filed; and has been returned wholly or partly unsatisfied.

From Id., § 156.

§ 1631. Notice of pendency of action to be filed.

The plaintiff must, at least twenty days before a final judgment directing a sale is rendered, file, in the clerk's office of each county where the mortgaged property is situated, a notice of the pendency of the action, as prescribed in section 1670 of this act; which must specify, in addition to the particulars required by that section, the date of the mortgage, the parties thereto, and the time and place of recording it.

From Co. Proc., § 132.

§ 1632. Effect of conveyance upon sale.

A conveyance upon a sale, made pursuant to a final judgment, in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate, only, that would have vested in the mortgagee, if the equity of redemption had been foreclosed. Such a conveyance is as valid, as if it was executed by the mortgagor and mortgagee, and is an entire bar against each of them, and against each party to the action who was duly summoned, and every person claiming from, through or under a party, by title accruing after the filing of the notice of the pendency of the action, as prescribed in the last section.

From 2 R. S. 191, § 158.

§ 1633. [Am'd, 1908, 1915.] Disposition of surplus; duties of officer making sale.

If there is any surplus of the proceeds of the sale, after paying the expenses of the sale, and satisfying the mortgage debt and the costs of the action, it must be paid into court, for the use of the person or persons entitled thereto. If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may, if an application therefor is pending, direct it to be invested at interest, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court. Within thirty days after completing the sale, and executing the proper conveyance to the purchaser, unless such time be extended by an order of the court entered in the office of the clerk within said thirty days, the officer making the sale must file with the clerk his report under oath of the disposition of the proceeds of the sale, accompanied by the vouchers of the persons to whom payments were ordered to be made.

Where real property, or an interest in real property, liable to be disposed of as prescribed in article third of title four of chapter eighteen of this act, is sold in an action or special proceeding, or otherwise, to satisfy a mortgage or other lien thereupon, which accrued during the decedent's lifetime, the surplus money must be paid into the surrogate's court having jurisdiction to issue letters testamentary or of administration upon the estate of the decedent, in the following cases:

1. Where eighteen months have not elapsed since the date when letters testamentary or of administration were first issued.

2. Where a proceeding for a judicial settlement of the accounts of such executor or administrator has been commenced within eighteen months from the date of the issue of such letters and is still pending.

3. Where no such letters have been issued and two years have not elapsed since the death of the decedent.

Money paid into the surrogate's court, as herein provided, may be paid out to the executor or administrator of the decedent, as directed by an order of the surrogate's court, to be accounted for by him upon the judicial settlement of his accounts; or, in a special proceeding brought for that purpose in the surrogate's court, an order may be entered directing distribution to the persons entitled thereto, in case eighteen months have elapsed since letters testamentary or of administration were first issued upon the estate of the decedent, or, in case no such letters have been issued, and two years have elapsed since the death of the decedent.

From Id., §§ 159, 160. Am'd by L. 1908, c. 294; L. 1915, c. 643 (in effect May 14, 1915).

§ 1634. When complaint to be dismissed on payment of sum due.

Where an action is brought to foreclose a mortgage upon real property, upon which a portion of the principal or interest is due, and another portion of either is to become due, the complaint must be dismissed, without costs against the plaintiff, upon the defendant paying into court, at any time before a final judgment directing a sale is rendered, the sum due, and the plaintiff's costs.

From Id., § 161.

§ 1635. Payment after judgment; when proceedings stayed.

In a case specified in the last section, if, after a final judgment directing a sale is rendered, but before the sale is made, the defendant pays into court the amount due for principal and interest, and the costs of the action, together with the expenses of the proceedings to sell, if any, all proceedings upon the judgment must be stayed; but, upon a subsequent default in the payment of principal or interest, the court may make an order, directing the enforcement of the judgment, for the purpose of collecting the sum then due.

From Id., § 162.

§ 1636. When part only of the property to be sold.

Where the mortgage debt is not all due, and the mortgaged property is so circumstanced, that it can be sold in parcels without injury to the interests of the parties, the final judgment must direct, that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and expenses of the sale; and that upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order, directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale. The plaintiff may apply for and obtain such an order, as often as a default happens.

From Id., §§ 163, 164.

§ 1637. When the whole property may be sold.

If, in a case specified in the last three sections, it appears that the mortgaged property is so circumstanced, that a sale of the whole will be most beneficial to the parties, the final judgment must direct, that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action, and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest, as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest, for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due.

From Id., §§ 165, 166.

ARTICLE FIFTH.

Action to compel the determination of a claim to real property.

Sec. 1638. Who may maintain action.
1639. Complaint.
1640. Proceedings when defendant denies plaintiff's title.
1641. Id.; when he pleads title.
1642. Proceedings the same as in ejectment.
1643. Proceedings when defendant claims in reversion or remainder.
1644. Judgment awarding defendant possession, etc.
1645. Judgment for plaintiff.
1646. Effect of judgment.
1647. Action to determine widow's dower.
1648. Proceedings, if plaintiff admits defendant's claim.
1649. Id.; when defendant's claim is denied.
1650. This article applies to corporations.

§ 1638. [Am'd, 1891, 1904, 1910.] Who may maintain an action.

Where a person has been, or he and those whose estates he has, have been for one year in possession of real property, or of any undivided interest therein, claiming it in fee, or for life, or for a term of years not less than ten, he may maintain an action against any other person to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make to any estate in that property in fee, or for life, or for a term of years not less than ten, in possession, reversion or remainder, or to any interest in that property, including any claim in the nature of an easement therein, whether appurtenant to any other estate or lands or not, and also including any lien or incumbrance upon said property, of the amount or value of not less than two hundred and fifty dollars. But this section does not apply to a claim for dower.

From 2 R. S. 312 (Part 3, c. 5, tit. 2), § 1, 3; Co. Proc., § 449; L. 1848, c. 50; L. 1854, c. 116; L. 1855, c. 511; L. 1860, c. 173; L. 1864, c. 219. Am'd by L. 1891, c. 210; L. 1904, c. 526; L. 1910, c. 203 (in effect May 2, 1910).

§ 1639. [Am'd, 1891, 1904, 1910.] Complaint.

The complaint in such an action must set forth facts showing:

1. The plaintiff's right to the real property; whether his estate therein is in fee, or for life, or for a term of years not less than ten; and whether he holds it as heir, devisee or purchaser, with the source from or means by which his title immediately accrued to him.

2. That the property, at the commencement of the action was, and, for the one year next preceding, has been in his possession, or in the possession of himself and those from whom he derives his title, either as sole tenant, or as joint tenant, or tenant in common with others.

3. That the defendant unjustly claims, or that it appears from the public records, or from the allegations of the complaint, that the defendant might unjustly claim an estate or interest or easement therein, or a lien or incumbrance thereupon of the character specified in the last section.

The complaint must describe the property as prescribed in section 1511 of this act and may contain an allegation that no personal claim is made against any defendant other than a defendant who shall assert a claim adverse to the claim of the plaintiff set forth in the complaint. The demand for judgment may be to the effect that the defendant and every person claiming under him to be barred from all claim to an estate in the property described in

the complaint, or from all claim to an interest or easement therein, or a lien or incumbrance thereupon, of the character specified in the last section, or it may combine two or more of said demands with other demand for appropriate relief.

From 2 R. S. 312, § 2. Am'd by L. 1891, c. 210; L. 1904, c. 526; L. 1910, c. 203 (in effect May 2, 1910).

§ 1640. Proceedings when defendant denies plaintiff's title.

If the defendant, in his answer, puts in issue the matters specified in subdivision second of the last section, and succeeds upon that defence, final judgment must be rendered in his favor, dismissing the complaint, and awarding to him costs against the plaintiff.

From 2 R. S. 312, § 7; L. 1855, c. 511.

§ 1641. [Am'd, 1891.] Id.; when he pleads title.

The defendant may, in his answer, either with or without the defense specified in the last section, set forth facts, showing that he has an estate in the property or any part thereof, adverse to the plaintiff, in fee, or for life, or for a term of years not less than ten, in possession, reversion, or remainder, as in a complaint for the same cause of action; or the defendant may set forth facts showing that he has an interest or an easement in, or a lien or incumbrance upon, said property; and thereupon he may demand that the complaint be dismissed, or any judgment to which he would be entitled in an action brought by him to recover that estate in said property, or to enforce in any manner the interest or easement therein, or the lien or incumbrance thereupon which he asserts; or he may combine any two or more of said demands.

New. Am'd by L. 1891, c. 210.

§ 1642. [Am'd, 1891.] Proceedings the same as in ejectment.

Where an issue of fact is joined in an action brought as prescribed in this article, unless the defendant merely demands that the complaint be dismissed, if the defendant claims an estate in said property, the subsequent proceedings, including the trial, judgment and execution, are the same as if it was an action of ejectment, except as otherwise expressly prescribed in this title; if the defendant claims an interest or easement in, or a lien or incumbrance upon, said property, the subsequent proceedings are the same as if it was an action brought by the defendant to establish or enforce the said interest, easement, lien or incumbrance, and the court may award any appropriate relief except as otherwise expressly prescribed in this title.

New. Am'd by L. 1891, c. 210.

§ 1643. Proceedings when defendant claims in reversion or remainder.

Where the defendant claims the property in question, or any part thereof, by virtue of an estate in remainder or reversion, he need not establish a right to the immediate possession thereof; but where the verdict, report, or decision finds that he has such an estate, it must specify the time when, or the contingency upon which, he will be entitled to possession; and final judgment to that effect must be rendered accordingly, without damages. In such a case, an execution for the delivery of the possession of the property may be issued upon the judgment; but only by the special order of the court, made upon an application by the defendant, or a person claiming under him, and satisfactory proof

that the time has arrived when, or the contingency has happened upon which, the applicant is entitled to possession by the terms of the judgment.

From 2 R. S. 314, 315, §§ 13, 16; L. 1855, c. 511.

§ 1644. Judgment awarding defendant possession, etc.

Where a final judgment, in favor of the defendant, determines that he is entitled to the immediate possession of the property, it must award him possession accordingly. The final judgment must also award to him his damages for the withholding of the property, as in an action of ejectment.

From 2 R. S. 314, § 15; L. 1855, c. 511.

§ 1645. [Am'd, 1891, 1910.] Judgment for plaintiff.

Final judgment for the plaintiff must be to the effect that the defendant, and every person claiming under him, by title accruing after the filing of the judgment-roll, or of the notice of the pendency of the action, as prescribed in article ninth of this title, be forever barred from all claim to any estate of inheritance, or for life, or for a term of years not less than ten, in the property; or such judgment must be that the defendant and every person claiming under him, as above stated, be forever barred from all claim to any interest or easement in, or lien or incumbrance upon, the said property, of any kind or nature whatsoever, or of any particular interest, easement, lien or incumbrance specified in said judgment; and the court may direct any instrument purporting to create any such interest, easement, lien or incumbrance to be delivered up or to be canceled of record; or two or more of said forms of judgment may be awarded in the same action. If such a judgment is taken upon the defendant's default in appearing or pleading, it shall not award costs to either party, unless it be taken upon a default in answering, after the decision of a demurrer to the complaint. A defendant against whom no personal claim is made in the complaint shall not be entitled to costs unless awarded by the court when such defendant asserts in his answer and establishes a claim in said lands adverse to the claim of the plaintiff in said action.

From 2 R. S. 313, § 6; L. 1855, c. 511. Am'd by L. 1891, c. 210; L. 1910, c. 203 (in effect May 2, 1910).

§ 1646. [Am'd, 1891.] Effect of judgment.

A final judgment in favor of either party, in an action brought as prescribed in this article, is conclusive against the other party, as to the title established in the action; and also against every person claiming from, through, or under that party, by title accruing after the filing of the judgment-roll, or of the notice of the pendency of the action, as prescribed in article ninth of this title. A new trial of said action after judgment shall not be granted as a matter of right, but the court may, in its discretion in the interest of justice, grant a new trial upon an application made by any party within one year after said judgment. But where a defendant is an infant, an idiot, a lunatic, an habitual drunkard, or imprisoned on a criminal charge or in execution upon conviction of a criminal offense for a term less than life, the said defendant shall have the right, within one year after his disability is terminated, to apply for and obtain a new trial of said action, and the representatives of such a defendant shall have the same right within one year after the death of said defendant, if such death occurs while the disability continues. Upon any new trial of an action, brought as prescribed in this article, the

record of the evidence given upon the previous trial, may be again offered to the court by either party, and may be received in evidence, in case the same evidence cannot be again procured. The courts may make such rules and orders as to preserving the record of the evidence given in such actions and perpetuating the proofs produced therein, either with or without the awarding of any other relief to the party whose proofs are so perpetuated, as shall be necessary or proper, and may embrace such directions in the judgment.

From 2 R. S. 314, § 14. Am'd by L. 1891, c. 210.

§ 1647. [Am'd, 1891.] Action to determine widow's dower.

A person claiming, as owner, an estate in fee, for life, or for years, in real property, may maintain an action against a woman, who claims to have a right of dower in the whole or a part of the property, to compel the determination of her claim. But such an action cannot be commenced until after the expiration of four months after the death of defendant's husband. If the defendant is under any of the disabilities specified in the last section, the provisions of that section relating to new trials and to perpetuating proofs, shall apply to her case.

From 2 R. S. 489 (Part 3, c. 8, tit. 7), §§ 6, 7, 8. Am'd by L. 1891, c. 210.

§ 1648. Proceedings, if plaintiff admits defendant's claim.

In an action brought as specified in the last section, if the complaint admits the defendant's right of dower in the property described therein, or any part thereof, it must demand judgment that her dower be admeasured. In that case, if the defendant does not, by her answer, set forth facts, showing that she is entitled to a greater right of dower, or another estate or interest in the property, than is so admitted, and demand judgment therefor, as if she was the plaintiff in an action for dower, the court must render an interlocutory judgment, directing her dower to be admeasured, with or without damages for its detention, as in an action for dower. The subsequent proceedings are the same, as if the defendant had, as plaintiff recovered an interlocutory judgment in an action for dower.

New.

§ 1649. Id.; when defendant's claim is denied.

Where the plaintiff insists, in his complaint, that the defendant has not a right of dower in the property, he must demand judgment that she be forever barred from such a claim. In that case, or where the plaintiff admits a right of dower in the defendant, and the defendant in her answer demands judgment for a greater right of dower, or another estate or interest in the property, than is so admitted, the provisions of this article, relating to an action to compel the determination of an adverse claim in fee, or for life, or for a term of years not less than ten, apply to all proceedings subsequent to the answer.

New.

§ 1650. [Am'd, 1891.] This article applies to corporations.

An action may be maintained, as prescribed in this article, by or against a corporation, or by or against an unincorporated association, as if it was a natural person, or such an action may be maintained by, or against the receiver or other successor of any such corporation or association.

From L. 1854, c. 116, § 1. Am'd by L. 1891, c. 210.

ARTICLE SIXTH.

Action for waste.

Sec. 1651. Who liable to action for waste.
1652. Action by heir, devisee, or grantor of reversion.
1653. Id.; by ward against guardian.
1654. Id.; by grantee of real property, sold under execution.
1655. Judgment in action against tenant of particular estate.
1656. Action against joint tenant or tenant in common.
1657. Id.; interlocutory judgment for partition.
1658. Id.; damages to be deducted from defendant's share.
1659. View; when not necessary; when and how made.

§ 1651. Who liable to action for waste.

An action for waste lies against a tenant by the curtesy, in dower, for life, or for years, or the assignee of such a tenant, who, during his estate or term, commits waste upon the real property held by him, without a special and lawful written license so to do; or against such a tenant, who lets or grants his estate, and, still retaining possession thereof, commits waste without a like license.

From 2 R. S. 334 (Part 3, c. 5, tit. 5), §§ 1, 2.

§ 1652. Action by heir, devisee, or grantor of reversion.

An heir or devisee may maintain an action for waste, committed in the time of his ancestor or testator, as well as in his own time. The grantor of a reversion may maintain an action for waste, committed before he aliened the same.

From Id., § 4.

§ 1653. Id.; by ward against guardian.

Such an action may also be maintained against a guardian by his ward, either before or after the termination of the guardianship, for waste, committed upon the real property of the ward, during the guardianship.

From Id., part of § 1.

§ 1654. Id.; by grantee of real property sold under execution.

Where real property is sold by virtue of an execution, the person, to whom a conveyance is executed pursuant to the sale, may maintain an action for waste, committed thereon after the sale, against the person, who was then in possession of the property.

From Id., § 20.

§ 1655. Judgment in action against tenant of particular estate.

If the plaintiff recovers in an action for waste, other than an action brought as prescribed in the next section, the final judgment must award to him treble damages. Where the action is brought by the person next entitled to the reversion, and it appears, in like manner, that the injury to the estate in reversion is equal to the value of the tenant's estate or unexpired term, or that it was done maliciously, the final judgment must also award to the plaintiff the forfeiture of the defendant's estate, and the possession of the place wasted.

From Id., § 10; Co. Proc., § 452.

§ 1656. Action against joint tenant or tenant in common.

An action for waste may also be maintained, by a joint tenant

or tenant in common, against his co-tenant, who commits waste upon the real property held in joint tenancy or in common. If the plaintiff recovers therein, he is entitled, at his election, either to a final judgment for treble damages, as specified in the last section, or to have partition of the property, as prescribed in the next two sections.

From Id., §§ 3, 11.

§ 1657. Id.; interlocutory judgment for partition.

Where the plaintiff elects to have partition, as prescribed in the last section, if the pleadings, verdict, report, or decision, do not determine the rights and interests of the several parties in the property so held in joint tenancy or in common, the court must ascertain them, by a reference or otherwise. If it appears that there are persons, not parties to the action, who must have been made parties to an action for the partition of the property, they must be brought in by supplemental summons, and, if necessary, supplemental pleadings must be made. When the rights and interests of all the parties are ascertained, an interlocutory judgment for the partition or sale of the property must be rendered, and the subsequent proceedings thereon must be the same, as in an action for the partition of the property, except as otherwise prescribed in the next section.

From Id., §§ 12, 13, 14, 17.

§ 1658. Id.; damages to be deducted from defendant's share.

The plaintiff may elect to take final judgment for the single damages awarded to him, or that, in making the partition, or in dividing the proceeds of a sale, so much of the share of the defendant in the real property, or the proceeds thereof, as will be sufficient to compensate the plaintiff for his single damages, and the costs of the action, other than the expenses of making the partition or sale, be laid off or paid, as the case may be, to the plaintiff. The residue of the property or proceeds, not laid off or distributed to the plaintiff or the defendant, must be laid off or paid to the persons entitled thereto, according to their respective rights and interests.

From Id., §§ 15, 16, 17.

§ 1659. View; when not necessary; when and how made.

In an action for waste, it is not necessary, either upon the execution of a writ of inquiry, or upon the trial of an issue of fact, that the jury, the judge, or the referee, should view the property. Where the trial is by a referee, or by the court without a jury, the referee or the judge may, in his discretion, view the property, and direct the attorneys for the parties to attend accordingly. In any other case, the court may, in its discretion, by order, direct a view by the jury.

From Id., §§ 8, 10.

ARTICLE SEVENTH.

Action for a nuisance.

Sec. 1660. When action may be brought.
1661. Defendants therein.
1662. Final judgment.
1663. Application of this article.

§ 1660. When action may be brought.

An action for a nuisance may be maintained in any case, where such an action might have been maintained under the laws in force, immediately before this act takes effect.

From 2 R. S. 332 (Part 3, c. 5, tit. 4), § 1; Co. Proc., § 454.

§ 1661. Defendants therein.

A person by whom the nuisance has been erected, and a person to whom the real property has been transferred, may be joined as defendants in such an action.

From 2 R. S. 332, § 2.

§ 1662. Final judgment.

A final judgment in favor of the plaintiff, may award him damages, or direct the removal of the nuisance, or both.

From Id., § 7; Co. Proc., § 454.

§ 1663. Application of this article.

This article does not affect an action, wherein the complaint demands judgment for a sum of money only.

New.

ARTICLE EIGHTH.

Other actions relating to real property.

Sec. 1664. Certain persons holding over deemed trespassers. Action against them.
1665. Reversioner, etc., may maintain action.
1666. Joint tenant, etc., may maintain action against his co-tenant.
1667. Action for cutting, etc., trees.
1668. Id.; when treble damages may be recovered.
1669. Treble damages for forcible entry or detainer.

§ 1664. Certain persons holding over deemed trespassers. Action against them.

A person in possession of real property, as guardian or trustee for an infant, or having an estate determinable upon one or more lives, who holds over and continues in possession, after the determination of his trust or particular estate, without the express consent of the person then immediately entitled, is a trespasser. An action may be maintained against him, or his executor or administrator, by the person so entitled, or his executor or administrator, to recover the full value of the profits, received during the wrongful occupation.

From 1 R. S. 749 (Part 2, c. 1, tit. 5), § 7.

§ 1665. Reversioner, etc., may maintain action.

A person, seised of an estate in remainder or reversion, may maintain an action founded upon an injury done to the inheritance, notwithstanding any intervening estate for life or for years.

From Id., § 8.

§ 1666. Joint tenant, etc., may maintain action against his co-tenant.

A joint tenant or a tenant in common of real property, or his executor or administrator, may maintain an action to recover his just proportion against his co-tenant, who has received more than his own just proportion, or against his executor or administrator.

From Id., § 9.

§ 1667. Action for cutting, etc., trees.

If any person cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise despoils a tree on the land of another, without the owner's leave; or on the common, or other land, of a city, village, or town, without having right or privilege in those lands, or license from the proper officer; an action may be maintained against him, by the owner, or the city, village or town, as the case may be.

From 2 R. S. 338 (Part 3, c. 5, tit. 6), § 1.

§ 1668. Id.; when treble damages may be recovered.

In an action brought as prescribed in the last section, the plaintiff may state in his complaint the amount of his damages, and demand judgment for treble the sum so stated. Thereupon, if the inquisition, or, where issues of fact are tried, the verdict, report or decision, awards him any damages, he is entitled to judgment for treble the sum so awarded, except that in either of the following cases, judgment must be rendered for single damages only:

1. Where the verdict, report, or decision finds affirmatively that the injury, for which the action was brought, was casual and involuntary; or that the defendant, when he committed the injury, had probable cause to believe that the land was his own.

2. Where the defendant has pleaded, and the verdict, report, or decision finds affirmatively, that the injury, for which the action was brought, was committed by taking timber, for the purpose of making or repairing a public road, or a public bridge, or by taking any wood, underwood, or tree, for a like purpose, by authority of a commissioner or overseer of highways.

From Id., §§ 2, 3, and part of § 1.

§ 1669. Treble damages for forcible entry or detainer.

If a person is disseized, ejected, or put out of real property, in a forcible manner; or, after he has been put out, is held and kept out, by force, or by putting him in fear of personal violence, he is entitled to recover treble damages, in an action therefor against the wrong-doer.

From Id., § 4.

ARTICLE NINTH.

Provisions applicable to two or more of the actions specified in this title.

Sec. 1670. Notice of pendency of action by plaintiff.
1671. Effect of notice; cancellation of notice upon making deposit or giving undertaking.
1671a. Additional persons bound in actions for partition, for dower, and to foreclose a mortgage.
1672. Notice to be recorded and indexed.
1673. Notice of pendency of action by defendant.
1674. When notice may be cancelled.
1675. When and how court may compel delivery of possession of real property to purchaser.
1676. Upon sale of real property, officer to pay taxes, etc.
1677. Judgment to be entered in county where real property is situated.
1678. Sale; notice of; how conducted.
1679. Purchases by certain officers prohibited. Penalty.
1680. Reversioner, etc., may bring action after tenant's default.
1681. Defendant, how prevented from committing waste, etc.
1682. When order for survey may be made.
1683. Contents and service of order.
1684. Authority of party under order.
1685. Liability of purchaser, pending an action.
1686. Infant may maintain, etc., real action in his own name.
1687. Joinder of real actions with others.
1688. When special proceeding to recover real property not allowed.

§ 1670. [Am'd, 1904.] Notice of pendency of action by plaintiff.

In an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real property, if the complaint is verified the plaintiff may, when he files his complaint, or at any time afterwards before final judgment, file, in the clerk's office of each county where the property is situated, a notice of the pendency of the action, stating the names of the parties, and the object of the action, and containing a brief description of the property in that county, affected thereby. Such a notice may be filed with the complaint, before the service of the summons; but, in that case, personal service of the summons must be made upon a defendant, within sixty days after the filing, or else, before the expiration of the same time, publication of the summons must be commenced, or service thereof must be made without the state, pursuant to an order obtained therefor, as prescribed in chapter fifth of this act.

From Co. Proc., § 132. Am'd by L. 1904, c. 518 (in effect Sept. 1, 1904).

§ 1671. [Am'd, 1905.] Effect of notice; cancellation of notice upon making deposit or giving undertaking.

Where a notice of the pendency of an action may be filed, as prescribed in the last section, the pendency of the action is constructive notice, from the time of so filing the notice only, to a purchaser or incumbrancer of the property affected thereby, from or against a defendant, with respect to whom the notice is directed to be indexed, as prescribed in the next section. A person, whose conveyance or incumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action. In any action, other than an action to foreclose a mortgage or for the partition of real property or for dower, in which a notice of the pendency thereof has been filed, and in which it shall appear to the court upon a motion made as hereinafter provided, that adequate relief can be secured to the plaintiff by a deposit of money, or in the discretion of the court by the giving of an undertaking, as hereinafter provided, where the cancellation of such notice is not otherwise expressly provided for or regulated, any defendant or any other person having an interest in the property affected by the action, may apply for the cancellation of such notice. Such application shall be by motion made in the action upon notice, to be directed and approved by the court, to all the parties to the action and to such other persons as the court may direct. If the court on the hearing of the motion shall decide that adequate relief can be secured to the plaintiff and that the case is one in which the judgment sought to be enforced against the real property mentioned in said notice of pendency of action may be secured by the deposit of the amount claimed or by the giving of an undertaking, the court may make an order directing that the applicant make a deposit in court of a sum of money, or in the discretion of the court, give an undertaking with at least two sufficient sureties for the payment of any amount which the party filing such notice of pendency of action, or any other party to the action claiming an interest or lien upon such real property may recover in the action, and will pay the judgment sought to be enforced against said real property, in the event that a final judgment shall be recovered therein and conditioned for the performance of such other terms as the court may direct, and that thereupon, and upon such other terms, if

any, as the court shall deem equitable, an order be made cancelling such notice of record. The sum required to be paid into court or the amount of the undertaking, shall be at least the amount claimed by the plaintiff or the value of the property affected by the action or the interest of the party filing such notice therein, with interest and costs, and if the court allow an undertaking to be given, a copy thereof with notice of filing of the same, shall be served upon the attorney for the plaintiff and upon such other parties as the court may direct and notice of not less than two days of the justification of the sureties. Upon the deposit of the sum required into court, or if an undertaking is given, upon the approval of such undertaking by the court or a judge thereof and the compliance with such other terms as may have been imposed, the court may direct that the notice of pendency of action be cancelled of record by a particular clerk or by all the clerks with whom it is filed and recorded, which cancellation must be made by a note to that effect, on the margin of the record, referring to the order. Unless the order is entered in the same clerk's office, a certified copy thereof must be filed therein, before the notice is cancelled. After a notice of pendency of action has been cancelled as herein provided, neither the proceedings in the action, nor any judgment which may be rendered therein, shall affect the real property described in any notice of pendency which has been cancelled pursuant to the provisions of this section.

Id. Am'd by L. 1905, c. 60 (in effect September 1, 1905).

§ 1671a. [Added, 1916.] Additional persons bound in actions for partition, for dower, and to foreclose a mortgage.

In an action or proceeding specified in articles second, third or fourth of this title, all the proceedings and the judgment shall bind, in addition to the persons who are bound pursuant to the provisions of section 1670, all persons who acquire inchoate dower in the real property described in the notice of pendency of the action after the filing of such notice and also all persons born between the filing of such notice of pendency of action and the entry of judgments in such action who would have been bound by such proceedings if born after such judgment; provided the court may in its discretion at any time before final judgment allow any such person to intervene or may require that he be brought in as party, or may make such other order or provision for the protection or recognition of his rights as justice may require and the circumstances of the case permit. In admitting such new party or requiring such new party to be brought in the court may give or refuse leave to answer; may permit or direct that the answer of any other defendant or defendants stand as his answer; may direct that the action retain its place on the calendar; may require or dispense with the appointment of guardian ad litem; may allow a new trial or any re-hearing; or direct that all or any part of the proceedings stand and bind such new party or make or impose any other provision, term or condition that to the court may seem proper.

Added by L. 1916, c. 518 (in effect Sept. 1, 1916).

§ 1672. [Am'd, 1913.] Notice to be recorded and indexed.

Each county clerk, with whom such a notice is filed, must immediately record it, in a book kept in his office for that purpose, and index it to the name of each defendant, specified in a direction, appended at the foot of the notice, and subscribed by the attorney for

the plaintiff. The notice filed in partition suits must be indexed against the name of each plaintiff and of each defendant having any interest or estate in the premises. The expense of procuring a new book, when necessary, must be paid out of the county treasury, as other county charges.

From L. 1884, c. 53, §§ 1, 2. Am'd by L. 1913, c. 69 (in effect Sept. 1, 1913).

§ 1673. Notice of pendency of action by defendant.

Where a defendant sets up in his answer a counterclaim, upon which he demands an affirmative judgment affecting the title to, or the possession, use, or enjoyment of, real property, he may, at the time of filing his answer, or at any time afterwards before final judgment, file a like notice. The last three sections apply to such a notice. For the purpose of such an application, the defendant filing such a notice is regarded as a plaintiff, and the plaintiff is regarded as a defendant.

From Co. Proc., § 132.

§ 1674. [Am'd, 1892.] When and how lis pendens cancelled.

After the action is settled, discontinued or abated, or final judgment is rendered therein against the party filing the notice, and the time to appeal therefrom has expired, or if a plaintiff filing the notice unreasonably neglects to proceed in the action, the court may, in its discretion, upon the application of any person aggrieved, and upon such notice as may be directed or approved by it, direct that a notice of the pendency of an action, filed as prescribed in the last four sections, be cancelled of record by a particular clerk, or by all the clerks, with whom it is filed and recorded. The cancellation must be made by a note to that effect, on the margin of the record, referring to the order. Unless the order is entered in the same clerk's office, a certified copy thereof must be filed therein, before the notice is cancelled. In a judgment creditor's action, the court may, at any stage of the proceeding, upon notice to the plaintiff or to the judgment creditor to be affected thereby, direct that a notice of the pendency thereof be cancelled, upon payment into court of the amount of the judgment or judgments sought to be enforced in such action, together with the accrued interest and such sum in addition thereto as the court may deem sufficient to cover interest likely to accrue during the pendency of the action and costs. Or, in lieu thereof, the court may, in its discretion, order that an undertaking be given in a sum double the amount of the judgment or judgments sought to be enforced, with two sufficient sureties to be approved by the court or a judge thereof, conditioned that the defendant or defendants applying therefor will pay the judgment or judgments sought to be enforced against said property, with interest and costs, in the event that a final judgment shall be entered in such judgment creditor's action in favor of the judgment creditor or creditors to the effect that such real estate was, at the time of the filing of said notices of pendency of action, equitably chargeable therewith. A copy of said undertaking, with notice of the filing of the same, shall be served upon the attorney for the judgment creditor, and notice of not less than two days of the justification of the sureties. Upon the approval of such undertaking by the court or a judge thereof, the court may direct that the notice of pendency of action be cancelled of record, in the manner above provided. Where a judgment creditor's action is brought by the plaintiff, as well on his own behalf as on behalf of

such other creditors as may come in and contribute to the expense of such action, notice of the application to cancel such lis pendens shall be given, as well to the plaintiff as to such other judgment creditors as shall, before the service of the notice of motion or order to show cause, have served upon the attorney appearing for the defendant in whose name the title shall stand at the time of the commencement of the action, a notice to the effect that such judgment creditor elects to come in and contribute to the expenses of such action, which notice shall also describe the judgment, by giving the name of the court in which it was recovered, such recovery and the amount thereof, and shall be accompanied by an affidavit of the judgment creditor or his attorney to the effect that such judgment has been duly docketed, giving the date and place of such docket, and that an execution has been issued thereon to the sheriff of the proper county, and has been returned unsatisfied, and the amount claimed to be due thereon. In such case the court shall provide for like deposit or like security, as the case may be, for the benefit of the judgment creditor giving such notice before the cancellation of such notice of pendency of action.

From Co. Proc., § 132. Am'd by L. 1892, c. 504.

§ 1675. When and how court may compel delivery of possession of real property to purchaser.

Where a judgment, in an action specified in this title, allots to any person a distinct parcel of real property, or contains a direction for the sale of real property, or confirms such an allotment or sale, it may also, except in a case where it is expressly prescribed in this act that the judgment may be enforced by execution, direct the delivery of the possession of the property to the person entitled thereto. If a party, or his representative or successor, who is bound by the judgment, withholds possession from the person thus declared to be entitled thereto, the court, besides punishing the disobedience as a contempt, may, in its discretion, by order, require the sheriff to put that person into possession. Such an order must be executed, as if it was an execution for the delivery of the possession of the property.

From 2 R. S. 191 (Part 3, c. 1, tit. 2), § 152.

§ 1676. Upon sale of real property, officer to pay taxes, etc.

Where a judgment, rendered in an action for partition, for dower, or to foreclose a mortgage upon real property, directs a sale of the real property, the officer making the sale must, out of the proceeds, unless the judgment otherwise directs, pay all taxes, assessments, and water rates, which are liens upon the property sold, and redeem the property sold from any sales for unpaid taxes, assessments, or water rates, which have not apparently become absolute. The sums, necessary to make those payments and redemptions, are deemed expenses of the sale, within the meaning of that expression, as used in any provision of article second, third, or fourth of this title.

From L. 1870, c. 717, § 2.

§ 1677. Judgment to be entered in county where real property is situated.

Where real property, sold by virtue of a judgment rendered in an action specified in the last section, is situated in a county, other than that in which the judgment is entered, the judgment must be also entered in the office of the clerk of the county wherein the property is situated, before the purchaser can be required to pay the purchase-money, or to accept a deed. The clerk of the latter county must enter it in the judgment-book kept by him, upon filing with him a copy thereof, certified by the clerk with whom it is entered.

New.

§ 1678. [Am'd, 1881, 1894, 1896, 1898, 1915, 1916.] Sale; notice of; how conducted.

A sale made in pursuance of any provision of this title, must be at public auction to the highest bidder. Notice of such sale must be given by the officer making it, as prescribed in section 1434 of this act for the sale by a sheriff of real property, by virtue of an execution, unless the property is situated wholly or partly in a city or in an incorporated village of the first class in which a daily, semi-weekly or tri-weekly newspaper is published, and, in that case, by publishing notice of the sale in such a daily, semi-weekly or tri-weekly paper, at least twice in each week for three successive weeks, or in a weekly paper published in a city or in such incorporated village of the first class, once in each of the six weeks, immediately preceding the sale, or in the counties of New York and Kings in two such daily papers, which, if the property be located in the county of New York, shall be designated for that purpose by and in the judgment directing such sale. If the officer appointed to make such sale does not appear at the time and place where such sale has been advertised to take place, then in that case the attorney for the plaintiff may postpone or adjourn such sale not to exceed four weeks, during which time such attorney may make application to the court to have another person appointed to make such sale. Notice of the postponement of the sale must be published in the paper or papers wherein the notice of sale was published. The terms of the sale must be made known at the sale, and if the property, or any part thereof, is to be sold subject to the right of dower, charge or lien, that fact must be declared at the time of the sale. If the property consists of two or more distinct buildings, farms or lots they shall be sold separately, unless otherwise ordered by the court; and provided, further, that where two or more buildings are situated on the same city lot, they be sold together.

From 2 R. S. 326 (Part 3, c. 5, tit. 3), §§ 56, 57. Am'd by L. 1881, c. 682; L. 1894, c. 263; L. 1896, c. 152; L. 1898, c. 662; L. 1915, c. 319; L. 1916, c. 589 (in effect Sept. 1, 1916).

§ 1679. [Am'd, 1916.] Purchases by certain officers prohibited. Penalty.

A commissioner, or other officer making a sale as prescribed in this title, or a guardian of an infant party to the action, shall not, nor shall any person, for his benefit, directly or indirectly, purchase, or be interested in the purchase of, any of the property sold; except that a guardian may, where he is lawfully authorized so to do, purchase for the benefit or in behalf of his ward. The violation of this section is a misdemeanor; and a purchase, made contrary to this section, is void. But no action shall be brought for or in respect to real property by a person claiming that the property has been heretofore sold under a judgment in an action directing the sale wherein there were infant defendants for whom a guardian ad litem had been appointed, and the premises were sold at public auction and purchased by or on behalf of such guardian ad litem, commissioner or other officer and where the deed to the premises so purchased has been recorded in the proper office for thirty years, unless such action shall be commenced within six months after this act takes effect.

From 2 R. S. 326, § 58. Am'd by L. 1916, c. 585 (in effect Sept. 1, 1916).

§ 1680. Reversioner, etc., may bring action after tenant's default.

Where a tenant for life, or for a term of years suffers judgment to be taken against him, by consent or by default, in an action of ejectment, or an action for dower, the heir, or person owning the reversion or remainder, may, after the determination of the particular estate, maintain an action of ejectment to recover the property.

From 2 R. S. 339 (Part 3, c. 5, tit. 7), § 2.

§ 1681. Defendant, how prevented from committing waste, etc.

If, during the pendency of an action specified in this title, the defendant commits waste upon, or does any other damage to the property in controversy, the court, or a judge thereof, may, upon the application of the plaintiff, and due proof of the facts by affidavit, grant, without notice or security, an order, restraining him from the commission of any further waste upon or damage to the property. Disobedience to such an order may be punished, as a contempt of the court. This section does not affect the plaintiff's right to a permanent or a temporary injunction in such an action.

From 2 R. S. 336 (Part 3, c. 5, tit. 5), §§ 18, 19.

§ 1682. When order for survey may be made.

If the court, in which an action relating to real property is pending, is satisfied that a survey of any of the property, in the possession of either party, or of a boundary line between the parties, or between the property of either of them, and of another person, is necessary or expedient, to enable either party to prepare a pleading, or prepare for trial, or for any other proceeding in the action, it may, upon the application of either party, upon notice to the party in possession, make an order, granting to the applicant leave to enter upon that party's property, to make such a survey.

From 2 R. S. 341 (Part 3, c. 5, tit. 7), § 13.

§ 1683. Contents and service of order.

An order, made as prescribed in the last section, must specify, by a description as definite as may be, the property or boundary line to be surveyed, and the real property of the adverse party, upon which it is necessary to enter for that purpose. A copy thereof must be served on the owner or occupant of that property, before entry thereupon.

From Id., § 14.

§ 1684. Authority of party under order.

After serving a copy of the order, as prescribed in the last section, the party obtaining it, his necessary surveyors, servants, and agents, may enter, for the purpose of making the survey, upon the real property described in the order, and may there make the survey; but each person so entering is responsible for any unnecessary injury done by him; and the party procuring the order is responsible for such an injury, done by any person so entering.

From Id., § 15.

§ 1685. Liability of purchaser, pending an action.

If the defendant, in an action of ejectment or an action for dower, aliens the real property in question, after the filing of a notice, as specified in section 1670 of this act, and an execution against him for the plaintiff's damages is returned wholly or partly unsatisfied, an action may be maintained by the plaintiff against any person, who has been in possession of the property, under the defendant's conveyance, to recover the unsatisfied portion of the damages, for a time not exceeding that, during which he possessed the property.

From Id., § 19.

§ 1686. Infant may maintain, etc., real action in his own name.

Any action specified in this title may be maintained by or against an infant in his own name; and article fourth of title

second of chapter fifth of this act applies to such an action, except as otherwise prescribed in sections 1535 and 1536 of this act.
New.

§ 1687. Joinder of real actions with others.

Nothing contained in this title is to be construed, as to prevent the plaintiff from uniting in the same complaint two or more causes of action, in any case specified in section 484 of this act.
New.

§ 1688. When special proceeding to recover real property not allowed.

A special proceeding to recover real property cannot be taken, except in a case specially prescribed by law.
See 2 R. S. 343, § 24.

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ARTICLE TEN.

Evidence in actions or proceedings involving a title to real property.

Sec. 1688a. Testimony perpetuated pursuant to this article may be received.
1688b. Effect of documentary evidence.
1688c. Mode of introducing testimony.
1688d. Application to take deposition and perpetuate testimony.
1688e. Petition, what to contain.
1688f. Appointment of referee; notice to appear.
1688g. Referee to take deposition.
1688h. Examination; deposition to be signed and certified.
1688i. Depositions as evidence.

§ 1688a. [Added, 1901.] Testimony perpetuated pursuant to this article may be received.

In any action or proceeding involving a question as to title to real property in the state of New York, the court shall upon the offer of any party receive in evidence testimony perpetuated pursuant to the provisions of this article; provided that the testimony of a witness shall not be admissible under the provisions hereof, until the court is satisfied that such witness is deceased, or is unable personally to attend by reason of insanity, sickness or other infirmity, or is confined in a prison or jail, or is absent from the state, and his attendance cannot with reasonable diligence be compelled by subpœna or his testimony taken by commission.
Added by L. 1901, c. 303 (in effect Sept. 1, 1901).

§ 1688b. [Added, 1901.] Effect of documentary evidence.

No provision of this article shall give to any documentary evidence introduced in connection with such testimony any greater or different effect than may be due to it by reason of the testimony relative thereto or its own character.
Id.

§ 1688c. [Added, 1901.] Mode of introducing testimony.

Such testimony may be introduced in such action or proceeding in any mode established by the practice of the courts for the introduction of testimony given upon a former trial of an action by a witness who has since died, and subject to objections as to the competency of a witness or the relevancy or competency of a question put to him or the answer given by him, as if the witness were personally examined, and without being noted upon the deposition.
Id.

§ 1688d. [Added, 1901.] Application to take deposition and to perpetuate testmony.

Where a person has been, or he and those under whom he claims have been, for one year in possession of real property or of an undivided interest therein, claiming it in fee or for life or for a term of years, not less than ten, he may apply to the supreme court, by petition, to take the deposition of any person or persons and to perpetuate such testimony to be received in evidence pursuant to the provisions of this article.

Id.

§ 1688e. [Added, 1901.] Petition, what to contain. 2 Dem. Rules 138

The person desiring to take a deposition and to perpetuate testimony as prescribed in this article may present to a justice of the supreme court a petition duly verified, setting forth as follows:

First. A description of the real property in relation to which the petitioner desires testimony taken and perpetuated, the estate of the petitioner therein, whether in fee or for life, or for a term of years, and whether he holds as heir, devisee or purchaser, or as trustee of an express trust.

Second. That the property at the date of the petition is and for one year next preceding has been in his possession or the possession of himself and those from whom he derives title, either as sole owner or as joint tenant or as tenant in common.

Third. A general statement of the facts as to which testimony is to be taken and the circumstances which render it necessary for the protection of the petitioner's rights that the proposed testimony should be perpetuated.

Fourth. The names and residences of the persons to be examined.

Fifth. The names and residences of persons having interests which may be adversely affected by the testimony sought to be taken, so far as such names and residences are within the knowledge of the petitioner; or, where such names and residences cannot be ascertained, a statement of the class of persons having interests which may be so adversely affected.

Sixth. Any other fact necessary to show that the case comes within the provisions of this article.

Id.

§ 1688f. [Added, 1901; am'd, 1913.] Appointment of referee; notice to appear.

Upon the presentation of the petition, the judge shall make an order containing directions as to the persons to whom, and the manner in which, notice shall be given of the time and place at which such application will be heard; and at the time fixed in said notice for that purpose, if it shall be shown to the satisfaction of the court that the case comes within the provisions of this article, the court shall make an order appointing a referee to take such testimony and prescribing the manner in which and the persons to whom notice shall be given of the time and place at which the testimony will be taken before said referee.

If it shall appear from the petition that the person or persons to be examined reside without the state, the judge to whom the petition may be presented may direct that a commission be issued to one or more competent persons named therein to examine the person or persons named therein under oath upon the interrogatories annexed to the commission; to take and certify the deposition of each witness, and to return the same and the commission according to the directions given in or with the commission; and

for this purpose the judge shall make an order directing that interrogatories be settled on notice to persons who, from the petition it may appear, may be adversely affected by the testimony sought to be taken. All the provisions of chapter nine, title three, article two of the code of civil procedure shall apply to depositions taken without the state as herein provided; and a deposition taken and filed in accordance with the provisions thereof and of this article, shall have the same force and effect as the depositions of a witness before a referee as herein provided, if, before it may be read in evidence, the petition and order under which it was taken and proof of service of all the notices required by this article, shall be filed in the office of the clerk of the county in which the real estate is situated, and the deposition or a certified copy thereof shall be recorded in the office of the register, or, if there be none, of the county clerk, of the county in which the real estate is situated.

Id. Am'd by L. 1913, c. 140 (in effect March 27, 1913).

§ 1688g. [Added, 1901; am'd, 1913.] Referee to take deposition.

Before proceeding with the testimony, the referee shall require proof that due notice of the hearing has been given in accordance with the directions in said order contained, and thereupon the referee must proceed to take the depositions of the persons proposed to be examined, as stated in the petition, at the time and place mentioned in the notice, and may from time to time adjourn the examination to another day and another place within the same county. All the provisions of sections 854, 855, 856, 857 and 858 of the code of civil procedure apply to the examination of a person taken before a referee as prescribed in this article.

Id. Am'd by L. 1913, c. 140 (in effect March 27, 1913).

§ 1688h. [Added, 1901.] Examination; deposition to be signed and certified.

The referee upon every examination taken as prescribed in this article must insert therein every answer or declaration of the person examined, which any party to the said proceeding requires to be inserted. If upon the examination before the referee the person examined refuses to answer any question, the referee must report the fact to the court or a judge thereof, who must determine whether the witness is bound to answer the question. The deposition when completed must be read and subscribed by the persons examined, certified to by the referee, and within ten days thereafter must, together with the petition and order under which it was taken, and proof of service of all the notices required by this article, be filed in the office of the clerk of the county in which it was taken, and the said deposition or a certified copy thereof must be recorded in the office of the register (or clerk where there is no register) of the county in which the real estate is situated.

Id.

§ 1688i. [Added, 1901; am'd, 1913.] Depositions as evidence.

Subject to the provisions of this article, the depositions taken before a referee or pursuant to a commission or a certified copy thereof may be read in evidence by any party to an action or proceeding, which shall involve the title to such real property, as against the person on whose petition said depositions were taken, each person to whom notice of the taking of such depositions was given as directed in the order appointing the referee, and all persons claiming from, through or under them or any of them.

Id. Am'd by L. 1913, c. 140 (in effect March 27, 1913).

TITLE II.

Actions relating to chattels.

Article 1. Action to recover a chattel.
2. Action to foreclose a lien upon a chattel.

ARTICLE FIRST.

Action to recover a chattel.

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1735. Injury, etc., no defence.
1736. Abatement and revival of action.

§ 1689. Joinder of action with others.

Nothing in this title is to be so construed, as to prevent the plaintiff from uniting, in the same complaint, two or more causes of action, in any case specified in section 484 of this act.

New.

§ 1690. [Am'd, 1894.] When it cannot be maintained.

An action to recover a chattel cannot be maintained in either of the following cases:

1. Where the chattel was taken by virtue of a warrant, against

the plaintiff, for the collection of a tax, assessment or fine, issued in pursuance of a statute of the State or of the United States; unless the taking was, or the detention is, unlawful, as specified in section 1695 of this act.

2. Where it was seized by virtue of an execution, or a warrant of attachment, against the property of the plaintiff, unless it was legally exempt from such seizure, or is unlawfully detained, as specified in section 1695 of this act.

3. Where is[1] was seized by virtue of an execution, or a warrant of attachment, against the property of a person other than the plaintiff, and at the time of the commencement of the action the plaintiff had not the right to reduce it into his possession.

From 2 R. S. 522 (Part 3, c. 8, tit. 12), §§ 4, 5. Am'd by L. 1894, c. 305.

§ 1691. Id.; after judgment against the plaintiff.

Where a chattel is replevied, in an action to recover the same, and a final judgment awarding the possession thereof to the defendant is rendered, a subsequent action to recover the same chattel cannot be maintained by the plaintiff, for the same cause of action. But the judgment does not affect his right to maintain an action to recover damages, for taking or detaining the same or any other chattel, unless it was rendered against him upon the merits.

From 2 R. S. 532, § 62.

§ 1692. Id.; by an assignee.

An action to recover a chattel, the title to which has been transferred to the plaintiff, since the wrongful taking, or during the wrongful detention thereof, with or without the damages sustained by the taking, withholding, or detention, may be maintained in any case, where, except for the transfer, such an action might be maintained, by the person from or through whom the plaintiff derives title; but not otherwise.

New.

§ 1693. Jurisdiction, etc., when replevin precedes summons.

Where a chattel is replevied before the service of the summons, as prescribed in this article, the seizure thereof by the sheriff is regarded as equivalent to the granting of a provisional remedy, for the purpose of giving jurisdiction to the court, and enabling it to control the subsequent proceedings in the action; and as equivalent to the commencement of the action, for the purpose of determining, whether the plaintiff is entitled to maintain the action, or the defendant is liable thereto.

New.

§ 1694. Plaintiff may require sheriff to replevy.

The plaintiff may, when the summons is issued, or at any time afterwards, and before the service of a copy of the defendant's answer, or, where judgment is taken by default for want of an appearance or pleading, before the entry of the final judgment, cause the chattel, to recover which the action is brought, to be replevied by the sheriff of the county where it is found. For that purpose, he must deliver to the sheriff an affidavit and a written undertaking, as prescribed in the following sections of this article, with a written requisition, indorsed upon or annexed to the affidavit, and subscribed by his attorney, to the effect, that the sheriff is required to replevy the chattel described therein. The

[1] So in the original (" is " for " it ").

requisition may be directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the chattel is found. It is deemed the mandate of the court.

From Co. Proc., §§ 206, 209.

§ 1695. Affidavit therefor, before commencement of action.

The affidavit, to be delivered to the sheriff, as prescribed in the last section, must particularly describe the chattel to be replevied; and must contain the following allegations:

1. That the plaintiff is the owner of the chattel, or is entitled to the possession thereof, by virtue of a special property therein; the facts with respect to which must be set forth.

2. That it is wrongfully detained by the defendant.

3. The alleged cause of the detention thereof, according to the best knowledge, information, and belief of the person making the affidavit.

4. That it has not been taken by virtue of a warrant, against the plaintiff, for the collection of a tax, assessment, or fine, issued in pursuance of a statute of the State, or of the United States; or, if it has been taken under color of such a warrant, either that the taking was unlawful, by reason of defects in the process, or other causes specified, or that the detention is unlawful, by reason of facts specified, which have subsequently occurred.

5. That it has not been seized by virtue of an execution or warrant of attachment, against the property of the plaintiff, or of any person from or through whom the plaintiff has derived title to the chattel, since the seizure thereof; or, if it has been so seized, that it was exempt from the seizure, by reason of facts specified, or that its detention is unlawful, by reason of facts specified which have subsequently occurred.

6. Its actual value.

From Co. Proc., § 207.

§ 1696. Id.; after commencement of action.

But where the affidavit is made after the service of the summons, the allegations, required to be inserted therein by subdivisions first and second of the last section, must be to the effect, that the plaintiff, at the time of the commencement of the action, was the owner of the chattel, or was entitled to the possession thereof by virtue of a special property therein; and that it was then wrongfully detained by the defendant, as prescribed in those subdivisions.

New.

§ 1697. Id.; where several chattels are to be replevied.

Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity. Where it describes two or more chattels to be replevied, it may, at the election of the plaintiff, state the aggregate value of all; or, separately, the value of any chattel or of any class of chattels, and the aggregate value of the remainder, if any. Where it states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in the following provisions of this article, the return of any or all of the chattels or classes of chattels, the value of which is thus stated, or of the portion thereof which has been replevied. If he procures such a return, the remainder must be

delivered to the plaintiff, except as is otherwise prescribed in this article.

New.

§ 1698. Provision where a part only is replevied.

The sheriff must replevy a smaller number or a smaller quantity, if the whole of the chattel or chattels described in the affidavit cannot be found. In that case, if the aggregate value only is stated in the affidavit, the value of the entire chattel or class of chattels, as so stated, is to be deemed the value of the part replevied, for the purposes of the proceedings to procure a return thereof to the defendant.

New.

§ 1699. Plaintiff's undertaking for replevin.

The undertaking to be delivered to the sheriff, with a requisition to replevy a chattel, must be executed by at least two sureties, who must be approved by the sheriff. It must be to the effect, that the sureties are bound in a specified sum, not less than twice the value of the chattel, as stated in the affidavit, for the prosecution of the action; for the return of the chattel to the defendant, if possession thereof is adjudged to him, or if the action abates, or is discontinued, before the chattel is returned to the defendant; and for the payment to the defendant of any sum, which the judgment awards to him against the plaintiff.

From Co. Proc., part of § 209.

§ 1700. How chattel to be replevied.

If any chattel, described in the affidavit, is found in the possession of the defendant, or of his agent, the sheriff, to whom an affidavit, requisition, and undertaking are delivered, as prescribed in the foregoing sections of this article, must forthwith replevy it, by taking it into his possession. He must thereupon, without delay, serve on the defendant a copy of the affidavit, requisition, and undertaking, by delivering the same to him personally, if he can be found within the county; or, if he cannot be so found, to his agent, if any, from whose possession the chattel is taken; or, if neither can be found within the county, by leaving the copy at the usual place of abode of either, with a person of suitable age and discretion.

From Co. Proc., rest of § 209.

§ 1701. Id.; how taken from a building, etc.

If any chattel, described in the affidavit, is secured or concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it is not delivered, pursuant to the demand, he must cause the building or inclosure to be broken open, and must take the chattel into his possession.

From Co. Proc., § 214.

§ 1702. Replevied chattel; how kept, etc.

A sheriff, who has replevied a chattel, must retain it in his possession, keeping it in a secure place, until the person, who is entitled to the possession thereof, is ascertained, as prescribed in this article. He must then deliver it to that person, upon request and payment of his lawful fees, and necessary expenses for taking and keeping it, as taxed by a judge of the court, or the county judge of the county where the chattel was replevied, upon such a notice as the judge deems proper.

From Co. Proc., § 215.

§ 1703. When defendant may except to sureties; proceedings thereupon.

Within three days after the chattel is replevied, and a copy of the affidavit, requisition, and undertaking is served, the defendant, unless he requires a return of the chattel replevied, or of one or more of them, where two or more chattels are replevied, may serve upon the sheriff a notice, that he excepts to the plaintiff's sureties; otherwise he is deemed to have waived all objections to them. Where the defendant has not appeared, the notice must be subscribed either by him, or by his agent or attorney. The person so subscribing the notice must add to his signature his office address, as prescribed by law, with respect to a notice of appearance. Within ten days after service of such a notice, the plaintiff's attorney must serve upon the defendant's attorney, or, if the defendant has not appeared, upon the sheriff, notice of the justification of the sureties. If the notice of justification is served upon the sheriff, he must immediately serve it upon the person, whose name is subscribed to the notice of exception, in the mode prescribed by law, for service of a paper upon an attorney in an action.

From Id., § 210.

§ 1704. When defendant may reclaim chattel; proceedings thereupon.

The defendant, if he does not except to the plaintiff's sureties, as prescribed in the last section, may, within the time allowed to him for such an exception, serve upon the sheriff, a notice that he requires a return of the chattel replevied. With the notice, he must deliver to the sheriff the following papers:

1. An affidavit, containing an allegation, either that the defendant is the owner of the chattel, or that he is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts with respect to which must be set forth.

2. An undertaking, executed by at least two sureties, to the effect that they are bound, in a specified sum, not less than twice the value of the chattel, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if delivery thereof is adjudged, or if the action abates in consequence of the defendant's death; and for the payment to him of any sum, which the judgment awards against the defendant.

Within three days after serving a notice, requiring a return of the chattel, as prescribed in this section, the defendant must serve upon the plaintiff's attorney, notice of the justification of the sureties to the undertaking.

From Id., § 211.

§ 1705. Sureties; when and how to justify.

The justification of sureties, as prescribed in either of the last two sections, must take place, either in the county where the chattel was replevied, or in the county where one of the sureties resides. The provisions, regulating the justification of bail, contained in article third of title first of chapter seventh of this act, govern, except as otherwise expressly prescribed in this article, with respect to the notice of justification of the sureties; the officer before whom they must justify; the substitution of new sureties or a new undertaking; the examination and qualifications of the sureties; and the allowance of the undertaking. But after the allowance, the undertaking and examination must be delivered to the sheriff.

From Id., §§ 210, 212, 213.

§ 1706. When and to whom sheriff must deliver chattel.

If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for that purpose; or if he makes default in serving notice of the justification of his sureties, or in procuring the allowance of his undertaking; or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking; the sheriff must, except in the case specified in section 1709 of this act, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, makes default in serving notice of justification, or in procuring the allowance of his undertaking; or if the defendant, after he has required the return of the chattel, duly procures the allowance of his undertaking; the sheriff must immediately deliver the chattel to the defendant. When the chattel is delivered by the sheriff to either party, as prescribed in this section, the sheriff ceases to be responsible for the sufficiency of the sureties of either party; until then, he is responsible for the sufficiency of the sureties of the plaintiff or of the defendant, as the case may be.

From Id., §§ 210, 211, 212.

§ 1707. Penalty for wrong delivery by sheriff.

A sheriff, who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in the last section, or by virtue of an execution issued upon a judgment in the action, forfeits, to the party aggrieved, two hundred and fifty dollars; and is also liable to him for all damages which he sustains thereby.

From 2 R. S. 525 (Part 3, c. 8, tit. 12), § 18.

§ 1708. Undertaking; to whom delivered.

Where the sheriff duly delivers a chattel to either party, as prescribed in the last section but one, he must, at the same time, deliver to the adverse party the undertaking, received by him from the party to whom the chattel is delivered, together with the examination of the sureties, and the judge's allowance, if any.

From Co. Proc., § 423.

§ 1709. Claim of title by third person; proceedings thereupon.

At any time before a chattel, which has been replevied, is actually delivered to either party, if a person, not a party to the action, claims, as against the defendant, a right to the possession thereof, existing at the time when it was replevied, an affidavit may be made and delivered to the sheriff, in his behalf, stating that he makes such a claim; specifying the chattel or chattels to which it relates, if two or more chattels have been replevied, and the claim relates only to part of them; and setting forth the facts upon which his right of possession depends. In that case, the sheriff may, in his discretion, before he delivers the chattel to the plaintiff, serve upon the plaintiff's attorney a copy of the affidavit, with a notice that he requires indemnity against the claim. If the indemnity is not furnished, within a reasonable time after the plaintiff becomes entitled to the delivery of the chattel, the sheriff may, in his discretion, deliver it to the claimant, without incurring any liability to the plaintiff, by reason of so doing.

From Id., § 216.

§ 1710. Action against sheriff upon such claim.

A person, not a party to the action, who has served an affidavit, as prescribed in the last section, may maintain an action against

the sheriff, who has delivered the chattel to the plaintiff, to recover his damages, by reason of the taking, detention, or delivery of the chattel. But the summons in such an action must be issued, within three months after the delivery of the chattel to the plaintiff, and must be served, within three months after it is issued. An action cannot be maintained against a sheriff, by a person so entitled to make a claim, except as prescribed in this section.

From Id., § 216, last sentence.

§ 1711. Indemnity to sheriff against such action.

The indemnity, to be furnished to the sheriff by the plaintiff, as prescribed in the last section but one, must consist of a written undertaking to him, executed by at least two sureties, to the effect that they will indemnify him against any liability for damages, costs, or expenses, to be incurred in an action brought against him by the claimant, or a person deriving title from or through the claimant, by reason of the taking or detention of the chattel, or its delivery to the plaintiff, not exceeding a sum, to be specified in the undertaking, which must be at least five hundred dollars, and not less than the actual value of the chattel claimed, and two hundred and fifty dollars in addition thereto. Each of the sureties, besides possessing the other qualifications required by law, must be a freeholder or a householder of the sheriff's county. The sheriff, before delivering the chattel, may require the persons offered as sureties to submit to an examination, before the officer who takes the acknowledgment of the undertaking, as where persons are offered to him as bail upon an arrest. The sureties are entitled to be substituted as defendants in an action, brought as prescribed in the last section, as if the chattel had been levied upon by virtue of an execution.

From Co. Proc., § 216.

§ 1712. When agent, etc., may make affidavit for replevin or return.

The affidavit, to be delivered to the sheriff in behalf of the plaintiff, with a requisition to replevy a chattel, may be made by the plaintiff's agent or attorney, if the material facts are within his personal knowledge; or if the plaintiff is not within the county where the attorney resides, or has his office, or is not capable of making the affidavit. The affidavit, to be delivered to the sheriff, either in behalf of the defendant, with a notice that he requires the return of the chattel, or in behalf of a person, not a party, who makes a claim as prescribed in section 1709 of this act, may be made by an agent or attorney, if the material facts are within his personal knowledge, or if the defendant or claimant, as the case may be, is not within the county where the property was replevied, and capable of making the affidavit. When the affidavit is made by an attorney or agent, he must state therein what allegations, if any, are made upon his information and belief; and he must set forth therein the grounds of his belief, as to all matters not stated upon his knowledge, and the reason why the affidavit is not made by the party or the claimant.

New.

§ 1713. Second and subsequent replevin; proceedings thereupon.

Where the sheriff has replevied a part only of a chattel, or of two or more chattels, described in the plaintiff's affidavit, and has

served upon the defendant the papers required upon such a replevin, the plaintiff may, at any time before the service of a copy of the defendant's answer, or before judgment by default, for want of an appearance or pleading, require the same or any other sheriff, to replevy any other part thereof. For that purpose, he must deliver to the sheriff an affidavit, containing the same allegations, and a requisition and undertaking, with respect to the part yet to be replevied, as if the action was brought to recover that part only. Where a second or subsequent replevin is made, as prescribed in this section, the proceedings are the same, as if a former replevin had not been made.

New.

§ 1714. Replevin, where order of arrest has been granted.

Where an order of arrest is granted, as prescribed in title first of chapter seventh of this act, the plaintiff's right to a replevin is subject to the following regulations:

1. If the defendant has been arrested, pursuant to the order, a subsequent replevin cannot be made of a chattel, with respect to which the order was granted.

2. If the defendant has not been arrested, a subsequent replevin of a chattel, with respect to which the order was granted, supersedes the order.

New. See § 550, subd. 1, ante.

§ 1715. Return, etc., by sheriff.

The sheriff must, within twenty days after he has delivered a chattel replevied by him, to the party entitled to the possession thereof, or to a third person, as prescribed in this article, file with the clerk the plaintiff's affidavit, and the accompanying requisition, with a return, stating in what manner he has executed the latter. If he has omitted to replevy a part of the chattel, or of two or more chattels, described in the affidavit, the return must state the cause of the omission.

From Co. Proc., § 217.

§ 1716. Id.; how compelled.

If the sheriff fails to comply with the last section, either party may require him to do so, within ten days after service of a notice to that effect, or to show cause, at a term of the court designated in the notice, why he should not be punished for a contempt of the court. The notice may be served at any time before final judgment, except that it cannot be served on the part of the defendant, before answer. An omission to comply with such a notice is punishable as a contempt of the court.

New.

§ 1717. Replevin papers to be made part of judgment-roll, etc.

The plaintiff's affidavit, with the accompanying requisition, and the return of the sheriff, must be made a part of the judgment-roll in the action; and a copy of each of them must be furnished to the court, or the referee, upon the trial of an issue of fact, with a copy of the summons and of the pleadings.

New.

§ 1718. Action not affected by failure to replevy.

The plaintiff may proceed in the action, and recover therein the chattel, or its value, although he has not required the sheriff to replevy it, or the sheriff has not been able to replevy it.

From 2 R. S. 525 (Part 3, c. 8, tit. 12), § 19.

§ 1719. When and how plaintiff may abandon his claim as to part.

Where part only of two or more distinct chattels, specified in the complaint, has been replevied, the plaintiff's attorney may, with or before the notice of trial, serve upon the defendant's attorney a notice, that he abandons so much of his claim, as relates to those which have not been replevied; and thenceforth the proceedings are the same, as if the action had been brought to recover only the chattels which have been replevied. A copy of the notice must be furnished to the court, or to the referee, upon the trial of an issue of fact, with a copy of the summons and of the pleadings.

New.

§ 1720. Title; how stated in pleading.

An allegation, in a pleading interposed by either party, to the effect that the party pleading, or a third person, was, at the time when the action was commenced, or the chattel was replevied, as the case may be, the owner of the chattel, or that it was then his property, is a sufficient statement of title, unless the right of action or defence rests upon a right of possession, by virtue of a special property; in which case, the pleading must set forth the facts, upon which the special property depends, so as to show, that at the time when the action was commenced, or the chattel was replevied, as the case may be, the party pleading, or the third person, was entitled to the possession of the chattel.

New.

§ 1721. Taking, etc.; how stated in complaint.

Where the complaint contains a sufficient statement of the plaintiff's title, a general allegation, that the defendant wrongfully took the chattel, is sufficient, without setting forth the facts, showing that the taking was wrongful. Where the taking of the chattel is not complained of, but the action is founded upon its wrongful detention, the complaint must set forth the facts, showing that the detention was wrongful.

From 2 R. S. 523 (Part 3, c. 8, tit. 12), § 36.

§ 1722. Damages when chattel injured, etc., by defendant.

Where the plaintiff recovers a chattel which was injured, or otherwise depreciated in value, while it was in the possession or under the control of the defendant, under such circumstances, that the plaintiff might recover damages for the injury or depreciation, in an action brought against the defendant therefor, he may recover the same damages, in an action brought as prescribed in this article. In that case, he must set forth the facts in his complaint, and demand judgment for damages accordingly.

New.

§ 1723. Answer of title in third person.

The defendant may by answer defend, on the ground that a third person was entitled to the chattel, without connecting himself with the latter's title.

New.

§ 1724. Answer that property was distrained doing damage.

Where the defence is, that a chattel, to recover which the action is brought, was distrained doing damage, an allegation

that the defendant, or the person by whose command he acted, was then lawfully possessed of the real property, and that the chattel was distrained, while it was doing damage thereupon, is sufficient, without setting forth the title to the real property.

From Co. Proc., § 166; 2 R. S. 528 (Part 3, c. 8, tit. 12), § 37.

§ 1725. Defendant may demand judgment for return.

Where a chattel has been replevied and delivered to the plaintiff, or to a person not a party to the action, as prescribed in the foregoing sections of this article, the defendant's attorney may, within the time allowed to him for the service of a notice of trial, serve upon the plaintiff's attorney, a notice, that the defendant demands judgment for the return of the chattel, or for its value, either with or without damages for the detention thereof. Upon the trial, a copy of such a notice must be furnished to the court or referee, with a copy of the summons and of the pleadings.

New.

§ 1726. Verdict, etc., what to state.

The verdict, report, or decision must fix the damages, if any, of the prevailing party. Where it awards to the plaintiff a chattel, which has not been replevied, or where it awards to the prevailing party a chattel, which has been replevied, and afterwards delivered by the sheriff to the unsuccessful party, or to a person not a party, it must also, except in a case specified in the next section, fix the value of the chattel, at the time of the trial.

From Co. Proc., § 261, first sentence.

§ 1727. Substitute in certain cases for finding as to value.

A verdict, report, or decision, in favor of the defendant, shall not fix the value of the chattel, in either of the following cases:

1. Where the plaintiff is the general owner of the chattel; but it was rightfully distrained doing damage, and its value is greater than the damages sustained by the defendant, by the injury for which it was distrained; in which case, those damages must be fixed.

2. Where the plaintiff is the general owner of the chattel, but the defendant had a special property therein, and the value of the chattel is greater than the value of the special property, or the sum charged upon the chattel by reason thereof; in which case, the value of the special property, or the sum so charged, must be fixed.

In either of the cases specified in this section, the verdict, report, or decision must set forth the reason, why the value of the chattel is not fixed.

New.

§ 1728. Verdict, etc., for part of several chattels; judgment thereupon.

Where the action is brought to recover two or more chattels, the verdict, report, or decision may award to one party one or more distinct chattels, which can be identified, and set apart from the others, and the residue to the other party; and, if necessary, the complaint must be amended so as to conform thereto. The final judgment, rendered thereupon, must award to each party the same relief, with respect to the finding in his favor, as if separate judgments were rendered; except that, where

each party is entitled to an absolute award of a sum of money, against the other, the smaller sum must be deducted from the greater, and the balance only must be awarded.

New.

§ 1729. Damages, how ascertained on default.

Where the plaintiff is entitled to judgment by default, for want of an appearance or pleading, the court, to which he applies for judgment, may ascertain and determine the damages to which he is entitled, and the value of the chattel, if necessary; or may direct a reference, or a writ of inquiry, for that purpose.

New.

§ 1730. Final judgment; docketing the same.

Final judgment for the plaintiff must award to him possession of the chattel recovered by him, with his damages, if any. If a chattel recovered was not replevied, or if, after it was replevied, it was delivered to the defendant, or to a person not a party, as prescribed in this article, the final judgment must also award to the plaintiff the sum fixed as the value thereof, to be paid by the defendant, if possession thereof is not delivered to the plaintiff. If the defendant has demanded judgment for the return of a chattel, which was replevied, and afterwards delivered to the plaintiff, or to a person not a party, as prescribed in this article, final judgment in his favor therefor must award to him possession thereof, with his damages, if any; and it must also award to him the sum fixed as the value thereof, to be paid by the plaintiff, if possession is not delivered to the defendant. But if the case is one of those specified in section 1727 of this act, final judgment in favor of the defendant must award to him the sum, fixed as therein specified, and, if it is not collected, the delivery of the chattel; or, if the chattel has not been replevied, or has been returned to him after replevin, that he is entitled to possession thereof, until the sum so awarded is collected, or otherwise paid. The judgment may be docketed, and the docket thereof creates a lien, as if it was a judgment for the full amount of the money, including costs, which it awards, either absolutely or conditionally.

From 2 R. S. 582 (Part 3, c. 8, tit. 12), § 61; Co. Proc., § 277.

§ 1731. Execution; contents thereof.

An execution for the delivery of the possession of a chattel, and to satisfy, out of the property of the judgment debtor, a sum of money contingently awarded against him, must contain, in addition to the other matters prescribed by law, the following directions:

1. Where the judgment is rendered in favor of the defendant, in a case specified in section 1727 of this act, the execution must require the sheriff to deliver possession of the chattel to the defendant, unless the plaintiff, before the delivery, pays to him the sum of money awarded to the defendant, with interest and the sheriff's fees; and, in case the chattel cannot be found within his county, then to satisfy that sum out of the property of the plaintiff.

2. In any other case, where the judgment awards a sum of money, if possession of the chattel is not delivered to the prevailing party, the execution must require the sheriff, if the chattel cannot be found within his county, to satisfy the sum so awarded, with interest and his fees, out of the property of the party against whom the judgment is rendered.

A direction to satisfy a sum of money out of property, as prescribed in this section, must be in the form required by law for a like direction, where an execution against property is issued upon a judgment for a sum of money.

From Co. Proc., § 289, subd. 4; 2 R. S. 530, § 50.

§ 1733. Id.; sheriff's power to take chattel.

For the purpose of taking possession of a chattel, by virtue of such an execution, the powers of the sheriff are the same, as where he is required to replevy a chattel.

From 2 R. S. 530, § 51.

§ 1733. Action on undertaking; when maintainable.

A plaintiff, who has recovered a final judgment, cannot maintain an action against the sureties in an undertaking, given in behalf of the defendant to procure a return of the chattel, or against the bail of a defendant, who has been arrested, until after the return, wholly or partly unsatisfied or unexecuted, of an execution in his favor for the delivery of the possession of the chattel, or to satisfy a sum of money out of the property of the defendant, or for both purposes, as the case requires. A defendant, who has recovered a final judgment, cannot maintain an action against the sureties in the plaintiff's undertaking, given to procure a replevin, until after a like return of a similar execution against the plaintiff.

From 2 R. S. 533, § 64.

§ 1734. Sheriff's return, evidence therein.

In such an action against the sureties, the sheriff's return to the execution is presumptive evidence of a failure to deliver, or to return a chattel, or to pay a sum of money, according to the terms of the undertaking.

From 2 R. S. 533, § 65.

§ 1735. Injury, etc., no defence.

It is not a defence to such an action, that the chattel was injured or destroyed, after it was replevied, unless the injury or destruction was effected by the act, or with the consent of the plaintiff in the action, or occurred after the chattel was taken by virtue of the execution.

New. See Suydam v. Jenkins, 3 Sandf. S. C. 614.

§ 1736. Abatement and revival of action.

In an action to recover a chattel, the cause of action survives or continues, notwithstanding the death of either party, in favor of or against his executor or administrator. Where the court makes an order, directing the abatement of such an action, as prescribed in section 761 of this act, an action may be maintained, upon an undertaking, given for the purpose of procuring a delivery or return of a chattel, as if final judgment, awarding to the adverse party possession thereof, had been rendered in the first action, and an execution thereupon had been returned unexecuted and unsatisfied; except that damages cannot be recovered therein for a wrongful taking, withholding, or detention. An action to recover the chattel cannot be maintained, after an action has been commenced upon an undertaking, as prescribed in this section.

New.

ARTICLE SECOND.

Action to foreclose a lien upon a chattel.

Sec. 1737. Action; when and in what courts maintainable.
1738. Warrant to seize chattel; proceedings thereupon.
1739. Judgment.
1740. Action in inferior court.
1741. Application of this article.

§ 1737. [Omitted; see Table, p. iii.] Action; when and in what courts maintainable.

An action may be maintained to foreclose a lien upon a chattel for a sum of money, in any case where such a lien exists at the commencement of the action. The action may be brought in any court, of record or not of record, which would have jurisdiction to render a judgment, in an action founded upon a contract, for a sum equal to the amount of the lien.

From L. 1869, c. 738, § 1.

§ 1738. [Omitted; see Table, p. iii.] Warrant to seize chattel; proceedings thereupon.

Where the action is brought in the supreme court, the city court of the city of New York, or a county court, if the plaintiff is not in possession of the chattel, a warrant may be granted by the court, or a judge thereof, commanding the sheriff to seize the chattel, and safely keep it to abide the final judgment in the action. The provisions of title third of chapter seven of this act apply to such warrant, and to the proceedings to procure it and after it has been issued, as if it was a warrant of attachment, except as otherwise expressly prescribed in this article.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1739. [Omitted; see Table, p. iii.] Judgment.

In an action brought in a court specified in the last section, final judgment, in favor of the plaintiff, must specify the amount of the lien, and direct a sale of the chattel to satisfy the same and the costs, if any, by a referee appointed thereby, or an officer designated therein, in like manner as where a sheriff sells personal property by virtue of an execution; and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the amount of the lien, and the costs of the action. It must also provide for the payment of the surplus to the owner of the chattel, and for the safe keeping of the surplus, if necessary, until it is claimed by him. If a defendant, upon whom the summons is personally served, is liable for the amount of the lien, or for any part thereof, it may also award payment accordingly.

From L. 1869, c. 738, § 3.

§ 1740. [Omitted; see Table, p. iii.] Action in inferior court.

Where the action is brought in a court, other than one of those specified in the last section but one, if the plaintiff is not in possession of the chattel, a warrant, commanding the proper officer to seize the chattel, and safely keep it to abide the judgment, may be issued, in like manner as a warrant of attachment may be issued in an action founded upon a contract, brought in the same court; and the provisions of law, applicable to a warrant of attachment, issued out of that court, apply to a warrant, issued as prescribed in this section, and to the proceedings to procure it, and after it

has been issued; except as otherwise specified in the judgment. A judgment in favor of the plaintiff, in such an action, must correspond to a judgment, rendered as prescribed in the last section, except that it must direct the sale of the chattel by an officer to whom an execution, issued out of the court, may be directed; and the payment of the surplus, if its safe keeping is necessary, to the county treasurer, for the benefit of the owner.

From L. 1869, c. 738, §§ 1-3.

§ 1741. [Omitted; see Table, p. iii.] Application of this article.

This article does not affect any existing right or remedy to foreclose or satisfy a lien upon a chattel, without action; and it does not apply to a case, where another mode of enforcing a lien upon a chattel is specially prescribed by law.

From Id., § 5.

CHAPTER XV.

Special Provisions, Regulating Other Particular Actions and Rights of Action, and Actions by or against Particular Parties.

TITLE I.— Matrimonial Actions.
TITLE II.— Actions Relating to a Corporation.
TITLE III.— Actions Relating to the Estate of a Decedent.
TITLE IV.—Other Special Actions and Rights of Action.
TITLE V.— Other Actions by or against Particular Parties.

TITLE I.

Matrimonial actions.

Article 1. Action to annul a void or voidable marriage.
2. Action for a divorce.
3. Action for a separation.
4. Provisions applicable to two or more of the actions specified in this title.

ARTICLE FIRST.

Action to annul a void or voidable marriage.

Sec. 1742. Action by woman, married under 16, to annul marriage.
1743. In what other cases marriage may be annulled.
1744. Action when party was under the age of consent.
1745. Id.; when former husband or wife was living.
1746. Id.; where party was an idiot.
1747. Id.; where party was a lunatic.
1748. Action by next friend of idiot or lunatic.
1749. Issue; when entitled to succeed, etc.
1750. Action on the ground of force, fraud, etc.
1751. Custody, maintenance, etc., of issue of such a marriage.
1752. Action on the ground of physical incapacity.
1753. Certain proceedings regulated in action to annul marriage.
1754. Judgment annulling a marriage; how far conclusive.
1755. How next friend of infant, lunatic, etc., allowed to sue, etc.

§ 1742. [Am'd, 1887.] Action by woman, married under 16, to annul marriage.

An action may be maintained, by the woman, to procure a judgment, declaring a marriage contract void, and annulling the marriage, under the following circumstances:

1. Where the plaintiff had not attained the age of sixteen years at the time of the marriage.

2. Where the marriage took place without the consent of her father, mother, guardian, or other person having the legal charge of her person.

3. Where it was not followed by consummation or cohabitation, and was not ratified by any mutual assent of the parties, after the plaintiff attained the age of sixteen years.

From L. 1841, c. 257. Am'd by L. 1887, c. 22. See § 7 of the Domestic Relations Law, which declares the age of consent to marry to be eighteen years, but does not amend this section.

§ 1743. [Am'd, 1916.] In what other cases marriage may be annulled.

An action may also be maintained to procure a judgment, declaring a marriage contract heretofore or hereafter entered into void and annulling the marriage, for either of the following causes, existing at the time of the marriage:

1. That one or both of the parties had not attained the age of

legal consent or the age under which the consent of parents or guardians was required by the laws of the state where the marriage was contracted.

2. That the former husband or wife of one of the parties was living, and that the marriage with the former husband or wife was then in force.

3. That one of the parties was an idiot or a lunatic.

4. That the consent of one of the parties was obtained by force, duress, or fraud.

5. That one of the parties was physically incapable of entering into the marriage state. But an action can be maintained, under this subdivision, only where the incapacity continues, and is incurable.

From 2 R. S. 142 (Part 2, c. 8, tit. 1), § 20; L. 1862, c. 246, § 2; L. 1916, c. 605 (in effect Sept. 1, 1916).

§ 1744. [Am'd, 1916.] Action when party was under the age of consent.

An action to annul a marriage heretofore or hereafter contracted, on the ground that one of the parties had not attained the age of legal consent, or the age under which the consent of parents or guardians was required by the laws of the state where the marriage was contracted, may be maintained by the infant, or by either parent of the infant, or by the guardian of the infant's person; or the court may allow the action to be maintained by any person, as the next friend of the infant. But a marriage shall not be annulled, at the suit of a party who was of the age under which the consent of parents or guardians was required by the laws of the state where the marriage was contracted when it was contracted, or where it appears that the parties, for any time after they attained that age, freely cohabited as husband and wife.

From 2 R. S. 142, § 21. Am'd by L. 1916, c. 605 (in effect Sept. 1, 1916).

§ 1745. [Am'd, 1882, 1913.] Id.; when former husband or wife was living.

An action to annul a marriage, upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force, may be maintained by either of the parties during the life-time of the other, or by the former husband or wife. Where it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead or that the former marriage had been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, the issue of the subsequent marriage, born or begotten before the final judgment, are deemed for all purposes, the legitimate children of the parent, who at the time of the marriage was competent to contract, and are entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of said parent; and the issue so entitled must be specified in the judgment, and the innocent party must be awarded their custody, and he or she is entitled to appoint a guardian of their persons by will.

This section shall be construed to extend to all cases where the judgment or decree of nullity of such subsequent marriage is rendered after the passage of this act, whether such subsequent marriage was contracted before or after the passage hereof.

From Id., §§ 22, 23. Am'd by L. 1882, c. 401; L. 1913, c. 444 (in effect May 8, 1913).

§ 1746. Id.; where party was an idiot.

An action to annul a marriage, on the ground that one of the parties thereto was an idiot, may be maintained, at any time during the life-time of either party, by any relative of the idiot, who has an interest to avoid the marriage.

From 2 R. S. 142, § 24.

§ 1747. Id.; where party was a lunatic.

An action to annul a marriage, on the ground that one of the parties thereto was a lunatic, may be maintained, at any time during the continuance of the lunacy, or, after the death of the lunatic in that condition, and during the life of the other party to the marriage, by any relative of the lunatic, who has an interest to avoid the marriage. Such an action may also be maintained by the lunatic, at any time after restoration to a sound mind; but in that case, the marriage shall not be annulled, if it appears that the parties freely cohabited as husband and wife, after the lunatic was restored to a sound mind.

From Id., §§ 25, 27.

§ 1748. Action by next friend of idiot or lunatic.

Where no relative of the idiot or lunatic brings an action to annul the marriage, as prescribed in either of the last two sections, the court may allow an action for that purpose to be maintained, at any time during the life-time of both the parties to the marriage, by any person as the next friend of the idiot or lunatic. But this section does not apply, where the marriage might have been annulled, at the suit of the lunatic, as prescribed in the last section.

From Id., § 26.

§ 1749. [Am'd, 1903.] Issue; when entitled to succeed, etc.

A child of a marriage, which is annulled on the ground of the idiocy or lunacy of one of its parents, is deemed, for all purposes, the legitimate child of the parent who is of sound mind. A child of a marriage, which is annulled on the ground that one or both of the parties had not attained the age of legal consent, is deemed, for all purposes, the legitimate child of both parents.

From Id., § 28. Am'd by L. 1903, c. 225 (in effect Sept. 1, 1903).

§ 1750. Action on the ground of force, fraud, etc.

An action to annul a marriage, on the ground that the consent of one of the parties thereto was obtained by force, duress, or fraud, may be maintained, at any time, by the party whose consent was so obtained. Such an action may also be maintained, during the life-time of the other party, by the parent or the guardian of the person of the party, whose consent was so obtained, or by any relative of that party, who has an interest to avoid the marriage. But a marriage shall not be annulled on the ground of force or duress, if it appears that, at any time before the commencement of the action, the parties thereto voluntarily cohabited as husband and wife; or on the ground of fraud, if it appears that, at any time before the commencement thereof, the parties voluntarily cohabited as husband and wife, with a full knowledge of the facts constituting the fraud.

From Id., §§ 30, 31; L. 1862, c. 246.

§ 1751. Custody, maintenance, etc., of issue of such a marriage.

The court must, upon the application of the plaintiff, award the custody of the children of a marriage, which is annulled on the ground of force, duress, or fraud, to the innocent parent, unless it appears that the latter is unfit, for any reason, to have the custody of one or more of the children, in which case the court must give such directions relating thereto, as the interests of the child or children require. The judgment may make provision for the education and maintenance of the children, out of the property of the guilty parent.

From 2 R. S. 142, § 32.

§ 1752. [Am'd, 1895.] Action on the ground of physical incapacity.

An action to annul a marriage, on the ground that one of the parties was physically incapable of entering into the marriage state, may be maintained by the injured party against the party whose incapacity is alleged; or such an action may be maintained by the party who was incapable against the other party, provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did not know it was incurable. Such an action must be commenced before five years have expired since the marriage.

From Id., § 33. Am'd by L. 1895, c. 809.

§ 1753. Certain proceedings regulated in action to annul marriage.

In an action brought as prescribed in this article, a final judgment, annulling the marriage, shall not be rendered by default, for want of an appearance or pleading, or upon the trial of an issue, without proof of the facts, upon which the allegation of nullity is founded. And the declaration or confession of either party to the marriage is not alone sufficient as proof; but other satisfactory evidence of the facts must be produced. In such an action, except where it is founded upon an allegation of the physical incapacity of one of the parties thereto, the court must, upon the application of either of the parties, make an order directing the trial, by a jury, of all the issues of fact; or it may, of its own motion, make an order directing the trial, by a jury, of one or more issues of fact; for which purpose, the questions to be tried must be prepared and settled, as prescribed in section 970 of this act.

From 2 R. S. 142, §§ 35, 36; Id., 175, § 45.

§ 1754. Judgment annulling a marriage; how far conclusive.

A final judgment, annulling a marriage, rendered during the life-time of both the parties, is conclusive evidence of the invalidity of the marriage, in every court, of record or not of record, in any action or special proceeding, civil or criminal. Such a judgment, rendered after the death of either party to the marriage, is conclusive only as against the parties to the action, and those claiming under them.

From 2 R. S. 142, § 37.

§ 1755. How next friend of infant, lunatic, etc., allowed to sue, etc.

An order, allowing a person to maintain an action, as the next friend of an infant, as prescribed in section 1744 of this act, or as the next friend of an idiot or lunatic, as prescribed in section 1748 of this act, may be granted by the court, in its discretion, without notice, or upon notice to such persons and in such a manner, as it deems proper. A motion to vacate such an order must be made at a term held by the judge who granted it, unless he is dead, out of office, or unable to hear it by reason of sickness or otherwise; or unless he expressly directs it to be heard at a term held by another judge. But where such an order has been granted, the court, to which application for final judgment is made, may dismiss the complaint, if justice so requires, although, in a like case, the party to the marriage, if plaintiff, would be entitled to judgment.

New.

ARTICLE SECOND.

Action for a divorce.

Sec. 1756. In what cases action may be maintained.
1757. Answer; mode of trial; judgment by default.
1758. When divorce denied, although adultery proved.
1759. Regulations when action brought by wife.
1760. Id.; when action brought by husband.
1761. Regulation when action brought by either husband or wife.

§ 1756. In what cases action may be maintained.

In either of the following cases, a husband or a wife may maintain an action, against the other party to the marriage, to procure a judgment, divorcing the parties and dissolving the marriage, by reason of the defendant's adultery.

1. Where both parties were residents of the State, when the offence was committed.
2. Where the parties were married within this State.
3. Where the plaintiff was a resident of the State, when the offence was committed, and is a resident thereof, when the action is commenced.
4. Where the offence was committed within the State, and the injured party, when the action is commenced, is a resident of the State.

From 2 R. S. 144 (Part 2, c. 3, tit. 1), § 38; L. 1862, c. 246, § 1.

§ 1757. [Am'd, 1899, 1911.] Answer; mode of trial; judgment by default.

1. The answer of the defendant may be made, without verifying it, notwithstanding the verification of the complaint, except that an answer containing a counterclaim, which charges adultery must be verified in respect of such counterclaim, where the complaint is verified. If the answer puts in issue the allegation of adultery, the court must, upon the application of either party, or it may, of its own motion, make an order directing the trial, by a jury, of that issue; for which purpose the questions to be tried must be prepared and settled, as prescribed in section 970 of this act. If the answer does not put in issue the allegation of adultery, or if the defendant makes default in appearing or pleading, the plaintiff before he is entitled to judgment, must nevertheless satisfactorily prove the material allegations of his complaint, and also, by his own testimony or otherwise, that there is no judgment or decree, in any court of the State of competent jurisdiction, against him in favor of the defendant for a divorce on the ground of adultery.

2. In an action brought to obtain a divorce on the ground of adultery, the plaintiff or defendant may serve a copy of his pleading on the co-respondent named therein. At any time within twenty days after such service on said co-respondent, he may appear to defend such action, so far as the issues affect such co-respondent. If no such service be made, then at any time before the entry of judgment any co-respondent named in any of the pleadings shall have the right, at any time before the entry of judgment, to appear either in person or by attorney, in said action and demand of plaintiff's attorney a copy of the summons and complaint, which must be served within ten days thereafter, and he may appear to defend such action, so far as the issues affect such co-respondent. In case no one of the allegations of adultery controverted by such co-respondent shall be proved, such co-respondent shall be entitled to a bill of costs against the person naming him as such co-respondent, which bill of costs shall consist only of the sum now allowed by law as a trial fee, and dis-

bursements, and such co-respondent shall be entitled to have an execution issue for the collection of the same.

From 2 R. S. 144, §§ 39, 40, 41; L. 1877, c. 168. Am'd by L. 1899, c. 661; L. 1911, c. 311 (in effect Sept. 1, 1911).

§ 1758. When divorce denied, although adultery proved. In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

1. Where the offence was committed by the procurement or with the connivance of the plaintiff.

2. Where the offence charged has been forgiven by the plaintiff. The forgiveness may be proved, either affirmatively, or by the voluntary cohabitation of the parties, with the knowledge of the fact.

3. Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery, by the plaintiff, of the offence charged.

4. Where the plaintiff has also been guilty of adultery, under such circumstances, that the defendant would have been entitled, if innocent, to a divorce.

From 2 R. S. 144, § 42.

§ 1759. [Am'd, 1894, 1895, 1900.] Regulations when action brought by wife. Where the action is brought by the wife, the following regulations apply to the proceedings:

1. The legitimacy of any child of the marriage, born or begotten before the commencement of the action, is not affected by the judgment dissolving the marriage.

2. The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of plaintiff, as justice requires, having regard to the circumstances of the respective parties; and may, by order, upon the application of either party to the action, and after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment whether heretofore or hereafter rendered, annul, vary or modify such a direction. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained.

3. If, when final judgment is rendered, dissolving the marriage, the plaintiff is the owner of any real property; or has, in her possession, or under her control, any personal property, or thing in action, which was left with her by the defendant, or acquired by her own industry, or given to her by bequest or otherwise; or if she is or may thereafter become entitled to any property, by the decease of a relative intestate; the defendant shall not have any interest therein, absolute or contingent, before or after her death.

4. Where final judgment is rendered dissolving the marriage, the plaintiff's inchoate right of dower, in any real property, of which the defendant then is or was theretofore seized, is not affected by the judgment.

From 2 R. S. 144, §§ 43, 45, 46. Am'd by L. 1894, c. 729; L. 1895, c. 884; L. 1900, c. 742 (in effect Sept. 1, 1900).

§ 1760. Id.; when action brought by husband.

Where the action is brought by the husband, the following regulations apply to the proceedings:

1. The legitimacy of a child, born or begotten before the commission of the offence charged, is not affected by a judgment dissolving the marriage; but the legitimacy of any other child of the wife may be determined, as one of the issues in the action. In the absence of proof to the contrary, the legitimacy of all the children, begotten before the commencement of the action, must be presumed.

2. A judgment dissolving the marriage does not impair, or otherwise affect, the plaintiff's rights and interests, in and to any real or personal property, which the defendant owns or possesses, when the judgment is rendered.

3. Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of the plaintiff's real property, or to a distributive share in his personal property.

From 2 R. S. 144, §§ 44, 47, 48.

§ 1761. [Added, 1913.] Regulations when action brought by either husband or wife.

Whenever the relation of husband and wife ceases by the entry of a judgment dissolving the marriage, the defendant guilty of adultery is not entitled to any interest in any policy of insurance on the life of the plaintiff, wherein such defendant is named as a beneficiary, and the plaintiff may apply to the court granting the final decree or to a special term of the supreme court on notice to the defendant, or the attorney who appeared for defendant in action for divorce, and to the insurance company issuing the policy or policies, for an order directing the insurance company issuing the policy or policies to substitute therein such beneficiary as the plaintiff may nominate. In case where it is shown that the defendant has contributed from his or her separate estate toward the payment of the premiums on such policy, the court shall grant such order on such terms as in the discretion of the court shall be equitable. This section shall also apply in like manner when the defendant obtains a decree against the plaintiff on a counterclaim.

Added by L. 1913, c. 536 (in effect Sept. 1, 1913).

ARTICLE THIRD.

Action for a separation.

Sec. 1762. For what causes action may be maintained.
1763. Id.; in what cases.
1764. Requisites of complaint.
1765. Defendant may set up plaintiff's misconduct.
1766. Support, maintenance, etc., of wife and children.
1767. Judgment for separation may be revoked.

§ 1762. For what causes action may be maintained.

In either of the cases specified in the next section, an action may be maintained, by a husband or wife, against the other party to the marriage, to procure a judgment, separating the parties from bed and board, forever, or for a limited time, for either of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.
2. Such conduct, on the part of the defendant towards the plaintiff, as may render it unsafe and improper for the former to cohabit with the latter.
3. The abandonment of the plaintiff by the defendant.
4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

From 2 R. S. 146 (Part 2, c. 8, tit. 1), §§ 50, 51.

§ 1763. Id.; in what cases.

Such an action may be maintained, in either of the following cases:

1. Where both parties are residents of the State, when the action is commenced.
2. Where the parties were married within the State, and the plaintiff is a resident thereof, when the action is commenced.
3. Where the parties, having been married without the State, have become residents of the State, and have continued to be residents thereof at least one year; and the plaintiff is such a resident, when the action is commenced.

Id.

§ 1764. Requisites of complaint.

The complaint in such an action must specify particularly the nature and circumstances of the defendant's misconduct, and must set forth the time and place of each act complained of, with reasonable certainty.

From Id., § 52.

§ 1765. Defendant may set up plaintiff's misconduct.

The defendant may set up, in justification, the misconduct of the plaintiff; and if that defence is established to the satisfaction of the court, the defendant is entitled to judgment.

From Id., § 53.

§ 1766. Support, maintenance, etc., of wife and children.

Where the action is brought by the wife, the court may, in the final judgment of separation, give such directions, as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard

to the circumstances of the respective parties. And the court may, in such an action, render a judgment, compelling the defendant to make the provision specified in this section, where, under the circumstances of the case, such a judgment is proper, without rendering a judgment of separation.

From Id., §§ 54, 55.

§ 1767. Judgment for separation may be revoked.

Upon the joint application of the parties, accompanied with satisfactory evidence of their reconciliation, a judgment for a separation, forever, or for a limited period, rendered as prescribed in this article, may be revoked, at any time, by the court which rendered it, subject to such regulations and restrictions as the court thinks fit to impose.

From Id., § 56.

ARTICLE FOURTH.

Provisions applicable to two or more of the actions specified in this title.

Sec. 1768. Married woman deemed a resident in certain cases.
1769. Alimony, expenses of action, and costs; how awarded.
1770. What is deemed a counterclaim.
1771. Custody and maintenance of children and support of plaintiff.
1772. Support, maintenance, etc., of wife and children. Sequestration.
1773. Id.; when enforced by punishment for contempt.
1774. Regulations respecting judgment by default.

§ 1768. Married woman deemed a resident in certain cases.

If a married woman dwells within the State, when she commences an action against her husband, as prescribed in either of the last two articles, she is deemed a resident thereof, although her husband resides elsewhere.

From 2 R. S. 147 (Part 2, c. 8, tit. 1), § 57.

§ 1769. Alimony, expenses of action, and costs; how awarded.

Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband to pay any sum or sums of money, necessary to enable the wife to carry on or defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs, in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case; or the court may, in the judgment, or by an order made at any time, direct the costs to be paid out of any property sequestered, or otherwise in the power of the court.

From Id., § 58.

§ 1770. [Am'd, 1881.] What is deemed a counterclaim.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, a cause of action, against the plaintiff and in favor of the defendant, arising under either of the said articles, may be interposed, in connection with a denial of the material allegations of the complaint, as a counterclaim.

New. Am'd by L. 1881, c. 703.

§ 1771. [Am'd, 1895, 1904, 1906.] Custody and maintenance of children, and support of plaintiff.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions, or in case no such direction or directions shall have been made, amend it by inserting such direction or directions as justice requires for the custody, care, education and maintenance of any such child or children in such final judgment or order or orders. But no such appli-

cation shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained. Where an action is brought by a wife, as prescribed in article second of this chapter, and a final judgment of divorce has been rendered in her favor, the court, upon the application of the defendant on notice, and on proof of the marriage of the plaintiff after such final judgment, must by order modify such final judgment and any orders made with respect thereto, by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the plaintiff.

From 2 R. S. 147, § 59. Am'd by L. 1895, c. 891; L. 1904, c. 339; L. 1908, c. 297 (in effect Sept. 1, 1908).

§ 1772. [Am'd 1904.] Support, maintenance, etc., of wife and children. Sequestration.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, or a judgment for divorce or separation rendered in another state, upon the ground of adultery upon which an action has been brought in this state, and judgment rendered therein, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order, made as prescribed in section 1769 of this act; the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires.

From 2 R. S. 147, § 60. Am'd by L. 1904, c. 318 (in effect Sept. 1, 1904).

§ 1773. [Am'd, 1909.] Id.; when enforced by punishment for contempt.

Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in article 19 of the Judiciary Law for the punishment of a contempt of court, other than a criminal contempt. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.

New. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 1774. [Am'd, 1902, 1903, 1905.] Regulations respecting judgment.

In an action brought as prescribed in this title, a final judgment shall not be rendered in favor of the plaintiff upon the defend-

ant's default in appearing or pleading, unless either the summons and a copy of the complaint were personally served upon the defendant; or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the state, or published, pursuant to an order for that purpose, obtained as prescribed in chapter fifth of this act, contains the following words, or words to the same effect, legibly written or printed upon the face thereof, to wit: "Action to annul a marriage;" "Action for a divorce;" or "Action for a separation;" according to the article of this title, under which the action is brought. Where the summons is personally served, but a copy of the complaint is not served therewith; or where a copy of the summons and copy of the complaint are delivered to the defendant without the state, the certificate or affidavit proving service must affirmatively state, in the body thereof, that such an inscription, setting forth a copy thereof, was so written or printed upon the face of the copy of the summons delivered to the defendant. No final judgment annulling a marriage, or divorcing the parties and dissolving a marriage, shall be entered, in an action brought under either article first or article second of this title, until after the expiration of three months after the filing of the decision of the court or report of the referee. Such decision or report must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and can not be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay. Within thirty days after the expiration of said period of three months final judgment shall be entered as of course upon said decision or report, unless for sufficient cause the court in the meantime shall have otherwise ordered. Upon filing the decision of the court or report of the referee, a judgment annulling a marriage or divorcing the parties and dissolving a marriage, shall be interlocutory only and shall provide for the entry of final judgment granting such relief three months after entry of interlocutory judgment unless otherwise ordered by the court. The final judgment must be entered within thirty days after the expiration of said period of three months and can not be entered after the expiration of such period of thirty days except by order of the court on application and sufficient cause being shown for the delay. The interlocutory judgment may, in the discretion of the court, provide for the payment of alimony until the entry of final judgment; it may include a judgment for costs, when costs are awarded, in which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the entry of final judgment in said action.

New. Am'd by L. 1902, c. 264; L. 1903, c. 482; L. 1905, c. 397 (in effect Sept. 1, 1905).

TITLE II.

Actions relating to a corporation.

Article 1. Action by a corporation, and action against a corporation, to recover damages or property.
2. Judicial supervision of a corporation, and of the officers and members thereof.
3. Actions to procure the dissolution of a corporation, and actions to enforce the individual liability of the officers or members of a corporation, with or without a dissolution thereof.
4. Action by the people to annul a corporation.
5. Provisions applicable to two or more of the actions specified in this title.

ARTICLE FIRST.

Action by a corporation, and action against a corporation, to recover damages or property.

Sec. 1775. Complaint in actions by or against corporations.
1776. When proof of corporate existence unnecessary.
1777. Misnomer, when waived.
1778. Action against a corporation, upon a note, etc.
1779. When foreign corporation may sue.
1780. When foreign corporation may be sued.

§ 1775. Complaint in actions by or against corporations. In an action brought by or against a corporation, the complaint must aver that the plaintiff, or the defendant, as the case may be, is a corporation; must state whether it is a domestic corporation or a foreign corporation; and, if the latter, the state, country, or government, by or under whose laws it was created. But the plaintiff need not set forth, or specially refer to, any act or proceeding, by or under which the corporation was created.

From 2 R. S. 459 (Part 3, c. 8, tit. 4), § 13.

§ 1776. When proof of corporate existence unnecessary. In an action, brought by or against a corporation, the plaintiff need not prove, upon the trial, the existence of the corporation, unless the answer is verified, and contains an affirmative allegation that the plaintiff, or the defendant, as the case may be, is not a corporation.

From Id., § 3; L. 1864, c. 422; L. 1875, c. 508.

§ 1777. Misnomer, when waived. In an action or special proceeding, brought by or against a corporation, the defendant is deemed to have waived any mistake in the statement of the corporate name, unless the misnomer is pleaded in the answer, or other pleading in the defendant's behalf.

From 2 R. S. 459, § 14.

§ 1778. Action against a corporation upon a note, etc. In an action against a foreign or domestic corporation, to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money, upon demand, or at a particular time, an order, extending the time to answer or demur, shall not be granted, except by the court, upon notice to the plaintiff's attorney. In such an action, unless the defendant serves, with a copy of his answer or demurrer, a copy of an order of a judge, directing that the issues presented by the pleadings be tried, the plaintiff may take judgment, as in case of

default in pleading, at the expiration of twenty days after service of a copy of the complaint, either personally with the summons, or upon the defendant's attorney, pursuant to his demand therefor; or, if the service of the summons was otherwise than personal, at the expiration of twenty days after the service is complete.

From 2 R. S. 459, §§ 8, 9, 10.

§ 1779. When foreign corporation may sue.

An action may be maintained by a foreign corporation, in like manner, and subject to the same regulations, as where the action is brought by a domestic corporation, except as otherwise specially prescribed by law. But a foreign corporation cannot maintain an action, founded upon an act, or upon a liability or obligation, express or implied, arising out of, or made and entered into in consideration of, an act, which the laws of the State forbid a corporation or association of individuals to do, without express authority of law. This section does not affect the validity of a meeting of the stockholders or directors of a foreign corporation, held within the State, where such a meeting is authorized by the laws of the state, country, or government by or under which the corporation is created; or of an act, done at such a meeting, which is not in conflict with the same laws, or the laws of the State.

From Id., §§ 1, 2; L. 1873, c. 634.

§ 1780. [Am'd, 1913.] When foreign corporation may be sued.

An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

2. Where it is brought to recover real property situated within the State, or a chattel, which is replevied within the State.

3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

4. Where a foreign corporation is doing business within this State.

From Co. Proc., § 427; 2 R. S. 459, § 15; L. 1849, c. 107. Am'd by L. 1913, c. 60 (in effect Sept. 1, 1913).

ARTICLE SECOND.

Judicial supervision of a corporation, and of the officers and members thereof.

[N. B.—Of this title there has been transferred to the **General Corporation Law** of the "**Consolidated Laws**" the whole of **Article II** (comprising §§ 1781-1783); the whole of **Article III** (comprising §§ 1784-1796); the whole of **Article IV** (comprising §§ 1797-1803); and the whole of **Article V** (comprising §§ 1804-1813), except §§ 1809, 1812 and 1813 (which have, however, been amended).]

§§ 1781-1783. [Omitted; see Table, p. iii.]

ARTICLE THIRD.

Actions to procure the dissolution of a corporation, and actions to enforce the individual liability of the officers or members of a corporation, with or without a dissolution thereof.

§§ 1784-1796. [Omitted; see Table, p. iii.]

ARTICLE FOURTH.

Action by the people to annul a corporation.

§§ 1797-1803. [Omitted; see Table, p. iii.]

ARTICLE FIFTH.

Provisions applicable to two or more of the actions specified in this title.

Sec. 1809. Requisites of injunction against joint-stock associations in certain cases.
1812. Application of certain provisions to joint-stock associations.
1813. In action against stockholders, misnomer not available.

§§ 1804-1808. [Omitted; see Table, p. iii.]

§ 1809. [Am'd, 1909.] **Requisites of injunction against joint-stock associations in certain cases.**

An injunction order, suspending the general and ordinary business of a joint-stock association, consisting of seven or more persons, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application therefor, to the proper officer of the association, or to the trustee,

director, or other officer enjoined. If such an injunction order is made, otherwise than as prescribed in this section, it is void.

From L. 1870, c. 151, § 1. See § 1919, post. Am'd by L. 1909, c. 65. (See Table, p. iii, ante).

§§ 1810, 1811. [Omitted; see Table, p. iii.]

§ 1812. [Am'd, 1909.] Application of certain provisions to joint-stock associations.

Section 1809 of the Code of Civil Procedure and sections 306 and 307 of the General Corporation Law apply to an action or special proceeding, against a joint-stock association created by or under the laws of the State, or a trustee, director, or other officer thereof; or against a joint-stock association created by or under the laws of another state, government, or country, or a trustee, director, or other officer thereof, where the association does business within the State, or has, within the State, a business agency or a fiscal agency or an agency for the transfer of its stock.

From Id., § 5; L. 1875, c. 428. Am'd by L. 1909, c. 65. (See Table, p. iii, ante).

§ 1813. [Am'd, 1909.] In action against stockholders, misnomer not available.

Where an action, authorized by a law of the State, is brought against one or more persons, as stockholders of a joint-stock association, an objection to any of the proceedings cannot be taken, by a person properly made a defendant in the action, on the ground that the plaintiff has joined with him, as a defendant in the action, a person, whose name appears on the stock-books of the association, as a stockholder thereof, by the name so appearing; but who is misnamed, or dead, or is not liable for any cause. In such a case, the court may, at any time before final judgment, upon motion of either party, amend the pleadings and other papers, without prejudice to the previous proceedings, by substituting the true name of the person intended, or by striking out the name of the person who is dead, or not liable, and, in a proper case, inserting the name of his representative or successor.

From L. 1869, c. 157, § 2. Am'd by L. 1909, c. 65. (See Table, p. iii, ante).

TITLE III.

Actions relating to the estate of a decedent.

Article 1. Action by or against an executor or administrator.
2. Action by a creditor against his debtor's next of kin, legatee, heir, or devisee.
3. Action to establish or impeach a will.
4. General and miscellaneous provisions.

ARTICLE FIRST.

Action by or against an executor or administrator.

Sec. 1814. Action, etc., by and against executor, etc., to be brought in representative capacity.
1815. When personal and representative causes of action may be joined.
1816. Id.; separate dockets and executions.
1817. Regulations, when some of the executors, etc., are not summoned.
1818. Executors who have not qualified, not necessary parties.
1819. Action by legatee, etc., against executor, etc.
1820. Id.; by infant; guardian's bond.
1821. When action barred by judgment against heir, etc.
1822. [Repealed.]
1823. Decedent's real property not bound by judgment against executor, etc.
1824. Want of assets not to be pleaded by executor, etc.
1825. Leave to issue execution against executor, etc.
1826. Id.; how procured; order; and contents thereof.
1827. Security may be required from a legatee.
1828. Actions, etc., when not to abate.
1829. Execution on former judgment.
1830. Action against executor, etc., who has been superseded.
1831. False pleading by executor, etc.
1832. When inventory may be contradicted.
1833. Liability for uncollected demands.
1834. The last two sections qualified.
1835. Costs; how awarded.
1836. Id.; when awarded.

§ 1814. Action, etc., by and against executor, etc., to be brought in representative capacity.

An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be enforced against the property of the decedent, except by the special direction of the court, contained therein.

New.

§ 1815. When personal and representative causes of action may be joined.

An action may be brought against an executor or administrator, personally, and also in his representative capacity, in either of the following cases:

1. Where the complaint sets forth a cause of action against him in both capacities, or states facts, which render it uncertain, in which capacity the cause of action exists against him.

2. Where the complaint sets forth two or more causes of action against the defendant, in different capacities, all of which grow out of the same transaction, or transactions connected with the same subject of action; do not require different places or modes of trial; and are not inconsistent with each other.

In a case specified in this section, a judgment for the plaintiff for a sum of money must distinctly show, whether it is awarded against the defendant personally, or in his representative capacity.

New.

§ 1816. Id.; separate dockets and execution.

In a case specified in the last section, or where costs, to be collected out of the individual property of an executor or administrator, are awarded in an action by or against him in his representative capacity, so much of the judgment, as awards a sum of money against him personally, may be separately docketed, and a separate execution may be issued thereupon, as if the judgment contained no award against him in his representative capacity.

New.

§ 1817. Regulations, when some of the executors, etc., are not summoned.

In an action or special proceeding against two or more executors or administrators, representing the same decedent, all are considered as one person; and those who are first served with process, or first appear, must answer the plaintiff. Separate answers, by different executors or administrators cannot be required or allowed, except by direction of the court. Judgment in favor of the plaintiff may be entered, and, in a proper case, execution may be issued, against all the defendants, as if all had appeared. But this section does not affect the plaintiff's right to bring into court all the executors or administrators, who are parties.

From 2 R. S. 448 (Part 3, c. 8, tit. 3), §§ 5, 7.

§ 1818. Executors who have not qualified, not necessary parties.

One of two or more executors, to whom letters testamentary have not been issued, is not a necessary party to an action or special proceeding, in favor of or against the executors, in their representative capacity.

From L. 1838, c. 149, § 1.

§ 1819. Action by legatee, etc., against executor, etc.

If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy, or distributive share, the person entitled thereto may maintain such an action against him, as the case requires. But for the purpose of computing the time, within which such an action must be com-

menced, the cause of action is deemed to accrue, when the executor's or administrator's account is judicially settled, and not before.

From 2 R. S. 114 (Part 2, c. 6, tit. 5), § 9.

§ 1820. Id.; by infant; guardians' bond.

The guardian ad litem of an infant, in whose favor an action is brought, as prescribed in the last section, must, unless he is also the general guardian, execute and file with the clerk, before the commencement of the action, a bond to the infant, with at least two sufficient sureties, in a penalty fixed by a judge of the court conditioned that the guardian will duly account to the infant, when he attains full age, or, in case of his death, to his personal representatives, for all money or property, which the guardian may receive, by reason of the legacy or distributive share.

From Id., § 12.

§ 1821. When action barred by judgment against heir, etc.

A final judgment against an heir or devisee bars an action against the executor or administrator of the decedent, for the same cause, and every other remedy to enforce payment thereof out of the decedent's property; unless an execution against property, issued upon the judgment, has been returned wholly or partly unsatisfied, or sufficient real property to satisfy the judgment has not descended, or been devised, to the judgment debtor. But, if the judgment was recovered for a debt or legacy, expressly charged upon the estate descended or devised, the bar is absolute.

From Id., §§ 7, 8.

§ 1822. [Repealed by L. 1914, c. 448, (in effect Sept. 1, 1914). Superseded by § 2681 of this Code.]

§ 1823. Decedent's real property not bound by judgment against executor, etc.

Real property, which belonged to a decedent, is not bound, or in any way affected, by a judgment against his executor or administrator, and is not liable to be sold by virtue of an execution issued upon such a judgment, unless the judgment is expressly made, by its terms, a lien upon specific real property therein described, or expressly directs the sale thereof.

From 2 R. S. 449 (Part 3, c. 8, tit. 3), § 12.

§ 1824. Want of assets not to be pleaded by executor, etc.

In an action against an executor or administrator, in his representative capacity, wherein the complaint demands judgment for a sum of money, the existence, sufficiency, or want of assets, shall not be pleaded by either party; and the plaintiff's right of recovery is not affected thereby, except with respect to the costs to be awarded, as prescribed by law. A judgment in such an action is not evidence of assets in the defendant's hands.

New. Supersedes 2 R. S. 88, 89, §§ 31, 39, 40, and Id., 448, 450, 451, §§ 6, 19–22.

amended by chap 96 1917 Laws

§ 1825. Leave to issue execution against executor, etc.

An execution shall not be issued, upon a judgment for a sum of money, against an executor or administrator, in his representative capacity, until an order, permitting it to be issued, has been made by the surrogate, from whose court the letters were issued. Such an order must specify the sum to be collected; and the execution must be indorsed with a direction to collect that sum.

From 2 R. S. 88 (Part 2, c. 6, tit. 3), § 32.

§ 1826. Id.; how procured; order; and contents thereof.

At least six days' notice of the application for an order specified in the last section, must be personally served upon the executor or administrator, unless it appears that service cannot be so made with due diligence; in which case, notice must be given to such persons, and in such manner, as the surrogate directs, by an order to show cause why the application should not be granted. Where it appears that the assets, after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the plaintiff, are not, or will not be, sufficient to pay all the debts, legacies, or other claims of the class to which the plaintiff's claim belongs, the sum, directed to be collected by the execution, shall not exceed the plaintiff's just proportion of the assets. In that case, one or more orders may be afterwards made in like manner, and one or more executions may be afterwards issued, whenever it appears that the sum, directed to be collected by the first execution, is less than the plaintiff's just proportion.

From Id., § 32; 2 R. S. 115 (Part 2, c. 6, tit. 5), § 13.

§ 1827. Security may be required from a legatee.

Where a judgment has been rendered against an executor or administrator, for a legacy or distributive share, the surrogate, before granting an order, permitting an execution to be issued thereupon, may, and, in a proper case, must, require the applicant to file in his office, an undertaking to the defendant, in such a sum, and with such sureties, as the surrogate directs, to the effect that if, after collection of any sum of money by virtue of the execution, the remaining assets are not sufficient to pay all sums, for which the defendant is chargeable, for expenses, claims entitled to priority as against the applicant, and the other legacies or distributive shares, of the class to which the applicant's claim belongs, the plaintiff will refund to the defendant, the sum so collected, or such ratable part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency.

From 2 R. S. 114, 115 (Part 2, c. 6, tit. 5), §§ 10, 11.

§ 1828. Actions, etc., when not to abate.

An executor, administrator, or a person appointed by the surrogate, as prescribed in chapter eighteen of this act, to dispose of the real property of a decedent, is deemed a trustee, appointed by virtue of a statute, within the meaning of that expression, as used in section 766 of this act.

Supersedes 2 R. S. 77, § 40; Id., 115, § 14; L. 1850, c. 162.

§ 1829. Execution on former judgment.

An execution may be issued, in the name of an executor or administrator, in his representative capacity, upon a judgment recovered by any person who preceded him in the administration of

the same estate, in any case where it might have been issued in favor of the original plaintiff, and without a substitution.

From 2 R. S. 449 (Part 3, c. 8, tit. 3), § 13.

§ 1830. Action against executor, etc., who has been superseded.

If an executor or administrator is defendant in an action or special proceeding, pending when his powers cease, the plaintiff may, in a proper case, proceed therein against him, to charge him personally; but a judgment or other determination, thereafter rendered or made against him, is not of any force, as against the estate of the decedent, or a person succeeding to the administration thereof.

From 2 R. S. 115 (Part 2, c. 6, tit. 5), § 15.

§ 1831. False pleading by executor, etc.

An executor or administrator cannot be made personally liable to the adverse party, for a debt or for damages, by reason of his having made a false allegation in pleading.

From 2 R. S. 438 (Part 3, c. 8, tit. 3), § 10.

§ 1832. When inventory may be contradicted.

In an action or special proceeding, to which an executor or administrator is a party, wherein the question, whether he has administered the estate of the decedent, or any part thereof, is in issue, or is the subject of inquiry, and the inventory of assets, filed by him, is given in evidence, either party may rebut the same, by proof, either:

1. That any property was omitted in the inventory, or was not returned therein at its true value; or,
2. That any property has perished, or has been lost, without the fault of the executor or administrator; or has been fairly sold by him, at private or public sale, at a less price than the value so returned; or that, since the return of the inventory, it has deteriorated or enhanced in value.

From Id., § 14.

§ 1833. Liability for uncollected demands.

In such an action or special proceeding, the executor or administrator shall not be charged with a demand or right of action, included in the inventory, unless it appears that the same has been collected, or might have been collected, with due diligence.

From Id., § 15.

§ 1834. The last two sections qualified.

The last two sections do not vary any rule of evidence, respecting any proof, which an executor or administrator may now make.

From Id., § 16.

§ 1835. Costs; how awarded.

Where a judgment for a sum of money only is rendered against an executor or administrator, in an action brought against him in his representative capacity, costs shall not be awarded against him, except as prescribed in the next section.

From 2 R. S. 90 (Part 2, c. 6, tit. 3), § 41. See Co. Proc., § 317.

§ 1836. [Am'd, 1895, 1897, 1906, 1915.] Id.; when awarded, etc.

Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a

notice, published as prescribed by law, requiring creditors to present their claims and that the payment thereof was unreasonably resisted or neglected, the court may award costs and disbursements or disbursements without costs against the executor or administrator, to be collected either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court, or any county court, the facts must be certified by the judge or referee before whom the trial took place.

From 2 R. S. 90, § 41. Am'd by L. 1895, c. 595 and c. 946; L. 1897, c. 469; L. 1906, c. 60; L. 1915, c. 638 (in effect May 14, 1915).

§ 1836-a. [Added, 1911.] Actions by or against foreign executors or administrators.

An executor or administrator duly appointed in any other state, territory or district of the United States or in any foreign country may sue or be sued in any court in this state in his capacity of executor or administrator in like manner and under like restrictions as a nonresident may sue or be sued, if, within twenty days after any such executor or administrator shall commence, or appear in, any action or proceeding in any court in this state or within twenty days after he shall be required or directed by summons or otherwise to appear therein, there shall be filed in the office of the clerk of the court, in which such action or proceeding shall be brought or be pending, a copy of the letters testamentary or letters of administration issued to such executor or administrator duly authenticated as prescribed by section 2704 [1] of the code of civil procedure; in default whereof all proceedings in such action or proceeding may be stayed until such duly authenticated copy of such letters shall be so filed.

Added by L. 1911, c. 631 (in effect July 8, 1911).

[1] Section 2704 of the Code is now section 45 of the Decedent Estate Law.

ARTICLE SECOND.

Action by a creditor, against his debtor's next of kin, legatee, heir or devisee.

SEC. 1837. When action lies against next of kin, legatees, etc.
1838. Action may be joint or several.
1839. In joint action, recovery to be apportioned.
1840. Recovery in a several action.
1841. Requisites to recovery in action against legatee.
1842. Id.; in action against a preferred legatee.
1843. Liability of heirs and devisees.
1844. When action may be brought against heirs and devisees.
1845. Effect of application to sell real property.
1846. Action must be joint.
1847. Recovery to be apportioned.
1848. Requisites to recovery against heirs.
1849. Id.; against devisees.
1850. Deductions for prior recoveries.
1851. Complaint to describe land descended, etc.
1852. Judgment; when to be satisfied out of land.
1853. Id.; when not a lien on land aliened.
1854. How judgment taken, when land aliened.
1855. Classification of debts to be enforced under this article.
1856. Defence by reason of other prior or equal claims.
1857. Id.; when such a claim is paid.
1858. Action not suspended by infancy.
1859. This article not applicable, where will charges real property, etc.
1860. One action, where same person is heir, devisee, etc.

§ 1837. When action lies against next of kin, legatees, etc.

An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for that purpose, does not impair his right to maintain such an action.

From 2 R. S. 90 (Part 2, c. 6, tit. 3), § 42.

§ 1838. Action may be joint or several.

An action, specified in the last section, must be brought, either jointly against the surviving husband or wife, and all the legatees or all the next of kin, as the case may be, or at the plaintiff's election, against one of them only. But where a legacy is received by two or more persons jointly, they are deemed one legatee, within the meaning of each provision of this article, relating to legatees.

From 2 R. S. 451 (Part 3, c. 8, tit. 3), §§ 23, 26.

§ 1839. In joint action, recovery to be apportioned.

Where a joint action is brought, as prescribed in the last section, the whole sum, which the plaintiff is entitled to recover, must be apportioned among the defendants, in proportion to the legacy or distributive share, as the case may be, received by each of them; and the final judgment must award, against each defendant separately, the proportionate sum thus ascertained. The costs of the action, if the plaintiff is entitled to costs, must be apportioned in like manner; except that the expenses of serving the summons upon each defendant must be taxed against

him only; and one sheriff's fee, for returning an execution, may be taxed against each defendant, against whom any sum is awarded.

From Id., §§ 28–31, 34.

§ 1840. Recovery in a several action.

Where an action is brought against the surviving husband or wife only, or against one only of the next of kin, or legatees, the sum, which the plaintiff is entitled to recover, cannot exceed the sum which he would have been entitled to recover from the same defendant, in an action brought, as prescribed in the last section.

From Id., §§ 24, 25, 28.

§ 1841. Requisites to recovery in action against legatee.

If the action is brought against a legatee, or against all the legatees, the plaintiff must show, either

1. That no assets were delivered by the executor or administrator of the decedent, to the surviving husband or wife, or next of kin; or

2. That the value of assets, so delivered, has been recovered by some other creditor; or

3. That those assets, after payment of the expenses of administration and preferred demands, are not sufficient to satisfy the demand of the plaintiff; in which case, he can recover only for the deficiency.

From Id., § 27.

§ 1842. Id.; in action against a preferred legatee.

Where some of the legatees are preferred to others, an action may be maintained, as prescribed in the last five sections, against one or all of those who are equally preferred, or equally deferred, as if the legatees of that class were all the legatees. But where it is brought against a preferred legatee, or a class of preferred legatees, the plaintiff must show, in addition to the matters, with respect to the next of kin, required by the provisions of the last section, the same matters, with respect to each legatee, or class of legatees, to whom the defendant or defendants are preferred.

New.

§ 1843. [Omitted; see Table, p. iii.] Liability of heirs and devisees.

The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by, the decedent.

From 2 R. S. 452 (Part 3, c. 8, tit. 3), § 32.

§ 1844. [Am'd, 1909, 1915.] When action may be brought against heirs and devisees.

An action, to enforce the liability declared in section 101 of the Decedent Estate Law,[1] cannot be maintained, except in one of the following cases:

1. Where one year has elapsed since the death of the decedent, and no letters testamentary, or letters of administration, upon his estate, have been granted within the State.

2. Where eighteen months have elapsed, since letters testamentary, or letters of administration, upon his estate, were granted, within the State.

From 2 R. S. 109 (Part 2, c. 6, tit. 4), § 53. Am'd by L. 1909, c. 65; L. 1915, c. 636 (in effect May 14, 1915). (See Table, p. iii, ante.)

[1] Section 101 of the Decedent Estate Law is the same as former § 1843 of this Code, which, for convenience sake, is retained in this edition.

§ 1845. [Am'd, 1916.] Effect of application to sell real property.

Where it appears that, at the time of the commencement of an action to enforce the liability declared in section 101 of the decedent estate law, a proceeding for the judicial settlement of the accounts of the executor or administrator of decedent in which an order to dispose of real property of the decedent for the payment of his debts may be made, is pending in a surrogate's court, having jurisdiction, the proceedings in the action, subsequent to the complaint, must be stayed by the court, until the proceeding is disposed of, unless the plaintiff elects to discontinue. If an order to dispose of real property is granted, the action must be dismissed, unless the plaintiff has alleged in his complaint, or alleges in a supplemental complaint, that real property, other than that included in the decree, descended or was devised to the defendants. If the plaintiff elects to proceed under such an allegation, he is entitled to a preference in payment, out of the real property, with respect to which the allegation is made; but he cannot share, as a creditor, in the distribution of the money, arising from the disposal of the real property, described in the order, and the judgment in the action does not charge, or in any way affect, that property.

From id., § 53. Am'd by L. 1916, c. 444 (in effect May 9, 1916).

§ 1846. [Am'd, 1909.] Action must be joint.

An action against heirs or devisees, brought as prescribed in section 101 of the Decedent Estate Law and the last two sections of this act, must be brought jointly against all the heirs, to whom any real property descended from the decedent, or jointly against all the devisees, as the case may be.

From L. 1837, c. 460, § 73. Am'd by L. 1909, c. 65. (See Table, p. iii, ante.)

§ 1847. Recovery to be apportioned.

In such an action, the sum, which the plaintiff is entitled to recover, for damages and costs, must be apportioned among all the defendants, in proportion to the value of the real property descended to each heir, or devised to each devisee, as the case may be, as prescribed in section 1839 of this act, for a similar apportionment among legatees or next of kin, in proportion to the assets received by them. The final judgment must, in like manner, award against each defendant the proportionate sum, with which he is chargeable.

From 2 R. S. 455 (Part 3, c. 8, tit. 3), §§ 52, 53.

§ 1848. Requisites to recovery against heirs.

Where the action is brought against heirs, the plaintiff must show, either

1. That the decedent's assets, if any, within the State were not sufficient to pay the plaintiff's debt, in addition to the expenses of administration, and debts of a prior class; or

2. That the plaintiff has been unable, or will be unable, with due diligence, to collect his debt, by proceedings in the proper surrogate's court, and by action against the executor or administrator, and against the surviving husband or wife, legatees, and next of kin.

The executor's or administrator's account, as rendered to, and settled by, the surrogate, may be used as presumptive evidence of any of the facts, required to be shown by this section.

From 2 R. S. 452 (Part 3, c. 8, tit. 3), §§ 33, 36; L. 1859, c. 110.

§ 1849. Id.; against devisees.

Where the action is brought against devisees, the plaintiff must show, in addition to the matters specified in the last section,

either that the real property of the decedent, which descended to his heirs, was not sufficient to pay the plaintiff's debt, or that the plaintiff has been unable, or will be unable, with due diligence, to collect his debt by an action against the heirs.

From Id., 455, §§ 56, 59.

§ 1850. Deductions for prior recoveries.

Where the assets, applicable to the plaintiff's debt, were sufficient to pay a part thereof, or a part thereof has been collected from the executor or administrator, or from the surviving husband or wife, next of kin, or legatees, the plaintiff can recover only for the residue, remaining unpaid or uncollected; and if the action is against devisees, he can recover only for the residue, which the real estate descended, or the amount of his recovery against the heirs, is insufficient to discharge.

From Id., §§ 34, 57.

§ 1851. Complaint to describe land descended, etc.

The complaint must describe, with common certainty, the real property, descended or devised to the defendant; and must specify its value.

From Id., §§ 44, 60.

§ 1852. Judgment; when to be satisfied out of land.

If it appears that any of the real property, which descended or was devised to a defendant, had not been aliened by him at the time of the commencement of the action, the final judgment must direct, that the debt of the plaintiff, or the proportion thereof which he is entitled to recover against that defendant, be collected out of that real property. Such a judgment is preferred, as a lien upon that property, to a judgment obtained against the defendant, for his individual debt or demand.

From Id., §§ 47, 48.

§ 1853. Id.; when not a lien on land aliened.

But a judgment, rendered as prescribed in the last section, does not bind, and the execution thereupon cannot in any way affect, the title of a purchaser, in good faith and for value, acquired before a notice of the pendency of the action is filed, or final judgment is entered, and the judgment-roll filed.

From Id., §§ 51, 61.

§ 1854. How judgment taken, when land aliened.

If it appears that, before the commencement of the action, or afterwards and before the filing of a notice of the pendency of the action, the defendant aliened the real property descended or devised to him, or any part thereof, the plaintiff may, at his election, take a final judgment against him for the value of the property so aliened, or so much thereof as may be necessary, as in an action for the defendant's own debt.

From Id., §§ 49, 61.

§ 1855. [Am'd, 1909.] Classification of debts, to be enforced under this article.

Where the surviving husband or wife, next of kin, legatees, heirs, or devisees, are liable for demands against the decedent, as prescribed in this article or section 101 of the Decedent Estate Law, they must give preference in the payment thereof, and they are so liable therefor, in the order prescribed by law, for the payment of debts by an executor or administrator. Preference of

payment cannot be given to a demand, over another of the same class, except where a similar preference by an executor or administrator is allowed by law. The commencement of an action, under any provision of this article or section 101 of the Decedent Estate Law,[1] does not entitle the plaintiff's demand to preference over another of the same class, except as otherwise specially prescribed by law.

From Id., §§ 37, 38. Am'd by L. 1909, c. 65. (See Table, p. iii, ante).

§ 1856. Defense, by reason of other prior or equal claims.

Where it appears, in an action brought as prescribed in this article, that there are unsatisfied demands against the decedent's estate, of a class prior to that of the plaintiff's demand, the defendant is entitled to judgment, if the value of the property, which was received, devised, or inherited, as the case may be, by the class to which he belongs, does not exceed the amount of the valid demands of a prior class. If it exceeds the amount of those demands, the judgment against the defendant cannot exceed such a proportion of the plaintiff's demand, as the total amount of the valid demands of his class bears to the excess.

From Id., §§ 39, 40.

§ 1857. Id.; when such a claim is paid.

Where a defendant, or a person belonging to his class, has paid a demand against the decedent's estate, of a class prior to that of the plaintiff's demand, or has paid a demand of the same class, the amount of the demand so paid must be estimated, in ascertaining the amount to be recovered, as if it was outstanding and unpaid.

From Id., § 41.

§ 1858. Action not suspended by infancy.

An action against heirs or devisees, brought as prescribed in this article, is not delayed, nor is the remedy of the plaintiff suspended, by reason of the infancy of any of the parties; except that an execution shall not be issued against an infant heir or devisee, until the expiration of one year after final judgment is rendered, and the judgment-roll filed.

From Id., §§ 43, 54.

§ 1859. [Omitted; see Table, p. iii.] This article not applicable, where will charges real property, etc.

This article does not affect the liability of an heir or devisee, for a debt of a testator, where the will expressly charges the debt exclusively upon the real property descended or devised, or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised.

From Id., §§ 55, 58.

§ 1860. One action, where same person is heir, devisee, etc.

Where a person, who takes real property of a decedent by devise, and also by descent; or who takes personal property as next of kin, and also as legatee; or who takes both real and personal property in either capacity; or who is executor or administrator, and also takes in either of the before mentioned capacities; would be liable,

[1] As to § 101 of the Decedent Estate Law, see foot-note on page 506.

in one capacity, for a demand against the decedent, after the exhaustion of the remedy against him in another capacity; the plaintiff, in any action to charge him, which can be maintained, without joining with him any other person, except a person whose liability is in all respects the same, may recover any sum, for which he is liable, although the remedy against him in another capacity was not exhausted. But this section does not increase the sum, which the plaintiff is entitled to recover against him, in the capacity in which he is actually liable; nor does it charge a defendant individually, who is liable only in a representative capacity.

New.

ARTICLE THIRD.

Action to establish or impeach a will.

Sec. 1861. When action to establish a will may be brought.
1862. Judgment, that will be established.
1863. Judgment admitting the will to probate.
1864. Contents of judgment; surrogate's duty.
1865. Proof of lost will in certain cases.
1866. Action to establish, etc., will, relating to real property.
1867. Retrospective effect of this article.

§ 1861. When action to establish a will may be brought.

An action to procure a judgment, establishing a will, may be maintained, by any person interested in the establishment thereof, in either of the following cases:

1. Where a will of real or personal property, or both, has been executed, in such a manner and under such circumstances, that it might, under the laws of the State, be admitted to probate in a surrogate's court; but the original will is in another state or country, under such circumstances that it cannot be obtained for that purpose; or has been lost or destroyed, by accident or design, before it was duly proved and recorded within the State.

2. Where a will of personal property, made by a person, who resided without the State, at the time of the execution thereof, or at the time of his death, has been duly executed, according to the laws of the state or country in which it was executed, or in which the testator resided at the time of his death, and the case is not one, where the will can be admitted to probate in a surrogate's court, under the laws of the State.

From 2 R. S. 67 (Part 2, c. 6, tit. 1), §§ 63a, 63b, 64a, 67a, 68a, 69a.

§ 1862. Judgment, that will be established.

If, in such an action, the facts necessary to establish the validity of the will, as prescribed in the last section, are satisfactorily proved, final judgment must be rendered, establishing the will accordingly. But where the will of a person, who was a resident of the State at the time of his death, is established as prescribed in the last section, the judgment establishing it does not affect the construction or validity of any provision contained therein; and such a question arising with respect to any provision, must be determined in the same action, or in another action or a special proceeding, as the case requires, as if the will was executed within the State.

From Id., § 65a.

§ 1863. Judgment admitting the will to probate.

Where the parties to the action, who have appeared or have been duly summoned, include all the persons, who would be necessary parties to a special proceeding, in a surrogate's court, for the probate of the same will and the grant of letters thereupon, if the circumstances were such that it could have been proved in a surrogate's court; the final judgment, rendered as prescribed in the last section, must direct, that an exemplified copy thereof be transmitted to the surrogate having jurisdiction, and be recorded in his office; and that letters testamentary, or letters of administration with the will annexed, be issued thereupon from his court, in the same manner, and with like effect, as upon a will duly proved in that court.

From Id., § 67a.

§ 1864. Contents of judgment; surrogate's duty.

A copy of the will so established, or, if it is lost or destroyed, the substance thereof must be incorporated into a final judgment, rendered as prescribed in the last section; and the surrogate must record the same and issue letters thereupon, as directed in the judgment.

New.

§ 1865. Proof of lost will in certain cases.

But the plaintiff is not entitled to a judgment, establishing a lost or destroyed will, as prescribed in this article, unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime; and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness.

From 2 R. S. 67, § 67b.

§ 1866. Action to establish, etc., will, relating to real property.

The validity, construction or effect, under the laws of the State, of a testamentary disposition of real property situated within the State, or of an interest in such property, which would descend to the heir of an intestate, may be determined, in an action brought for that purpose, in like manner as the validity of a deed, purporting to convey land, may be determined. The judgment in such an action may perpetually enjoin any party, from setting up or from impeaching the devise, or otherwise making any claim in contravention to the determination of the court, as justice requires. But this section does not apply to a case, where the question in controversy is determined by the decree of a surrogate's court, duly rendered upon allegations for that purpose, as prescribed in article first of title third of chapter eighteen of this act, where the plaintiff was duly cited, in the special proceeding in the surrogate's court, before the commencement of the action.

From L. 1858, c. 238, § 1.

§ 1867. Retrospective effect of this article.

The provisions of this article apply as well to wills made before, as to those made after, this article takes effect.

From 2 R. S. 68 (Part 2, c. 6, tit. 1), §§ 66b, 67a, 68b.

ARTICLE FOURTH.

General and miscellaneous provisions.

Sec. 1868. Action by child born after will, or by witness to will.
1869. Receiver, as successor of surviving executor, etc.
1870. Next of kin defined.

§ 1868. [Omitted; see Table, p. iii.] Action by child born after will, or by witness to will.

A child, born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property, may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property; and he is subject to the same liabilities, and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed.

From 2 R. S. 456 (Part 3, c. 8, tit. 3), §§ 62-66.

§ 1869. [Am'd, 1895.] Receiver, as successor of surviving executor, etc.

Where the estate of a decedent has been brought under the jurisdiction of the supreme court, by an action for partition or distribution, or for the construction or establishment of a will, the court may, upon the death of the sole surviving executor, appoint a receiver of the estate, pending the action, upon such terms and conditions, and upon such notice to the parties interested, as the court directs, and upon such security, if any, as to the court seems proper. For the purpose of carrying into effect the judgment and orders of the court, in relation to the estate, a receiver so appointed is the successor in interest of the surviving executor; and has, subject to the direction of the court, the like power, as an administrator with the will annexed.

From L. 1863, c. 466. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1870. Next of kin defined.

The term "next of kin," as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife.

New.

TITLE IV.

Other special actions and rights of action.

Article 1. Judgment creditor's action.
2. Action by a private person upon an official bond.
3. Action by a private person for a penalty or forfeiture.
4. Certain actions to recover damages for wrongs.
5. Miscellaneous actions and rights of action.

ARTICLE FIRST.

Judgment creditor's action.

Sec. 1871. When judgment creditor may bring action.
1872. To what county execution must have issued.
1873. What property may be reached.
1874. Interest of judgment debtor in land contract may be reached.
1875. Id.; how applied.
1876. Injunction may be issued.
1877. Receiver may be appointed.
1878. How discovery may be compelled.
1879. Application of this article; what property cannot be reached.

§ 1871. When judgment creditor may bring action.

When an execution against the property of a judgment debtor, issued out of a court of record, as prescribed in the next section, has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor, and any other person, to compel the discovery of any thing in action, or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him, or held in trust for him; to prevent the transfer thereof, or the payment or delivery thereof, to him, or to any other person; and to procure satisfaction of the plaintiff's demand, as prescribed in the next section but one. Where the execution was issued as prescribed in section 1934 of this act, and a defendant not summoned in the original action is made a defendant in an action brought under this section, personal property, owned by him jointly with the defendants summoned or with any of them, may be applied to the satisfaction of the plaintiff's demand as prescribed in this article.

From 2 R. S. 173 (Part 3, c. 1, tit. 2), § 38.

§ 1872. To what county execution must have issued.

To entitle the judgment creditor to maintain an action as prescribed in the last section, the execution must have been issued as follows:

1. If, at the time of the commencement of the action, the judgment debtor is a resident of the State, to the sheriff of the county where he resides.

2. If he is not then a resident of the State, to the sheriff of the county where he has an office, for the regular transaction of business in person; or, if he has no such office within the State, to the sheriff of the county where the judgment-roll is filed, unless the execution was issued out of a court, other than the court in which the judgment was rendered; in which case, it must have been issued to the sheriff of the county where a transcript of the judgment is filed.

New.

§ 1873. What property may be reached.

The final judgment in the action must direct and provide for the satisfaction of the sum due to the plaintiff, out of any money, thing in action, or other personal property, belonging to, or due to the judgment debtor, or held in trust for him, which is discovered in the action; whether the same might or might not have been originally taken, by virtue of an execution.

From 2 R. S. 174 (Part 3, c. 1, tit. 2), § 39.

§ 1874. Interest of judgment debtor in land contract may be reached.

The final judgment in the action must also direct and provide for the satisfaction of the sum due to the plaintiff, out of the interest, if any, of the judgment debtor, in a contract for the purchase of real property by him; either by selling the interest, or by transferring it to the judgment creditor, in such a manner and upon such terms, as the court deems most conducive to the interests of the parties. Where the person, bound to perform the contract to the judgment debtor, is a defendant in the action, the final judgment may direct a specific performance of the contract to the judgment creditor, or, where the interest in the contract is directed to be sold, to the purchaser.

From 1 R. S. 744 (Part 2, c. 1, tit. 4), §§ 4, 5.

§ 1875. Id.; how applied.

In a case specified in the last section, the value of the interest of the judgment debtor holding the contract must be ascertained, under the direction of the court; and so much thereof as is necessary must be applied to the payment of the sum due to the plaintiff, and the residue, if any, to the benefit of the judgment debtor.

From Id., § 6.

§ 1876. Injunction may be issued.

A temporary injunction, restraining the transfer to any person, or the payment or delivery to the judgment debtor, of any money, thing in action, or other property or interest, which may, by the provisions of this article, be applied to the satisfaction of the sum due to the plaintiff, may be granted in the action. The injunction, and the proceedings before and after it is granted, are governed by the provisions of article first of title second of chapter seventh of this act; for which purpose, the injunction is deemed to be one of those specified in section 603 of this act.

From 2 R. S. 174, § 39.

§ 1877. Receiver may be appointed.

The court may, by an order, or by the interlocutory or final judgment in the action, appoint a receiver of any or all of the property of the judgment debtor; and may direct the judgment debtor, or any other defendant in the action, to convey or deliver to the receiver, as justice requires, any property, real or personal, book, voucher, or other paper, or to execute any instrument, which it deems necessary, for perfecting or assuring the receiver's title or possession.

New.

§ 1878. How discovery may be compelled.

A discovery may be compelled in an action, brought as prescribed in this article, by directing the person, required to make it, to appear before the court, or a referee appointed by it, and to be examined under oath, concerning the matters pertaining to

the discovery. But this section does not affect the right of the plaintiff, to cause the deposition of a defendant to be taken, as prescribed in article first of title third of chapter ninth of this act.
New.

§ 1879. Application of this article; what property cannot be reached.

This article does not apply to a case, where the judgment debtor is a corporation, created by or under the laws of the State. Nor does it authorize the discovery or seizure of, or other interference with, any property, which is expressly exempted by law from levy and sale, by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days next before the commencement of the action, where it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.

From L. 1870, c. 151, § 3, subd. 1; 2 R. S. 173, 174, §§ 38, 39; Co. Proc., § 297. See § 2463, post.

ARTICLE SECOND.

Action by a private person upon an official bond.

Sec. 1880. Application for leave to sue sheriff's bond; proof required.
1881. Order granting leave; action thereupon.
1882. Successive actions.
1883. Indorsement upon execution.
1884. Collection of execution; when a defence to subsequent action.
1885. When claimants entitled to ratable distribution.
1886. Action upon a surrogate's bond.
1887. Action upon a county treasurer's bond.
1888. Actions upon official bonds of other officers.
1889. Actions, etc., under the last three sections regulated.
1890. Receivers, etc., deemed public officers.
1891. Demand of money; when necessary before application.
1892. Application may be made ex parte.

§ 1880. [Am'd, 1895.] Application for leave to sue sheriff's bond; proof required.

Where a sheriff is liable for the escape of a prisoner committed to his custody, or is guilty of any other actionable default or misconduct in his office, the person injured thereby may apply to the supreme court, for leave to prosecute the sheriff's official bond. The application must be accompanied with proof, by affidavit, of the default or misconduct complained of, and that satisfaction of the same has not been received; and with a certified copy of the official bond.

From 2 R. S. 476 (Part 3, c. 8, tit. 5), §§ 1, 2. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1881. Order granting leave; action thereupon.

Upon such an application, the court must grant an order, permitting the applicant to maintain an action upon the bond. The action must be brought, in the court which granted the order, by the applicant as plaintiff; and it may be maintained, as if the applicant was the obligee named in the bond, except as otherwise expressly prescribed in this article.

From 2 R. S. 476, § 3. See, also, 1 R. S. 378 (Part 1, c. 12, tit. 2), § 67.

§ 1882. [Am'd, 1895.] Successive actions.

The same, or any other applicant, may, in like manner, either before or after judgment in the first action, obtain an order, permitting him to maintain another action, in the same court, upon the same bond, for another default or misconduct. Any number of such orders may be successively made; and neither of the actions authorized thereby is affected by the pendency of, or the recovery of judgment in, any other, except as otherwise expressly prescribed in this article.

From 2 R. S. 476, §§ 5, 6, 7, 8. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1883. Indorsement upon execution.

Where an execution is issued upon a judgment, recovered against the sheriff and any of his sureties, in an action, brought pursuant to the last four sections, the plaintiff's attorney must indorse thereon a direction to collect the same, in the first place, out of the property of the sheriff, and, if sufficient property of the sheriff cannot be found, then to collect the deficiency out of the property of the surety or sureties.

From 2 R. S. 478, § 15.

§ 1884. Collection of execution; when a defence to subsequent action.

It is a defence by a surety, against whom an action is brought upon a sheriff's official bond, that he, or any other surety or sureties, have been or will be compelled, for want of sufficient property of the sheriff, to pay, upon one or more judgments recovered against him or them, upon the same bond, an aggregate amount, exclusive of costs, officers' fees, and expenses, equal to the sum for which the defendant is liable, by reason of the bond. It is a partial defence, that the difference between the aggregate amount, so paid, or to be paid, and the sum for which the defendant is thus liable, is less than the amount of the plaintiff's demand.

From 2 R. S. 478, §§ 12, 13, 14.

§ 1885. When claimants entitled to ratable distribution.

If the aggregate amount of the liabilities, which might be recovered by actions upon the sheriff's official bond, as prescribed in this article, exceeds the sum for which the sureties are liable, the court must, upon the application of a person who has obtained leave to prosecute the bond, made upon notice to the plaintiff's attorney, in each action then pending upon the sheriff's official bond, and in each uncollected judgment recovered thereupon, direct and provide for the distribution of the money, collected out of the property of the sureties, among the persons in favor of whom the liabilities have accrued, in proportion to the amount which each one is entitled to recover; to be ascertained by a reference, or in such other manner as the court directs. For the purposes of the motion, an order may be made by a judge, forbidding the payment, to the plaintiff in any action, of the sum collected or to be collected, by virtue of a judgment therein. But this section does not authorize the court to compel a plaintiff to refund any money, collected and received by him, in good faith, before service of notice of such an order.

From Id., §§ 17, 18.

§ 1886. Action upon a surrogate's bond.

Where a surrogate, or an officer acting as surrogate, is guilty of any actionable default or misconduct in his office, the person injured thereby may apply for leave to prosecute the delinquent's official bond.

From Id., §§ 19, 20; L. 1858, c. 213.

§ 1887. Action upon a county treasurer's bond.

Where a certified copy of the order or judgment of a court, directing a county treasurer to pay or deliver, to one or more persons designated therein any money, stocks, securities, or other investments held by him, subject to the direction of that court, is served upon the county treasurer, if he fails to obey the direction, the person injured thereby may apply for leave to prosecute his official bond. Service upon a county treasurer, as required by this section, may be made personally, or by leaving the paper, either at his office, during his absence therefrom, with a person of suitable age and discretion, having charge of the office, or at his residence, or his last residence within the county, with a person of suitable age and discretion.

From L. 1874, c. 524, §§ 1, 2.

§ 1888. Actions upon official bonds of other officers.

Where a public officer is required to give an official bond to the people, and special provision is not made by law, for the prosecu-

tion of the bond, by or for the benefit of a person, who has sustained, by his default, delinquency, or misconduct, an injury, for which the sureties upon the bond are liable, such a person may apply for leave to prosecute the delinquent's official bond.

Substituted for 2 R. S. 479, 480, §§ 21-27.

§ 1889. Actions, etc., under the last three sections regulated.

Sections 1880 to 1885 of this act, both inclusive, govern an application, made as prescribed in either of the last three sections, and each action brought pursuant to an order made thereupon, as if the delinquent officer and his sureties were named therein instead of the sheriff and his sureties.

From the same sources as the last three sections.

§ 1890. Receivers, etc., deemed public officers.

A receiver, an assignee of an insolvent debtor, or a trustee or other officer, appointed by a court or a judge, is a public officer, within the meaning of the last section but one; but where he was appointed by or pursuant to the order of a court, or in a special proceeding specified in title twelfth of chapter seventeenth of this act, the application for leave to prosecute his official bond must be made to the court by which, or pursuant to whose order, he was appointed, or in which the judgment was rendered, as the case may be. An action, brought as prescribed in this section, must be brought in the court to which application is made for leave to bring it.

New.

§ 1891. Demand of money; when necessary before application.

Where the default, by reason of which an application for leave to prosecute an official bond is made, as prescribed in this article, consists of the non-payment of money, and special provision is not otherwise made by law, the applicant must prove a demand of the money from the officer, or that a demand cannot be made, with due diligence. But such proof is not necessary, where the applicant has recovered a judgment against the officer.

New.

§ 1892. Application may be made ex parte.

An application for leave to prosecute an official bond, as prescribed in this article, may be made without notice; but, in that case, the officer, or either of his sureties, may apply, upon notice, to vacate an order permitting the applicant to maintain an action, upon any ground, showing that it ought not to have been granted.

New.

ARTICLE THIRD.

Action by a private person for a penalty or forfeiture.

Sec. 1893. Action by person specially aggrieved.
1894. Action by common informer.
1895. Id.; service of summons.
1896. Id.; when not barred by a collusive recovery.
1897. Indorsement upon summons.
1898. When part of a penalty may be recovered.

§ 1893. Action by person specially aggrieved.

Where a penalty or forfeiture is given, by a statute, to a person aggrieved by the act or omission of another, the person to whom it is given, may, if it is pecuniary, maintain an action to recover the amount thereof; or, if it consists of the forfeiture of a chattel, he may maintain an action to recover the chattel, or its value, or other damages, as the case requires.

From 2 R. S. 480 (Part 3, c. 8, tit. 6), § 1.

§ 1894. Action by common informer.

Where a penalty or forfeiture is given, by a statute, to any person who sues therefor, an action to recover it may be maintained, by any person, in his own name; but the action cannot be compromised or settled, without the leave of the court in which it is brought.

From Id., §§ 5, 6.

§ 1895. Id.; service of summons.

The summons in an action, brought as prescribed in the last section, can be served only by an officer, authorized by law to collect an execution, issued out of the same court. The summons, when issued, cannot be countermanded by the plaintiff, before the service thereof; and, immediately after it has been served, the officer, who served it, must file it, with his certificate of service, in the office of the clerk, or deliver it, with a like certificate, to the magistrate by whom it was issued, as the case requires.

From Id., part of § 6.

§ 1896. Id.; when not barred by a collusive recovery.

In an action to recover a penalty or forfeiture, given by a statute, brought by any person, other than the person aggrieved or a public officer, the plaintiff may recover, notwithstanding the recovery of a judgment, for or against the defendant, in an action brought thereof by another person, if he establishes that the former judgment was recovered collusively and fraudulently.

From Id., § 14.

§ 1897. Indorsement upon summons.

In an action to recover a penalty or forfeiture, given by a statute, if a copy of the complaint is not delivered to the defendant with a copy of the summons, a general reference to the statute must be indorsed upon the copy of the summons so delivered, in the following form: "According to the provisions of," etc.; adding such a description of the statute, as will identify it with convenient certainty, and also specifying the section, if penalties or forfeitures are given, in different sections thereof, for different acts or omissions.

From Id., § 7.

§ 1898. When part of a penalty may be recovered.

Where a statute gives a pecuniary penalty or forfeiture, not exceeding a specified sum, an action may be maintained to recover the sum specified; and the court, jury, or referee, by which or by whom the issues of fact are tried, or, where judgment is taken by default for failure to appear or plead, the damages are ascertained, may award to the plaintiff the whole sum, or such a part thereof, as it or he deems proportionate to the offence.

From 2 R. S. 488, § 15.

ARTICLE FOURTH.

Certain actions to recover damages for wrongs.

Sec. 1899. Civil and criminal prosecutions not merged.
1900. Action for suing, etc., in name of another. Made also a misdemeanor.
1901. Treble and other increased damages to be recovered.
1902. Action for causing death by negligence, etc.
1903. Distribution of damages recovered.
1904. Id.; amount of recovery.
1905. Next of kin defined.
1906. Action for slander of a woman.
1907. When action for libel cannot be maintained.
1908. The last section qualified.

§ 1899. Civil and criminal prosecutions not merged.

Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other.

From Co. Proc. § 7.

§ 1900. Action for suing, etc., in name of another. Made also a misdemeanor.

If a person, vexatiously or maliciously, in the name of another but without the latter's consent, or in the name of an unknown person, commences or continues, or causes to be commenced or continued, an action or special proceeding, in a court, of record or not of record, or a special proceeding before a judge or a justice of the peace; or takes, or causes to be taken, any proceeding, in the course of an action or special proceeding in such a court, or before such an officer, either before or after judgment or other final determination; an action, to recover damages therefor, may be maintained against him, by the adverse party to the action or special proceeding; and a like action may be maintained by the person, if any, whose name was thus used. He is also guilty of a misdemeanor, punishable by imprisonment, not exceeding six months.

From 2 R. S. 550 (Part 3, c. 8, tit. 17), § 1.

§ 1901. Treble and other increased damages to be recovered.

In an action, brought by the adverse party, as prescribed in the last section, the plaintiff, if he recovers final judgment, is entitled to recover treble damages. In an action, brought by the person whose name was used, as prescribed in the last section, the plaintiff is entitled to recover his actual damages, and two hundred and fifty dollars in addition thereto.

From Id., part of § 1.

§ 1902. [Am'd, 1909, 1915.] Action for causing death by negligence, etc.

The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent, who has left, him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

From L. 1847, c. 450, §§ 1, 2; L. 1849, c. 256; L. 1870, c. 78. Am'd by L. 1909, c. 221; L. 1915, c. 620 (in effect Sept. 1, 1915).

§ 1903. [Am'd, 1904, 1911, 1915.] Distribution of damages recovered.

The damages recovered in an action, brought as prescribed in the last section, or obtained through settlement without action, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, or representative, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration; subject however to the following provisions, to wit:

1. In case the decedent shall have left him surviving a wife or husband, but no children, the damages recovered shall be for the sole benefit of such wife or husband.

2. In case the decedent leaves neither husband, wife, nor issue, but leaves a mother, and a father who has abandoned him, or who has left the maintenance and support of their child to the mother, the damages or recovery shall be for the sole benefit of such mother.

3. In case the decedent leaves no husband or wife, issue or father, or having left a father entitled to recovery, who dies prior to the recovery or verdict, the damages or recovery shall be for the sole benefit of the mother if then living.

The reasonable expenses of the action, or settlement, the reasonable funeral expenses of the decedent, and the commissions of the plaintiff or representative, upon the residue may be fixed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper or upon the judicial settlement of the account of the plaintiff, or representative, and may be deducted from the recovery.

Id. Am'd by L. 1904, c. 515; L. 1911, c. 122; L. 1915, c. 641 (in effect Sept. 1, 1915).

§ 1904. [Am'd, 1895, 1913.] Id.; amount of recovery.

The damages awarded to the plaintiff may be such a sum as the jury, upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought. If the decedent leaves surviving a father and a mother, the death of such father prior to the verdict shall not affect the amount of damages recoverable. When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded, interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report or decision, may specify the day from which interest is to be computed; if it omits so to do, the day may be determined by the clerk, upon affidavits.

From L. 1847, c. 450, § 2; L. 1849, c. 256; L. 1870, c. 78. Am'd by L. 1895, c. 946; L. 1913, c. 756 (in effect September 1, 1913).

§ 1905. [Am'd, 1913.] Next of kin defined.

The term "next of kin," as used in the foregoing sections, has the meaning specified in section 1870 of this act, except if decedent leaves surviving a father and mother but no widow, child or descendant, it shall mean both the father and the mother.

New. Am'd by L. 1913, c. 756 (in effect September 1, 1913).

§ 1906. Action for slander of a woman.

In an action of slander, brought by a woman, for words imputing unchastity to her, it is not necessary to allege or prove special damages. If the plaintiff is married, the damages recovered are her separate property.

From L. 1871, c. 219, § 1.

§ 1907. When action for libel cannot be maintained.

An action, civil or criminal, cannot be maintained against a reporter, editor, publisher, or proprietor of a newspaper, for the publication therein of a fair and true report of any judicial, legislative, or other public and official proceedings, without proving actual malice in making the report.

From L. 1854, c. 130.

§ 1908. The last section qualified.

The last section does not apply to a libel, contained in the heading of the report; or in any other matter, added by any person concerned in the publication; or in the report of any thing said or done, at the time and place of the public and official proceedings, which was not a part thereof.

From Id.

ARTICLE FIFTH.

Miscellaneous actions and rights of action.

Sec. 1909. When transferee of claim or demand may sue. Rights of defendant, etc.
1910. What claims or demands may be transferred.
1911. Id.; cause of action for usury.
1912. Judgment, when assignable.
1913. Action upon judgment regulated.
1914. Ancillary action for discovery abolished.
1915. Action upon a penal bond.
1916. Action by surety or trustee to recover costs, etc.
1917. Action upon lost negotiable paper.
1918. The last section qualified.

§ 1909. [Omitted; see Table, p. iii.] When transferee of claim or demand may sue. Rights of defendant, etc.

Where a claim or demand can be transferred, the transfer thereof passes an interest, which the transferee may enforce by an action or special proceeding, or interpose as a defence or counterclaim, in his own name, as the transferor might have done; subject to any defence or counterclaim, existing against the transferor, before notice of the transfer, or against the transferee. But this section does not apply, where the rights or liabilities of a party to a claim or demand, which is transferred, are regulated by special provision of law; nor does it vary the rights or liabilities of a party to a negotiable instrument, which is transferred.

New. See § 502, ante.

§ 1910. [Omitted; see Table, p. iii.] What claims or demands may be transferred.

Any claim or demand can be transferred, except in one of the following cases:

1. Where it is to recover damages for a personal injury, or for a breach of promise to marry.

2. Where it is founded upon a grant, which is made void by a statute of the State; or upon a claim to or interest in real property, a grant of which, by the transferor, would be void by such a statute.

3. Where a transfer thereof is expressly forbidden by a statute of the State, or of the United States, or would contravene public policy.

See Co. Proc., §§ 111, 112.

§ 1911. [Omitted; see Table, p. iii.] Id.; cause of action for usury.

A cause of action to cancel, or otherwise affect, an instrument executed, or an act done, as security for a usurious loan or forbearance, can be thus transferred, where the instrument or act creates a specific charge upon property, which is also transferred in disaffirmance thereof, and not otherwise; but, in that case, the transferee does not succeed to the right, conferred by statute upon the borrower, to procure relief, without paying, or offering to pay, any part of the sum or thing loaned.

New.

§ 1912. [Omitted; see Table, p. iii.] Judgment, when assignable.

A judgment for a sum of money, or directing the payment of a sum of money, recovered upon any cause of action, may be transferred; but if it is vacated or reversed, the transfer thereof

does not transfer the cause of action, unless the latter was transferable before the judgment was recovered.

New.

§ 1913. [Am'd, 1896.] Action upon judgment regulated.

Except in a case where it is otherwise specially prescribed in this act, an action upon a judgment for a sum of money, rendered in a court of record of the State, cannot be maintained, between the original parties to the judgment, unless, either

1. Ten years have elapsed since the docketing of such judgment; or,

2. It was rendered against the defendant by default, for want of an appearance or pleading, and the summons was served upon him, otherwise than personally; or,

3. The court in which the action is brought has previously made an order, granting leave to bring it. Notice of the application for such an order must be given to the adverse party, or the person proposed to be made the adverse party, personally, unless it satisfactorily appears to the court, that personal notice cannot be given, with due diligence; in which case, notice may be given in such a manner as the court directs.

From Co. Proc., § 71. Am'd by L. 1896, c. 568 (in effect Sept. 1, 1896). See § 3154, post.

§ 1914. Ancillary action for discovery abolished.

An action cannot be maintained, to obtain a discovery under oath, in aid of the prosecution or defence of another action.

From Co. Proc., § 389.

§ 1915. Action upon a penal bond.

A bond in a penal sum, executed within or without the State, and containing a condition to the effect, that it is to be void, upon performance of any act, has the same effect, for the purpose of maintaining an action or special proceeding, or two or more successive actions or special proceedings thereupon, as if it contained a covenant to pay the sum, or to perform the act, specified in the condition thereof. But the damages to be recovered for a breach, or successive breaches, of the condition, cannot, in the aggregate, exceed the penal sum, except where the condition is for the payment of money; in which case, they cannot exceed the penal sum, with interest thereupon, from the time when the defendant made default in the performance of the condition.

See 2 R. S. 353 (Part 3, c. 6, tit. 2), §§ 12, 13; 2 Id., 378, 379 (Part 3, c. 6, tit. 6), art. 2.

§ 1916. Action by surety or trustee to recover costs, etc.

A surety, including a drawer or indorser, may recover, in an action against his principal; and an executor, administrator, or other trustee, may, where the trust estate is insufficient to reimburse him, recover, in an action against the beneficiary whom he represents; his reasonable costs and other expenses, incurred necessarily and in good faith, in the prosecution or defence, by the express or implied consent of the principal or beneficiary, of an action or special proceeding, relating to the demand secured, or to the trust estate, as the case requires. This section does not affect any special agreement relating to those costs and expenses.

From L. 1858, c. 314, § 3.

§ 1917. Action upon lost negotiable paper.

Where it appears, upon the trial of an action, that a negotiable promissory note or bill of exchange, upon which the action

or a counterclaim interposed in the action, is founded, was lost, while it belonged to the party claiming the amount due thereupon, he may prove the contents thereof, by parol or other secondary evidence, and may recover or set off the amount due thereupon, as if it was produced. But for that purpose, he must give to the adverse party a written undertaking, in a sum fixed by the judge or the referee, not less than twice the amount of the note or bill, with at least two sureties, approved by the judge or the referee, to the effect, that he will indemnify the adverse party, his heirs and personal representatives, against any claim by any other person, on account of the note or bill, and against all costs and expenses, by reason of such a claim.

From 2 R. S. 406 (Part 3, c. 7, tit. 3), §§ 75, 76.

§ 1918. The last section qualified.

But where an action is prosecuted or defended by the people of the State, or by a public officer in their behalf, the people, or the public officer, may prove the contents of a lost note or bill of exchange, by parol or other secondary evidence, and may recover or set off the amount due thereupon, without giving any security to the adverse party.

See L. 1855, c. 85.

TITLE V.

Other actions by or against particular parties.

Article 1. Action by or against an unincorporated association.
2. Action by or against certain county, town, and municipal officers.
3. Actions, and rights of action, against and between joint debtors.

ARTICLE FIRST.

Action by or against an unincorporated association.

Sec. 1919. Actions, etc., by or against associations of seven or more persons.
1920. Proceedings in case of death, etc.
1921. Effect of judgment; execution thereupon.
1922. Subsequent action against members.
1923. This article permissive; effect upon statute of limitations.
1924. When objection of misnomer, etc., of parties not available.

§ 1919. [Am'd, 1900.] Actions, etc., by or against associations of seven or more persons.

An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

From L. 1849, c. 258, § 1; L. 1851, c. 455. Am'd by L. 1900, c. 184 (in effect Sept. 1, 1900).

§ 1920. Proceedings in case of death, etc.

The death or legal incapacity of a member of the association does not affect an action or special proceeding, brought as prescribed in the last section. If the officer, by or against whom it is brought, dies, is removed, resigns, or becomes otherwise incapacitated, during the pendency thereof, the court must make an order, directing it to be continued by or against his successor in office, or any other officer, by or against whom it might have been originally commenced.

From L. 1849, c. 258, § 2.

§ 1921. [Am'd, 1899.] Effect of judgment; execution thereupon.

In such an action, the officer against whom it is brought cannot be arrested; and a judgment against him does not authorize

an execution to be issued against his property, or his person; nor does the docketing thereof bind his real property, or chattels real. Where such a judgment is for a sum of money, an execution issued thereupon must require the sheriff to satisfy the same, out of any personal or real property belonging to the association, or owned, jointly or in common, by all the members thereof.

From Id., §§ 1, 3. Am'd by L. 1898, c. 293 (in effect Oct. 1, 1898).

§ 1922. Subsequent action against members.

Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as prescribed in the last three sections, another action, for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:

1. Where he was the plaintiff, or a defendant recovering upon a counterclaim, he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, or the counterclaim had not been made, as the case requires; and he may recover therein, as part of his damages, the costs of the first action, or so much thereof, as the sum, collected by virtue of the execution, was insufficient to satisfy.

2. Where he was a defendant, and the case is not within subdivision first of this section, he may maintain an action, to recover the sum remaining uncollected, against the persons who composed the association, when the action against him was commenced, or the survivors of them.

But this section does not affect the right of the person, in whose favor the judgment in the first action was rendered, to enforce a bond or undertaking, given in the course of the proceedings therein.

From L. 1849, c. 258, § 4; L. 1853, c. 158.

§ 1923. This article permissive; effect upon statute of limitations.

This article does not prevent an action from being brought by or against all the members of an association, except as prescribed in the last section. Where an action is brought against the members of the association, as prescribed in subdivision first of the last section, the time between the commencement of the action by or against the officer, and the return of the first execution issued upon the final judgment rendered therein, is not a part of the time limited by law, for the commencement of the second action.

New.

§ 1924. When objection of misnomer, etc., of parties not available.

Section 1813 of this act applies to an action brought, as prescribed in the last section but one, against the members of any association, which keeps a book for the entry of changes in the membership of the association, or the ownership of its property; and to each book so kept.

New. See § 1813, ante.

ARTICLE SECOND.

Actions by or against certain county, town, and municipal officers.

Sec. 1925. Action by a taxpayer against a public officer.
1926. Actions by certain specified officers.
1927. Actions against such officers.
1928. The last two sections qualified.
1929. Designation of such officers in the summons, etc.
1930. Successor may be substituted.
1931. When execution against officer not to issue.

§ 1925. [Am'd, 1892.] Action by a tax payer against a public officer.

An action to obtain a judgment, preventing waste of, or injury to, the estate, funds, or other property of a county, town, city, or incorporated village of the State, may be maintained against any officer thereof, or any agent, commissioner, or other person, acting in its behalf, either by a citizen, resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or incorporated village, or any public officer.

From L. 1872, c. 161. Am'd by L. 1892, c. 524.

§ 1926. [Am'd, 1897.] Actions by certain specified officers.

An action or special proceeding may be maintained, by the trustee or trustees of a school district; the overseer or overseers of the poor of a village, or city; the county superintendent or superintendents of the poor; or the supervisors of a county, upon a contract, lawfully made with those officers or their predecessors, in their official capacity; to enforce a liability created, or a duty enjoined, by law, upon those officers, or the body represented by them; to recover a penalty or a forfeiture, given to those officers, or the body represented by them; or to recover damages for an injury to the property or rights of those officers, or the body represented by them; although the cause of action accrued before the commencement of their term of office.

From 2 R. S. 473 (Part 3, c. 8, tit. 4), § 92. Am'd by L. 1897, c. 302 (in effect Sept. 1, 1897).

§ 1927. Actions against such officers.

An action or special proceeding may be maintained, against any of the officers specified in the last section, upon any cause of action, which accrues against them, or has accrued against their predecessors, or upon a contract made by their predecessors in their official capacity, and within the scope of their authority.

From 2 R. S. 474, § 98.

§ 1928. The last two sections qualified.

The last two sections do not apply to a case, where it is specially prescribed by law, that an action may be maintained, by or against the body, represented by an officer designated in those sections; but, in such a case, the prosecution or defence of the action, as the case may be, must be conducted by the persons then in office, who represent that body.

From id., § 94.

§ 1929. Designation of such officers in the summons, etc.

In an action or special proceeding, brought pursuant to section 1926 or section 1927 of this act, the officer, by or against whom

it is brought, must be described in the summons, or other process by which it is commenced, and in the subsequent proceedings therein, by his individual name, with the addition of his official title. An objection, growing out of an omission to join any officer, who ought to be joined with the others, must be taken by the answer, or, in a special proceeding, before the close of the case, on the part of the defendant; otherwise it is waived.

From Id., §§ 93, 96, 99.

§ 1930. Successor may be substituted.

In such an action or special proceeding, the court must, in a proper case, substitute a successor in office, in place of a person made a party in his official capacity, who has died or ceased to hold office; but such a successor shall not be substituted as a defendant, without his consent, unless at least fourteen days' notice of the application for the substitution, has been personally served upon him.

From Id., §§ 100, 101.

§ 1931. When execution against officer not to issue.

An execution cannot be issued upon a judgment for a sum of money, rendered against an officer in an action or special proceeding, brought by or against him, in his official capacity, pursuant to this article; except where it is rendered against the trustee or trustees of a school district, or the commissioner or commissioners of highways of a town. In either of those cases, an execution may be issued against and be collected out of the property of the officer, and the sum collected must be allowed to him, in the settlement of his official accounts, except as otherwise specially prescribed by law.

From Id., §§ 107, 108.

ARTICLE THIRD.

Actions and rights of action against and between joint debtors.

Sec. 1932. Judgment against defendants jointly indebted, when all are not served.
1933. Effect of such judgment.
1934. Execution; indorsement thereupon.
1935. How collected.
1936. Judgment, how docketed; effect of docketing.
1937. Action to charge defendants not personally summoned.
1938. Complaint in such action.
1939. Answer.
1940. Provisional remedies.
1941. Judgment.
1942. Joint debtors may compound separately. Mode and effect.
1943. Satisfying judgment.
1944. Rights of the debtors not released.
1945. Action against persons engaged in transportation.
1946. When partner not sued remains liable.
1947. Continuance of partnership business during action for accounting, etc.

§ 1932. Judgment against defendants jointly indebted, when all are not served.

In an action, wherein the complaint demands judgment for a sum of money against two or more defendants, alleged to be jointly indebted upon contract, if the summons is served upon one or more, but not upon all of the defendants, the plaintiff may proceed against the defendant or defendants, upon whom it is served, unless the court otherwise directs; and, if he recovers final judgment, it may be taken against all the defendants thus jointly indebted.

From Co. Proc., § 136, subd. 1.

§ 1933. Effect of such judgment.

Such a judgment is conclusive evidence of the liability of each defendant, upon whom the summons was personally served, or who appeared in the action. Where it is taken against a defendant, upon whom the summons was served by publication, or without the State, pursuant to an order for that purpose, it has the effect, as against that defendant, specified in section 445 of this act. As against such a defendant, who is allowed to defend after judgment, or as against a defendant not summoned, it is evidence only of the extent of the plaintiff's demand, after the liability of that defendant has been established, by other evidence.

From 2 R. S. 377 (Part 3, c. 6, tit. 6), § 2.

§ 1934. Execution; indorsement thereupon.

An execution upon such a judgment must be issued, in form, against all the defendants; but the attorney for the judgment creditor must indorse thereupon a direction to the sheriff, containing the name of each defendant, who was not summoned, and restricting the enforcement of the execution, as prescribed in the next section.

From Id., § 3.

§ 1935. How collected.

An execution against the person, issued upon such a judgment, shall not be enforced against the person of a defendant, whose name is so indorsed thereupon. An execution against property, issued upon such a judgment, shall not be levied upon the sole property of such a defendant; but it may be collected out of personal property, owned by him, jointly with the other defendants,

who were summoned, or with any of them; and out of the real and personal property of the latter, or of any of them.

From Id., § 4.

§ 1936. Judgment, how docketed; effect of docketing.

Where a judgment has been taken, as prescribed in section 1932 of this act, the clerk, with whom the judgment-roll is filed, must write upon the docket, opposite or under the name of each defendant, upon whom the summons was not served, the words, "not summoned;" and a like entry must be made by each county clerk, with whom the judgment is afterwards docketed. The judgment does not, by virtue of its being docketed, bind any real property, or chattel real, owned by such a defendant. But this section does not affect the plaintiff's right of action, to charge the judgment upon any real property.

New.

§ 1937. Action to charge defendants not personally summoned.

After the recovery of a judgment against joint debtors, as prescribed in section 1932 of this act, an action may be maintained by the judgment creditor, against one or more of the defendants, who were not summoned in the original action, to procure a judgment, charging his or their property with the sum remaining unpaid upon the original judgment.

From Co. Proc., § 375.

§ 1938. Complaint in such action.

The complaint in such an action must be verified; must contain an allegation that the judgment has not been paid; and must state the sum, remaining unpaid thereupon, at the time of the verification.

From Id., § 378.

§ 1939. Answer.

The defendant's answer is restricted to defences or counterclaims, which he might have made in the original action, if the summons therein had been served upon him, when it was first served upon a defendant jointly indebted with him; objections to the judgment; and defences or counterclaims, which have arisen since it was rendered.

From Id., § 379.

§ 1940. Provisional remedies.

For the purpose of obtaining an order of arrest, an injunction order, or a warrant of attachment, the action is regarded as being founded upon the contract, upon which the original judgment was recovered.

New.

§ 1941. Judgment.

Where the judgment is in favor of the plaintiff, it must determine the sum remaining unpaid upon the original judgment; and it may be docketed, and an execution may be issued thereupon, as if it was a judgment for the sum so remaining unpaid, and the costs, if any. Costs must be awarded, as if the action was brought upon the original contract, and the sum so remaining unpaid had been recovered therein.

From Co. Proc., § 380.

§ 1942. [Omitted; see Table, p. iii.] Joint debtors may compound separately. Mode and effect.

A joint debtor may make a separate composition with his creditor, as prescribed in this section. Such a composition discharges the debtor making it; and him only. The creditor must execute to the compounding debtor a release of the indebtedness, or other instrument exonerating him therefrom. A member of a partnership cannot thus compound for a partnership debt, until the partnership has been dissolved by consent or otherwise. In that case the instrument must release or exonerate him, from all liability incurred by reason of his connection with the partnership. An instrument, specified in this section, does not impair the creditor's right of action against any other joint debtor, or his right to take any proceeding against the latter; unless an intent to release or exonerate him, appears affirmatively upon the face thereof.

From L. 1838, c. 257, §§ 1, 2, 5; L. 1845, c. 348.

§ 1943. [Am'd, 1909.] Satisfying judgment.

An instrument, specified in section 230 of the Debtor and Creditor Law[1] is deemed a satisfaction-piece, for the purpose of discharging, as prescribed in section 1260 of this act, the docket of a judgment, recovered upon an indebtedness released or discharged thereby, as far as the judgment affects the compounding debtor. Where the docket of a judgment is discharged thereupon, a special entry must be made upon the docket, to the effect, that the judgment is satisfied, as to the compounding debtor only.

From L. 1838, c. 257, § 2. Am'd by L. 1909, c. 310 (in effect May 11, 1909).

§ 1944. [Omitted; see Table, p. iii.] Rights of the debtors not released.

Where a joint debtor has thus compounded, a joint debtor, who has not compounded, may make any defence or counterclaim, or have any other relief, as against the creditor, to which he would have been entitled, if the composition had not been made. He may require the compounding debtor to contribute his ratable proportion of the joint debt, or of the partnership debts, as the case may be, as if the latter had not been discharged.

From Id., §§ 3, 4.

§ 1945. Action against persons engaged in transportation.

In an action brought against one or more persons, engaged, as a joint-stock association, partnership, or otherwise, in the periodical transportation of passengers or property, an objection, to any of the proceedings, cannot be taken by a person properly made a defendant, on the ground that the plaintiff had joined with him, as a defendant, a person not jointly engaged with him in that business, or on the ground that the plaintiff has failed so to join with him a person so jointly engaged, unless the persons so engaged have, at least thirty days before the commencement of the action, filed in the clerk's office of each county, in which they transport passengers or property, a statement showing the names of all of them. A statement so filed, is conclusive, for the purposes specified in this section, as against the persons filing it, until thirty days after filing, in like manner, a new statement, showing a change of interest.

From L. 1836, c. 385.

§ 1946. When partner not sued remains liable.

Where, for any cause, one or more partners have not been joined as defendants in an action upon a partnership liability,

[1] Section 230 of the Debtor and Creditor Law is the same as former § 1942 of this Code (except the last sentence thereof), which, for convenience sake, is retained in this edition. The last sentence of said § 1942 now forms § 231 of the Debtor and Creditor Law.

and final judgment has been taken against the persons made defendants therein, the plaintiff, if the judgment remains unsatisfied, may maintain a separate action upon the same demand, against each omitted partner, setting forth in the complaint the facts specified in this section, as well as the facts constituting his cause of action upon the demand.

From Co. Proc., § 136, subd. 4.

§ 1947. Continuance of partnership business during action for accounting, etc.

In an action brought to dissolve a partnership, or for an accounting between partners, or affecting the continued prosecution of the business, the court may, in its discretion, by order, authorize the partnership business to be continued, during the pendency of the action by one or more of the partners, upon their executing and filing with the clerk an undertaking, in such a sum and with such sureties as the order prescribes, to the effect that they will obey all orders of the court, in the action, and perform all things which the judgment therein requires them to perform. The court may impose such other conditions, as it deems proper, and it may in its discretion at any time thereafter require a new undertaking to be given. The court may also ascertain the value of the partnership property, and of the interest of the respective partners by a reference or otherwise, and may direct an accounting between any of the partners; and the judgment may make such provision for the payment to the retiring partners, for their interest, and with respect to the rights of creditors, the title to the partnership property, and otherwise, as justice requires, with or without the appointment of a receiver, or a sale of the partnership property.

New.

CHAPTER XVI.

Actions in Behalf of the People, and Special Proceedings Instituted, in Their Behalf, by State Writ.

TITLE I.— Actions in Behalf of the People.
TITLE II.— Special Proceedings Instituted by State Writ.

TITLE I.

Actions in behalf of the people.

Article 1. Action against the usurper of an office or franchise.
2. Action to vacate letters-patent.
3. Action for a fine, penalty, or forfeiture, or upon a forfeited recognisance.
4. Certain actions, founded upon the spoliation, or other misappropriation of public property.
5. Action to recover property escheated, or forfeited for treason.
6. Miscellaneous provisions, relating to actions, etc., in behalf of the people.

ARTICLE FIRST.

Action against the usurper of an office or franchise.

Sec. 1948. Attorney-general may maintain action.
1949. Proceedings when complaint names rightful incumbent.
1950. Action triable by jury.
1951. Assumption of office by person entitled.
1952. Proceedings to obtain books and papers.
1953. Damages; how recovered.
1954. One action against several persons.
1955. When injunction may be granted.
1956. Final judgment in action for usurping office, etc.

§ 1948. [Am'd, 1896, 1909.] Attorney-general may maintain action.

The attorney-general may maintain an action, upon his own information, or upon the complaint of a private person, in either of the following cases:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises within the State, a franchise or a public office, civil or military, or an office in a domestic corporation.

2. Against a public officer, civil or military, who has done or suffered an act, which by law works a forfeiture of his office.

3. Against one or more persons who act as a corporation, within the State, without being duly incorporated; or exercises within the State, any corporate rights, privileges or franchises, not granted to them by the law of the State.

4. Against a foreign corporation which exercises within the state any corporate rights, privileges or franchises, not granted to it by the law of this state; or which within the state, has violated any provision of law, or, contrary to law, has done or omitted any act, or has exercised a privilege or franchise, not conferred upon it by the law of this state, where, in a similar case, a domestic corporation would, in accordance with section 131 of the General Corporation Law, be liable to an action to vacate its charter and to annul its existence; or which exercises within the state any corporate rights, privileges or franchises in a manner contrary to the public policy of the state.

From Co. Proc., § 432; 2 R. S. 462 (Part 3, c. 8, tit. 4), § 31. Am'd by L. 1896, c. 902; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 1949. Proceedings when complaint names rightful incumbent.

In an action, brought as prescribed in the last section, for usurping, intruding into, unlawfully holding, or exercising an office, the attorney-general, besides stating the cause of action in the complaint, may, in his discretion, set forth therein the name of the person rightfully entitled to the office, and the facts showing his right thereto; and thereupon, and upon proof, by affidavit, that the defendant, by means of his usurpation or intrusion, has received any fees or emoluments belonging to the office, an order to arrest the defendant may be granted by the court, or a judge. The provisions of title first of chapter seventh of this act apply to such an order, and the proceedings thereupon and subsequent thereto, except where special provision is otherwise made in this title. For that purpose, the order is deemed to have been made as prescribed in section 549 of this act. Judgment may be rendered upon the right of the defendant, and of the party so alleged to be entitled; or only upon the right of the defendant, as justice requires.

From Co. Proc., §§ 435, 436; see 2 R. S. 532, §§ 30, 31.

§ 1950. Action triable by jury.

An action, brought as prescribed in this article, is triable, of course and of right, by a jury, in like manner as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.

New.

§ 1951. Assumption of office by person entitled.

Where final judgment is rendered, upon the right and in favor of the person so alleged to be entitled, he may, after taking the oath of office, and giving an official bond, as prescribed by law, take upon himself the execution of the office. He must, immediately thereafter, demand of the defendant in the action, delivery of all the books and papers in the custody, or under the control, of the defendant, belonging to the office from which the defendant has been so excluded.

From Co. Proc., § 437; see 2 R. S. 582, § 32.

§ 1952. Proceedings to obtain books and papers.

If the defendant refuses or neglects to deliver any of the books or papers, demanded as prescribed in the last section, he is guilty of a misdemeanor; and the same proceedings must be taken to compel the delivery thereof, as are now or shall hereafter be prescribed by law, where a person, who has held an office, refuses or neglects to deliver the official books or papers to his successor.

From Co. Proc., § 438; 2 R. S. 582, § 33.

§ 1953. [Am'd, 1884.] Damages; how recovered.

Where final judgment has been rendered, upon the right and in favor of the person so alleged to be entitled, he may recover, by action, against the defendant, the damages which he has sustained, in consequence of the defendant's usurpation, intrusion into, unlawful holding, or exercise of the office.

From Co. Proc., § 439; see 2 R. S. 582, §§ 34–38. Am'd by L. 1884, c. 399.

§ 1954. One action against several persons.

Where two or more persons claim to be entitled to the same office or franchise, the attorney-general may bring the action against all, to determine their respective rights thereto.

From Co. Proc., § 440; see 2 R. S. 584, § 45.

§ 1955. [Am'd, 1896.] When injunction may be granted. In an action, brought as prescribed in subdivision third or fourth of section 1948 of this act, the final judgment, in favor of the plaintiff, must perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted, upon proof, by affidavit, that the defendant or defendants have violated any of the provisions of either of the said subdivisions third or fourth of section 1948 of this act. The provisions of title second of chapter seventh of this act apply to such a temporary injunction, and the proceedings thereupon, except where provision is otherwise made in this title. For that purpose, the injunction order is deemed to have been granted as prescribed in section 603 of this act. In the trial of an action brought as prescribed in subdivisions third or fourth of section 1948 of this act, a party or a witness is not excused from answering a question on the ground that such answer will tend to incriminate him; but such answer cannot be used as evidence against the person so answering, in a criminal action or criminal proceeding.

From 2 R. S. 462 (Part 3, c. 8, tit. 4), §§ 31, 32. Am'd by L. 1896, c. 963 (in effect May 28, 1896).

§ 1956. Final judgment in action for usurping office, etc. In any other action, brought as prescribed in this article, where a defendant is adjudged to be guilty of usurping or intruding into, or unlawfully holding or exercising, an office, franchise, or privilege, final judgment must be rendered, ousting and excluding him therefrom, and in favor of the people or the relator, as the case requires, for the costs of the action. As a part of the final judgment, the court may, in its discretion, also award, that the defendant, or, where there are two or more defendants, that one or more of them, pay to the people a fine, not exceeding two thousand dollars. The judgment for the fine may be docketed, and execution may be issued thereupon, in favor of the people, as if it had been rendered in an action to recover the fine. The fine, when collected, must be paid into the treasury of the State.

From Co. Proc., § 441; see 2 R. S. 585, § 48.

ARTICLE SECOND.

Action to vacate letters-patent.

Sec. 1957. When attorney-general may maintain action.
1958. Action triable by jury.
1959. Copy of judgment-roll to be filed, etc.
1960. Transcript to be sent to county clerk, etc.

§ 1957. When attorney-general may maintain action.

The attorney-general may maintain an action to vacate or annul letters-patent, granted by the people of the State, in either of the following cases:

1. Where they were obtained by means of a fraudulent suggestion, or concealment of a material fact, made by, or with the knowledge or consent of, the person to whom they were issued.

2. Where they were issued in ignorance of a material fact, or through mistake.

3. Where the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions upon which the letters-patent were granted, or have, by any other means, forfeited the interest acquired under the same.

Whenever the attorney-general has good reason to believe that any act or omission, specified in this section, can be proved, and that the person to be made defendant has no sufficient legal defence, he must commence such an action.

From Co. Proc., § 433.

§ 1958. Action triable by jury.

An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.

New. See § 1950, ante.

§ 1959. Copy of judgment-roll to be filed, etc.

Where final judgment, vacating or annulling letters-patent, is rendered in an action, brought as prescribed in the last section, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of State; who must make an entry, in the records of the commissioners of the land office, stating the substance and effect of the judgment, and the time when the judgment-roll was filed. The real property, granted by those letters-patent, may thereafter be disposed of by the commissioners of the land office, as if the letters-patent had not been issued.

From Co. Proc., §§ 445, 446; see 2 R. S. 580, §§ 24, 25.

§ 1960. Transcript to be sent to county clerk, etc.

Immediately after making the entry prescribed in the last section, the secretary of State must transmit a certified transcript thereof to the clerk, or the register, as the case requires, of each county, in which the real property affected by the judgment is situated. The clerk or register must file it; and, if the letters-patent are recorded in his office, he must note the contents of the transcript in the margin of the record.

New. See L. 1845, c. 110, § 1.

ARTICLE THIRD.

Action for a fine, penalty, or forfeiture, or upon a forfeited recognizance.

Sec. 1961. When action cannot be maintained.
1962. Action for forfeiture, etc.
1963. Money recovered; how disposed of.
1964. Certain proceedings in the action regulated.
1965. Recognizance; how forfeited.
1966. Action on recognizance.
1967. Money received by district-attorney; how disposed of.
1968. District-attorney to render account.

§ 1961. [Am'd, 1895.] When action cannot be maintained.

Whenever, by the decision of the appellate division of the supreme court, a construction is given to a statute, an act done, in good faith, and in conformity to that construction, after the decision was made, and before a reversal thereof by the court of appeals, is so far valid, that the party doing it is not liable to any penalty or forfeiture, for an act that was adjudged lawful by the decision of the court below. But this section does not control or affect the decision of the court of appeals, upon an appeal actually taken before the reversal.

From 2 R. S. 602 (Part 3, c. 9, tit. 3), § 66. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 1962. Action for forfeiture, etc.

Where real or personal property has been forfeited, or a penalty incurred, to the people of the State, or to an officer, for their use, pursuant to a provision of law, the attorney-general, or the district-attorney of the county in which the action is triable, must bring an action to recover the property or penalty, in a court having jurisdiction thereof. Where the supreme court and a justice's court have concurrent jurisdiction of the action, it may be brought in either, at the election of the attorney-general or district-attorney. A recovery in such an action bars a recovery, in any other action, brought for the same cause.

From Co. Proc., § 447; 2 R. S. 481 (Part 3, c. 8, tit. 6), § 3.

§ 1963. Money recovered; how disposed of.

Money recovered in such an action, which is not otherwise specially granted or appropriated by law, must, when collected, be paid into the treasury of the State.

From 2 R. S. 481, § 3.

§ 1964. Certain proceedings in the action regulated.

Sections 1897 and 1898 of this act apply to an action, brought as prescribed in the last two sections.

From Id., §§ 7, 15.

§ 1965. Recognizance; how forfeited.

Where the condition of a recognizance is broken, an order of the court, directing the prosecution of the recognizance, is a sufficient forfeiture thereof.

From 2 R. S. 486, § 31.

§ 1966. [Am'd, 1909.] Action on recognizance.

Where a recognizance to the people is forfeited, and the district-attorney of the county in which it was taken brings an action to

recover the penalty thereof, it is not necessary, in such an action, to allege or prove any damages, by reason of the breach of the condition; but where the people are entitled to judgment therein, they must have judgment absolute, for the penalty of the recognizance.

From 2 R. S. 485, § 29. Am'd by L. 1909, c. 65. (See Table, p. iii, ante).

§ 1967. [Omitted; see Table, p. iii.] Money received by district-attorney; how disposed of.

Within thirty days after a district-attorney receives or collects money upon a recognizance or for a penalty or forfeiture, belonging to the county, he must pay it to the county treasurer of his county, deducting only his necessary disbursements; except that, where he does not receive, as his compensation, a salary fixed pursuant to law, the county court may, by an order entered in its minutes, allow him to retain also a sum, specified in the order, for his reasonable costs and expenses, and a reasonable counsel fee.

From Id., § 32; L. 1852, c. 304, §§ 1, 6; L. 1870, c. 752, § 1.

§ 1968. [Omitted; see Table, p. iii.] District-attorney to render account.

Each district-attorney must render to the first term of the county court of his county, held in each calendar year, a written account, verified by his affidavit, of all actions brought by him upon recognizances, or for penalties or forfeitures belonging to the county, or to the State; of all his proceedings therein; of all judgments recovered by him therein; and of all money, collected by him from any person, belonging to the county or to the State. This section applies to a district-attorney who has gone out of office, during the preceding calendar year.

From 2 R. S. 486, §§ 34, 35, 36.

ARTICLE FOURTH.

Certain actions, founded upon the spoliation, or other misappropriation of public property.

Sec. 1969. Action in court of the State for public funds illegally obtained, converted, etc.
1970. Stay of other domestic actions; parties thereto to be brought in.
1971. Actions, etc., in foreign courts.
1972. Money, damages, etc., vest in people, on commencement of action.
1973. Limitation of action.
1974. Ultimate disposition of proceeds of action, in court of the State.
1975. Id.; upon petition of corporation, etc., aggrieved.
1976. Attorney-general must bring action.

§ 1969. Action in court of the State for public funds illegally obtained, converted, etc.

Where any money, funds, credits, or other property, held or owned by the State, or held or owned, officially or otherwise, for or in behalf of a governmental or other public interest, by a domestic municipal, or other public corporation, or by a board, officer, custodian, agency, or agent of the State, or of a city, county, town, village or other division, subdivision, department, or portion of the State, has heretofore been, or is hereafter, without right obtained, received, converted, or disposed of, an action to recover the same, or to recover damages, or other compensation, for so obtaining, receiving, paying, converting, or disposing of the same, or both, may be maintained by the people of the State, in any court of the State having jurisdiction thereof, although a right of action, for the same cause, exists by law in some other public authority, and whether an action therefor, in favor of the latter, is or is not pending, when the action in favor of the people is commenced.

From L. 1875, c. 49, § 1. See §§ 549, 637, 789, ante.

§ 1970. Stay of other domestic actions; parties thereto to be brought in.

Where an action is commenced by the people, for a cause specified in the last section, the court in which it is brought, may, upon the application of any party thereto, grant an order staying proceedings in any other action, brought, for the same cause, in the same or any other court of the State, by a public authority, other than the people; and, if necessary or proper, it may vacate any order or interlocutory judgment, made or rendered in such an action; and it may, by the same order, or by a subsequent order, granted upon the application of any party to either action, direct that any party to the action so stayed, be brought in, as a party to the action commenced by the people.

From Id., § 2.

§ 1971. Actions, etc., in foreign courts.

The people of the State may commence and maintain, in their own name, or otherwise, as is allowable, one or more actions, suits, or other judicial proceedings, in any court, or before any tribunal, of the United States, or of any other state, or of any territory of the United States, or of any foreign country, for any cause specified in the last section but one.

From Id., § 1.

§ 1972. Money, damages, etc., vest in people, on commencement of action.

Upon the commencement, by the people of the State, of any action, suit, or other judicial proceeding, as prescribed in this

article, the entire cause of action, including the title to the money, funds, credits, or other property, with respect to which the suit or action is brought, and to the damages or other compensation, recoverable for the obtaining, receipt, payment, conversion, or disposition thereof, if not previously so vested, is transferred to, and becomes absolutely vested in, the people of the State.

From Id., § 1.

§ 1973. Limitation of action.

The people of the State will not sue for a cause of action, specified in this article, unless it accrued within ten years before the action is commenced.

From Id., § 1.

§ 1974. Ultimate disposition of proceeds of action, in court of the State.

Any court of the State, in which an action is brought by the people, as prescribed in this article, may, by the final judgment therein, or by a subsequent order, direct that any money, funds, damages, credits, or other property, recovered by, or awarded to, the plaintiff therein, which, if that action had not been brought, would not have vested in the people, be disposed of, as justice requires, in such a manner as to re-instate the lawful custody thereof, or to apply the same, or the proceeds thereof, to the objects and purposes for which they were authorized to be raised or procured; after paying into the State treasury, out of the proceeds of the recovery, all expenses incurred by the people in the action.

From Id., § 3.

§ 1975. Id.; upon petition of corporation, etc., aggrieved.

Any corporation, board, officer, custodian, agency, or agent, may, in behalf of any city, county, town, village, or other division, subdivision, department, or portion of the State, which was not a party to an action, brought as prescribed in this article, and which claims to be entitled to the custody or disposition of any of the money, funds, damages, credits, or other property, recovered by, or awarded to the plaintiff, by the final judgment in the action, or any of the proceeds thereof, and not disposed of as prescribed in the last section, present, at any time after the actual collection of the money, and its payment into the State treasury, or the actual receipt of the property by the people, to the supreme court, at a special term thereof held in the county of Albany, a verified petition, setting forth the facts, and praying for the relief to which he or it is entitled. Notice of the application and a copy of the petition must be served upon the attorney-general. Upon the hearing the court may make such a final order, as justice requires, for the disposition of the money or other property, as prescribed in the last section.

From Id., § 3

§ 1976. Attorney-general must bring action

The attorney-general must commence an action, suit, or other judicial proceeding, as prescribed in this article, whenever he deems it for the interests of the people of the State so to do; or whenever he is so directed, in writing, by the governor.

From Id., § 4.

ARTICLE FIFTH.

Action to recover property escheated, or forfeited for treason.

Sec. 1977. Attorney-general to bring ejectment for real property, escheated or forfeited.
1978. Notice to be published before trial or judgment.
1979. When unknown claimants may be made defendants.
1980. Effect of judgment against unknown claimants.
1981. Attorney-general to report recoveries to commissioners of land office.
1982. Action to recover personal property forfeited for treason.

§ 1977. Attorney-general to bring ejectment for real property, escheated or forfeited.

Whenever the attorney-general has good reason to believe, that the title to, or right of possession of, any real property, has vested in the people of the State, by escheat, or by conviction or outlawry for treason, he must commence an action of ejectment, to recover the property.

From 1 R. S. 282 (Part 1, c. 9, tit. 12), § 1.

§ 1978. Notice to be published before trial or judgment.

The attorney-general must cause a notice, specifying the names of the parties, and the object of the action, and containing a brief description of the property affected thereby, to be published in the newspaper printed at Albany, in which legal notices are required to be published, in a newspaper published in the city of New-York, and in a newspaper published in each county in which any part of the property is situated, at least once in each week, for twelve successive weeks, before an issue of fact, joined in the action, is brought to trial; or, where judgment is rendered therein in favor of the plaintiff, otherwise than upon the trial of an issue of fact, before final judgment is rendered.

From Id., §§ 2, 3.

§ 1979. When unknown claimants may be made defendants.

If the property is not occupied, and no person is known to the attorney-general, as claiming title thereto, the defendant or defendants may be designated as "unknown claimants," without any other description. In all other respects, section 451 of this act applies to an action, in which the defendant or defendants are thus designated.

From Id., § 1.

§ 1980. Effect of judgment against unknown claimants.

Where, in an action of ejectment, to recover property alleged to be escheated, brought as prescribed in the last section, final judgment in favor of the people is rendered against unknown claimants, and the real property recovered thereby is afterwards sold and conveyed, under the direction of the commissioners of the land office, the judgment is conclusive upon the title of that property, as against all persons, except those who commence an action of ejectment for the recovery thereof, or of a part thereof, within five years after the final judgment was rendered in the action in favor of the people, and the judgment-roll was filed thereupon. But section 375 of this act applies to such an action.

From Id., § 4.

§ 1981. Attorney-general to report recoveries to commissioners of land office.

The attorney-general must, from time to time, make a report to the commissioners of the land office, of all the real property recovered by the people, in any action brought pursuant to this article.

From Id., § 9.

§ 1982. Action to recover personal property forfeited for treason.

Where personal property is forfeited to the people, upon a conviction of outlawry for treason, the attorney-general must bring, and may maintain, an action to recover the same, or the value thereof, or such other action, founded upon the forfeiture, as might be maintained by a private person, who had acquired title to the property.

From 1 R. S. 284 (Part 1, c. 9, tit. 13), § 2.

ARTICLE SIXTH.

Miscellaneous provisions, relating to actions, etc., in behalf of the people.

Sec. 1983. Scire facias, quo warranto, etc., abolished.
1984. Actions to be brought in the name of the people.
1985. Judgment for costs may be taken against the people.
1986. Relator; when to be joined as plaintiff; compensation of attorney-general.
1987. Costs; how collected against corporation and usurpers of franchise.
1988. Joinder of causes of action against same person.
1989. Consolidation of actions against several defendants.
1990. When people, municipal corporation, etc., not required to give security.

§ 1983. Scire facias, quo warranto, etc., abolished.

The writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto, have been abolished. The relief, formerly obtained by means of either of those writs, may be obtained by action, where an appropriate action therefor is prescribed in this act.

From Co. Proc., § 428.

§ 1984. Actions to be brought in the name of the people.

An action, brought as prescribed in this title, except an action to recover a penalty or forfeiture, expressly given by law to a particular officer, must be brought in the name of the people of the State; and the proceedings therein are the same, as in an action by a private person, except as otherwise specially prescribed in this title.

New.

§ 1985. Judgment for costs may be taken against the people.

Where judgment is rendered, or a final order is made, against the people, in a civil action brought, or special proceeding instituted, in their name, by a public officer, pursuant to a provision of law, it must be to the same effect, and in the same form, as against a private individual, who brings a like action, or institutes a like special proceeding, except as otherwise specially prescribed by law. But an execution shall not be issued against the people.

From 2 R. S. 552 (Part 3, c. 8, tit. 17), § 18.

§ 1986. Relator; when to be joined as plaintiff; compensation of attorney-general.

Where an action is brought by the attorney-general, as prescribed in this title, on the relation or information of a person, having an interest in the question, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person. In such a case, the attorney-general must, as a condition of bringing the action, require the relator to give satisfactory security to indemnify the people against the costs and expenses thereof. Where security is so given, the attorney-general is entitled to compensation for his services, to be paid by the relator, in like manner as the attorney and counsel for a private person.

From Co. Proc., § 434.

amended by Chap. 104 – Laws 1918

§ 1987. Costs; how collected against corporation and usurpers of franchise.

Where final judgment in an action, brought as prescribed in this title, is rendered against a corporation, or persons claiming to be a corporation, the court may direct the costs to be collected by execution against any of the persons claiming to be a corporation; or by warrant of attachment, or other process, against the person of any director or other officer of the corporation.

From Co. Proc., § 443.

§ 1988. Joinder of causes of action against same person.

Where two or more causes of action exist, in favor of the people, against the same person, for money due upon, or damages for the non-performance of, one or more contracts of the same nature, the attorney-general must join all those causes in one action.

From 1 R. S. 180 (Part 1, c. 8, tit. 5), § 13.

§ 1989. Consolidation of actions against several defendants.

Where two or more actions, brought in behalf of the people, upon the same mortgage or other contract, are pending against separate defendants, claiming or defending under the same title, the attorney-general must, upon the request of the defendants, cause them to be consolidated into one action; and only one bill of costs can be taxed against the defendants.

From Id., § 14.

§ 1990. [Am'd, 1894.] When people, municipal corporation, etc., not required to give security.

Each provision of this act, requiring a party to give security, for the purpose of procuring an order of arrest, an injunction order, or a warrant of attachment, or as a condition of obtaining any other relief, or taking any proceeding; or allowing the court, or a judge, to require such security to be given, is to be construed as excluding an action brought by the people of the state, or by a domestic municipal corporation; or by a public officer, in behalf of the people, or of such a corporation; except where the security, to be given in such an action, is specially regulated by the provision in question; but in any action in which a domestic municipal corporation, or a public officer in behalf of such corporation, shall be, by the foregoing provisions of this section, excused from giving security on procuring an order of arrest, an order of injunction or a warrant of attachment, such corporation shall be liable for all damages that may be so sustained by the opposite party by reason of such order of arrest, attachment or injunction in the same case and to the same extent as sureties to an undertaking would have been, if such an undertaking had been given.

From L. 1876, c. 449, § 11. Am'd by L. 1894, c. 90.

TITLE II.

Special proceedings instituted by State writ.

Article 1. Provisions applicable to two or more State writs.
2. The writ of habeas corpus, to bring up a person to testify.
3. The writ of habeas corpus, and the writ of certiorari, to inquire into the cause of detention.
4. The writ of mandamus.
5. The writ of prohibition.
6. The writ of assessment of damages.
7. The writ of certiorari, to review the determination of an inferior tribunal.

ARTICLE FIRST.

Provisions applicable to two or more State writs.

Sec. 1991. State writs enumerated.
1992. To be under seal of court.
1993. State writ at the instance of the people.
1994. Relator, when joined with people; parties how styled.
1995. Parties may appear by attorney.
1996. Allowance to be indorsed and signed.
1997. Final order; certain proceedings same as in actions.
1998. When writ returnable.
1999. How served.
2000. Habeas corpus, how served; fees and undertaking, when required.
2001. Fees to persons not officers.
2002. Last two sections qualified.
2003. Mode of serving writ, when person conceals himself, etc.
2004. Person served to obey habeas corpus.
2005. Id.; as to certiorari.
2006. Time of returning habeas corpus.
2007. Punishment for non-payment of costs.

§ 1991. State writs enumerated.

The writ of habeas corpus to bring up a person to testify, or to answer; the writ of habeas corpus, and the writ of certiorari, to inquire into the cause of detention; the writ of mandamus; the writ of prohibition; the writ of assessment of damages, which is substituted for the writ heretofore known as the writ of ad quod damnum; and the writ of certiorari to review the determination of an inferior tribunal, which may be called the writ of review, shall hereafter be styled, collectively, State writs.

New.

§ 1992. To be under seal of court.

A State writ must be issued under the seal of the court, by which it is awarded. Where it is allowed by a judge out of court, and is returnable before a court of record, it must be issued under the seal of the court before which it is returnable. Where it is returnable before a judge out of court, or before a body or tribunal, other than a court of record, it must be issued under the seal of the supreme court. Where the seal of the supreme court is to be used, as prescribed in this section, it may be the seal of the county wherein the writ is awarded, or wherein it is returnable.

From 2 R. S. 574 (Part 3, c. 9, tit. 1), § 74.

§ 1993. State writ at the instance of the people.

Where a State writ is required, in an action or special proceeding, civil or criminal, to which the people are a party, or in which they are interested, it may be awarded upon the applica-

tion of the attorney-general, or of the district-attorney having charge of the action or special proceeding; and the indorsement of the allowance thereof must state, that it was issued upon such an application.

From Id., § 77.

§ 1994. Relator, when joined with people; parties, how styled.

A State writ must be issued in behalf of the people of the State; but where it is awarded upon the application of a private person, it must show that it was issued upon the relation of that person. The officer or other person, against whom the writ is issued, shall be styled the defendant therein.

New.

§ 1995. Parties may appear by attorney.

The parties to a special proceeding, instituted by State writ, may appear by attorney, with like effect as in an action brought in the supreme court; but a return to such a writ must be made under the hand of the defendant, except in a case where it is otherwise specially prescribed by law, or where the court or judge, for good cause shown by affidavit, otherwise directs. Where the attorney-general or the district-attorney does not appear for the people, the attorney for the relator is deemed also the attorney for the people.

New.

§ 1996. Allowance to be indorsed and signed.

The presiding judge of a court, by which a State writ is awarded, or the judge who allows such a writ out of court, as the case may be, must sign an allowance thereof indorsed thereupon, stating the date of the allowance.

From 2 R. S. 574, § 76.

§ 1997. Final order; certain proceedings same as in actions.

The final determination of the rights of the parties to a special proceeding instituted by State writ, is styled a final order. The provisions of this act, relating to amendments, motions, and intermediate orders, in an action, are applicable to similar acts in such a special proceeding; except where special provision is otherwise made therein, or where the proceeding is repugnant to the object of the State writ, or the mode of procedure thereunder.

New.

§ 1998. When writ returnable.

Except where special provision is otherwise made in this act, a State writ may be made returnable forthwith, or on a future day certain, as the case requires.

From 2 R. S. 574, § 75.

§ 1999. How served.

Except where special provision is otherwise made in this act, a State writ must be personally served, in like manner as a summons, issued out of the supreme court; and each provision of this act, relating to the personal service of such a summons upon a defendant, applies to the service of a State writ.

New.

§ 2000. [Am'd, 1910.] Habeas corpus, how served; fees and undertaking, when required.

A writ of habeas corpus can be served by any person of the age of twenty-one years and upwards. Where the prisoner is in custody of a sheriff, coroner, constable, or marshal, the service is not complete, unless the person serving the writ tenders to the officer, the fees allowed by law for bringing up the prisoner, and delivers to him an undertaking, with at least one surety, in a sum specified therein, to the effect, that the surety will pay the charges of carrying back the prisoner, if he shall be remanded; and that the prisoner will not escape by the way, either in going to, remaining at, or returning from the place to which he is to be taken. The sum so specified must be, at least, twice the sum for which the prisoner is detained, if he is detained for a specific sum of money; if not, it must be one thousand dollars.

From 2 R. S. 574, § 78. Am'd by L. 1910, c. 120 (in effect Sept. 1, 1910).

§ 2001. Fees to persons not officers.

A court or a judge, allowing a writ of habeas corpus, directed to any person other than a sheriff, coroner, constable, or marshal, may, in its or his discretion, require the applicant, in order to render the service thereof complete, to pay the charges of bringing up the prisoner. In that case, the amount of the charges, not to exceed the fees allowed by law to a sheriff for a similar service, must be specified in the certificate allowing the writ.

From Id., § 84.

§ 2002. Last two sections qualified.

The last two sections are not applicable to a case, where the writ is allowed upon the application of the attorney-general or a district-attorney.

From Id., § 79.

§ 2003. Mode of serving writ, when person conceals himself, etc.

A writ of habeas corpus or of certiorari, issued as prescribed in article second or article third of this title, may be served by delivering it to the person to whom it is directed. If he cannot be found, with due diligence, it may be served by leaving it, at the jail or other place in which the prisoner is confined, with any under officer, or other person of proper age, having charge, for the time, of the prisoner, and paying or tendering to him the fees or charges for bringing up the prisoner. If the person, upon whom the writ ought to be served, keeps himself concealed, or refuses admittance to the person attempting to serve it, it may be served by affixing it in a conspicuous place, on the outside, either of his dwelling-house, or of the place where the prisoner is confined. In that case, the service is complete, without tendering the fees or charges for bringing up the prisoner.

From Id., §§ 80, 81.

§ 2004. Person served to obey habeas corpus.

A sheriff, coroner, constable, or marshal, upon whom complete service of a writ of habeas corpus is made, as prescribed in this article, must obey and make return to the writ, according to the exigency thereof, whether it is directed to him or not. Any other person, upon whom such a writ is served, having the custody of the individual for whose benefit it was issued, must obey and execute it, according to the command thereof, without requiring

any bond, or the payment of any charges, except such as are specified in the certificate allowing the writ.

From Id., § 82.

§ 2005. Id.; as to certiorari.

A person, upon whom a writ of certiorari, issued as prescribed in this title, is served, must, in like manner, upon payment or tender of the fees allowed by law for making a return to the writ, and for copying the warrant, or other process or proceeding, to be annexed thereto, obey and return the writ, according to the exigency thereof.

From Id., § 83.

§ 2006. Time of returning habeas corpus.

Where a writ of habeas corpus is returnable on a day certain, the return must be made at the time and place specified therein. Where such a writ is returnable forthwith, at a place within twenty miles of the place of service, the return must be made, and the prisoner must be produced, within twenty-four hours after service; and the like time must be allowed, for each additional twenty miles.

From Id., § 85.

§ 2007. Punishment for non-payment of costs.

For non-payment, upon demand, of the costs awarded by a final order, made in a special proceeding instituted by State writ, except where a peremptory writ of mandamus is awarded, after the issuing of an alternative mandamus, the person required to pay the same may be punished for a contempt of the court awarding them, or of which the judge awarding them is a member, as if the final order was a final judgment of the court.

New.

ARTICLE SECOND.

The writ of habeas corpus, to bring up a person to testify.

Sec. 2008. Habeas corpus to testify; when allowed by court or judge.
2009. Id.; when allowed by judge.
2010. Id.; in suit before justice of the peace, etc.
2011. The last three sections qualified.
2012. Application, how made.
2013. Certain prisoners to be remanded.
2014. Officer to obey and return writ.

§ 2008. Habeas corpus to testify; when allowed by court or judge.

A court of record, other than a justices' court of a city, or a judge of such a court, or a justice of the supreme court, has power, upon the application of a party to an action or special proceeding, civil or criminal, pending therein, to issue a writ of habeas corpus, for the purpose of bringing before the court a prisoner, detained in a jail or prison within the State, to testify as a witness in the action or special proceeding, in behalf of the applicant.

From 2 R. S. 559 (Part 3, c. 9, tit. 1), § 1.

§ 2009. [Am'd, 1895.] Id.; when allowed by judge.

Such a writ may also be issued by a justice of the supreme court, upon the application of a party to a special proceeding, civil or criminal, pending before any officer or body, authorized to examine a witness therein. In a case specified in this section, the writ may also be issued by a county judge or a special county judge, residing within the county where the officer resides, before whom, or the court or other body sits, in or before which, the special proceeding is pending.

From Id., § 3. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2010. [Am'd, 1895.] Id.; in suit before justice of the peace, etc.

Such a writ may also be issued by a justice of the supreme court, upon the application of a party to an action, pending before a justice of the peace, or in a justices' court of a city, or a district court of the city of New-York, to bring before the justice or court, to be examined as a witness, a prisoner confined in the jail of the county where the action is to be tried, or an adjoining county. In a case specified in this section, the writ may also be issued by a county judge, or a special county judge, residing within the county where the justice resides, or the court is located, or the prisoner is confined, as the case may be.

From 2 R. S. 559, § 4. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2011. [Am'd, 1880, 1895, 1914, 1915.] The last three sections qualified.

Such a writ may be issued by the appellate division of the supreme court in any department, or by the presiding justice thereof, upon such terms and conditions, and under such regulations as such appellate division or presiding justice prescribes, to bring up a prisoner sentenced to death, upon the application of or upon notice to the district attorney of the county in which the attendance of

the prisoner is desired and upon proof that such prisoner is a necessary and material witness in a criminal action then pending and that the interests of public justice require his attendance.

A writ shall not be issued, by virtue of either of the last three sections, or in any way except as in this section provided for, to bring up a prisoner sentenced to death. Nor shall it be issued to bring up a prisoner confined under any other sentence for a felony; except by and in the discretion of a justice of the supreme court upon such notice to the district-attorney of the county wherein the prisoner was convicted, and upon such terms and conditions, and under such regulations, as the judge prescribes.

From 2 R. S. 559, § 1. Am'd by L. 1880, c. 301; L. 1895, c. 946; L. 1914, c. 133; L. 1915, c. 354 (in effect April 23, 1915).

§ 2013. Application, how made.

An application for a writ, made as prescribed in either of the foregoing sections of this article, must be verified by affidavit, and must state:

1. The title and nature of the action or special proceeding, in regard to which the testimony of the prisoner is desired; and the court, or body, in or before which, or the officer before whom, it is pending.

2. That the testimony of the prisoner is material and necessary to the applicant, on the trial of the action, or the hearing of the special proceeding, as he is advised by counsel and verily believes.

3. The place of confinement of the prisoner.

4. Whether the prisoner is or is not confined under a sentence for a felony.

But where the attorney-general or district-attorney makes the application, he need not swear to the advice of counsel.

From 2 R. S. 559, § 2.

§ 2013. Certain prisoners to be remanded.

The return to a writ, issued as prescribed in this article, must state for what cause the prisoner is held; and if it appears therefrom, that he is held by virtue of a mandate in a civil action or special proceeding, or by virtue of a commitment upon a criminal charge, he must, after having testified, be remanded, and again committed to the prison, from which he was taken.

From Id., § 15.

§ 2014. Officer to obey and return writ.

Any officer to whom a writ, issued as prescribed in this article, is delivered, must obey the same, according to the exigency thereof, and make a return thereto accordingly. If he refuses or neglects so to do, he forfeits, to the people, if the writ was issued upon the application of the attorney-general or a district-attorney, or, in any other case, to the party on whose application the writ was issued, the sum of five hundred dollars. But where the prisoner is confined under a sentence to death, a return to that effect is a sufficient obedience to the writ, without producing him.

From Id., § 20.

ARTICLE THIRD.

The writ of habeas corpus, and the writ of certiorari, to inquire into the cause of detention.

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2064. Recognizance valid for adjourned terms.
2065. Penalty for refusing copy of process, etc.
2066. Application of this article to other writs of habeas corpus.

§ 2015. Who entitled to prosecute the writs. Habeas corpus may issue on Sunday.

A person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretence, is entitled, except in one of the cases specified in the next section, to a writ of habeas corpus, or a writ of certiorari, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom. A writ of habeas corpus may be issued and served under

this section, on the first day of the week, commonly called Sunday; but it cannot be made returnable on that day.

From 2 R. S. 563 (Part 3, c. 9, tit. 1), § 21.

§ 2016. When neither writ shall be allowed.

A person is not entitled to either of the writs specified in the last section, in either of the following cases:

1. Where he has been committed, or is detained, by virtue of a mandate, issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

2. Where he has been committed, or is detained, by virtue of the final judgment or decree, of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

From Id., § 22.

§ 2017. [Am'd, 1895.] How and to whom application for habeas corpus or certiorari made.

Application for the writ must be made, by a written petition, signed, either by the person for whose relief it is intended, or by some person in his behalf, to either of the following courts or officers:

1. The supreme court, at a special term or the appellate division thereof, where the prisoner is detained within the judicial district within which the term is held.

2. A justice of the supreme court, in any part of the State.

3. An officer authorized to perform the duties of a justice of the supreme court at chambers, being or residing within the county,[1] where the prisoner is detained; or, if there is no such officer within that city or county, capable of acting, or, if all those who are capable of acting and authorized to grant the writ, are absent, or have refused to grant it, then to an officer, authorized to perform those duties, residing in an adjoining county.

From Id., § 23. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2018. Application in another county; proof required.

Where application for either writ is made as prescribed in subdivision third of the last section, without the county where the prisoner is detained, the officer must require proof, by the oath of the person applying, or by other sufficient evidence, of the facts which authorize him to act as therein prescribed; and if a judge in that county, authorized to grant the writ, is said to be incapable of acting, the cause of the incapacity must be specially set forth. If such proof is not produced, the application must be denied.

From 2 R. S. 563, § 24.

§ 2019. Contents of petition.

The petition must be verified by the oath of the petitioner, to the effect that he believes it to be true; and must state, in substance:

1. That the person in whose behalf the writ is applied for, is imprisoned, or restrained in his liberty; the place where, unless it is unknown, and the officer or person by whom, he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party, whose name is unknown.

[1] When this section was amended by L. 1895, c. 946, the words "city or," preceding this word "county," were omitted, apparently by mistake.

2. That he has not been committed, and is not detained, by virtue of any judgment, decree, final order, or process, specified in section 2016 of this act.

3. The cause or pretence of the imprisonment or restraint, according to the best knowledge and belief of the petitioner.

4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition; unless the petitioner avers, either, that by reason of the removal or concealment of the prisoner before the application, a demand of such a copy could not be made, or that such a demand was made, and the legal fees for the copy were tendered to the officer or other person, having the prisoner in his custody, and that the copy was refused.

5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists.

6. It must specify whether the petitioner applies for the writ of habeas corpus, or for the writ of certiorari.

From Id., § 25.

§ 2020. When writ must be granted; penalty for refusing.

A court or a judge, authorized to grant either writ, must grant it without delay, whenever a petition therefor is presented, as prescribed in the foregoing sections of this article, unless it appears, from the petition itself, or the documents annexed thereto, that the petitioner is prohibited by law from prosecuting the writ. For a violation of this section, a judge, or, if the application was made to a court, each member of the court, who assents to the violation, forfeits to the prisoner one thousand dollars, to be recovered by an action in his name, or in the name of the petitioner to his use.

From Id., §§ 26, 31.

§ 2021. [Am'd, 1895.] Form of writ of habeas corpus.

The writ of habeas corpus, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,
To the Sheriff of," etc. (or "to A. B.")

"We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. is called or charged, before .....", ("the supreme court, at a special term or term of the appellate division thereof, to be held", or "E. F., justice of the supreme court", or otherwise, as the case may be) "at ..... on ....." [or "immediately after the receipt of this writ",] "to do and receive what shall then and there be considered, concerning the said C. D. And have you then there this writ.

"Witness, ..., one of the justices" (or "judges") "of the said court", (or "county judge", or otherwise, as the case may be,) "the ..... day of ....., in the year eighteen hundred and .....".

From Id., § 27. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2022. [Am'd, 1895.] Form of writ of certiorari.

The writ of certiorari, issued as prescribed in this article, must be substantially in the following form, the blanks being properly filled up:

"The People of the State of New York,
To the Sheriff of," etc. (or "to A. B.")

"We command you, that you certify fully and at large, to .....", ("the supreme court, at a special term or term of

the appellate division thereof, to be held", or "E. F., justice of the supreme court", or otherwise, as the case may be,) "at ....., on .....", [or "immediately after the receipt of this writ",] "the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D. is called or charged. And have you then there this writ".

"Witness, ..., one of the justices", (or "judges") "of the said court", (or "county judge," or otherwise, as the case may be,) "the ..... day of ....., in the year eighteen hundred and .....".

From 2 R. S. 565, § 28. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2023. When writ returnable before another judge.

If application for either writ is made to the supreme court, or to a justice thereof, in a county other than that where the person is imprisoned or confined, the writ may be made returnable, in its or his discretion, before any judge authorized to grant it, in the county of the imprisonment or confinement.

From L. 1837, c. 240, § 1.

§ 2024. When writ sufficient.

The writ of habeas corpus or the writ of certiorari shall not be disobeyed, for any defect of form, and particularly in either of the following cases:

1. If the person having the custody of the prisoner, is designated, either by his name of office, if he has one, or by his own name; or, if both names are unknown or uncertain, by an assumed appellation. Any person upon whom the writ is served, is deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person.

2. If the prisoner directed to be produced, is designated by name, or otherwise described in any way, so as to be identified as the person intended.

From 2 R. S. 565, § 29.

§ 2025. When writ to issue without application.

Where a justice of the supreme court, in court or out of court, has evidence, in a judicial proceeding taken before him, that any person is illegally imprisoned or restrained in his liberty, within the State; or where any other judge, authorized by this article to grant the writs, has evidence, in like manner, that any person is thus imprisoned or restrained, within the county where the judge resides; he must issue a writ of habeas corpus or a writ of certiorari, for the relief of that person, although no application therefor has been made.

From Id., § 30.

§ 2026. Return; its contents.

The person upon whom either writ has been duly served, must state, plainly and unequivocally, in his return:

1. Whether or not, at the time when the writ was served, or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued.

2. If he so had that person, when the writ was served, and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate, or other written authority, a copy thereof must be annexed to the return, and, upon the return of the writ,

the original must be produced, and exhibited to the court or judge.

3. If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must conform to the return required by the second subdivision of this section, except that the substance of the mandate or other written authority may be given, if the original is no longer in his hands; and that the return must state particularly to whom, at what time, for what cause, and by what authority, the transfer was made.

The return must be signed by the person making it, and, unless he is a sworn public officer, and makes his return in his official capacity, it must be verified by his oath.

From 2 R. S. 566, § 32.

§ 2027. Habeas corpus; body of prisoner to be produced, unless, etc.

The person, upon whom a writ of habeas corpus has been duly served, must also bring up the body of the prisoner in his custody, according to the command of the writ; unless he states, in his return, that the prisoner is so sick or infirm, that the production of him would endanger his life or his health.

From Id., §§ 33, 49.

§ 2028. Proceedings on disobedience of writ.

Where a person, who has been duly served with either writ, refuses or neglects, without sufficient cause shown by him, fully to obey it, as prescribed in the last two sections, the court or judge, before which or whom it is made returnable, upon proof of the due service thereof, must forthwith issue a warrant of attachment, directed generally to the sheriff of any county where the delinquent may be found, or, if the delinquent is a sheriff, to any coroner of his county, or to a particular person specially appointed to execute the warrant, and designated therein; commanding such officer or other person forthwith to apprehend the delinquent, and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made, committing him to close custody in the jail of the county in which the court or judge is; or, if he is a sheriff, in the jail of a county, other than his own, designated in the order; and, in either case, without being allowed the liberties of the jail. The order must direct that he stand committed, until he makes return to the writ, and complies with any order, which may be made by the court or judge, in relation to the person for whose relief the writ was issued.

From Id., §§ 34, 35.

§ 2029. Id.; precept to bring up prisoner.

The court or judge may also, in its or his discretion, at the time when the warrant of attachment is issued, or afterwards, issue a precept to the sheriff, coroner, or other person, to whom the warrant is directed, commanding him forthwith to bring before the court or judge the person for whose benefit the writ was granted, who must thereafter remain in the custody of the officer or person executing the precept, until discharged, bailed, or remanded, as the court or judge directs.

From 2 R. S. 567, § 36.

§ 2030. Id.; power of county may be called.

The sheriff, coroner, or other person, to whom a warrant of attachment or precept is directed, as prescribed in either of the

/ast two sections, may, in the execution thereof, call to his aid the power of the county, as the sheriff may do, in the execution of a mandate issued from a court of record.

From Id., § 37.

§ 2031. Proceedings on return of habeas corpus.

The court or judge, before which or whom the prisoner is brought by virtue of a writ of habeas corpus, issued as prescribed in this article, must, immediately after the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint, or for the continuance thereof, is shown; whether the same was upon a commitment for an actual or supposed criminal matter, or for some other cause.

From Id., §§ 38, 39.

§ 2032. [Am'd, 1909.] When prisoner to be remanded.

The court or judge must forthwith make a final order to remand the prisoner, if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired:

1. By virtue of a mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction.

2. By virtue of the final judgment or decree of a competent tribunal, of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

3. For a criminal contempt, defined in section 750 of the Judiciary Law, and specially and plainly charged in a commitment, made by a court, officer, or body, having authority to commit for the contempt so charged.

From Id., § 40. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 2033. When to be discharged in civil cases.

If it appears upon the return, that the prisoner is in custody by virtue of a mandate in a civil cause, he can be discharged, only in one of the following cases:

1. Where the jurisdiction of the court which, or of the officer who, issued the mandate, has been exceeded, either as to matter, place, sum, or person.

2. Where, although the original imprisonment was lawful, yet by some act, omission, or event, which has taken place afterwards, the prisoner has become entitled to be discharged.

3. Where the mandate is defective in a matter of substance required by law, rendering it void.

4. Where the mandate, although in proper form, was issued in a case not allowed by law.

5. Where the person, having the custody of the prisoner under the mandate, is not the person empowered by law to detain him.

6. Where the mandate is not authorized by a judgment, decree, or order of a court, or by a provision of law.

From 2 R. S. 568, § 41.

§ 2034. The last section qualified.

But a court or judge, upon the return of a writ issued as prescribed in this article, shall not inquire into the legality or justice

of any mandate, judgment, decree, or final order, specified in the last section but one, except as therein stated.

From Id., § 42.

§ 2035. Proceedings on irregular commitment.

If it appears that the prisoner has been legally committed for a criminal offence, or if he appears, by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offence, although the commitment is irregular, the court or judge, before which or whom he is brought, must forthwith make a final order, to discharge him upon his giving bail, if the case is bailable; or, if it is not bailable, to remand him. Where bail is given pursuant to an order, made as prescribed in this section, the proceedings are the same as upon the return to a writ of certiorari, where it appears that the prisoner is entitled to be bailed.

From Id., § 43.

§ 2036. Id.; when prisoner may be committed to another officer.

Where a prisoner is not entitled to his discharge, and is not bailed, he must be remanded to the custody, or placed under the restraint, from which he was taken, unless the person, in whose custody or under whose restraint he was, is not lawfully entitled thereto; in which case, the order remanding him must commit him to the custody of the officer or person so entitled.

From Id., § 44.

§ 2037. Custody of prisoner pending the proceedings.

Pending the proceedings, and before a final order is made upon the return, the court or judge, before which or whom the prisoner is brought, may either commit him to the custody of the sheriff of the county wherein the proceedings are pending, or place him in such care or custody, as his age and other circumstances require.

From Id., § 45.

§ 2038. Notice to person interested in detention.

Where it appears, from the return to either writ, that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made, until notice of the time when, and the place where, the writ is returnable, or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner, and for such previous length of time, as the court or judge prescribes, as follows:

1. Where the mandate was issued or made in a civil action or special proceeding, to the person who has an interest in continuing the imprisonment or restraint, or his attorney.

2. In every other case, to the district attorney of the county, within which the prisoner was detained, at the time when the writ was served.

For the purpose of an appeal, the person to whom notice is given, as prescribed in the first subdivision of this section, becomes a party to the special proceeding.

From Id., §§ 46, 47; L. 1837, c. 240, § 2.

§ 2039. Prisoner may controvert return; proofs thereupon.

A prisoner, produced upon the return of a writ of habeas corpus may, under oath, deny any material allegation of the return, or

make any allegation of fact, showing either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. Thereupon the court or judge must proceed, in a summary way, to hear the evidence, produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires.
From 2 R. S. 569, § 48.

§ 2040. Proceedings upon sickness, etc., of prisoner.
Where the return to a writ of habeas corpus states that the prisoner is so sick or infirm, that the production of him would endanger his life or health, and the return is otherwise sufficient, the court or judge, if satisfied of the truth of that statement, must decide upon the return, and dispose of the matter, as if a writ of certiorari had been issued.
From Id., § 49.

§ 2041. When certiorari to issue on application for habeas corpus.
Where an application is made for a writ of habeas corpus, as prescribed in this article, and it appears to the court or judge, upon the petition and the documents annexed thereto, that the cause or offence, for which the party is imprisoned or detained, is not bailable, a writ of certiorari may be granted, instead of a writ of habeas corpus, as if the application had been made for the former writ.
From Id., § 50.

§ 2042. Proceedings upon its return.
Upon the return to such a writ of certiorari, the court or judge, before which or whom it is returnable, must proceed as upon a return to a writ of habeas corpus, and must hear the proofs of the parties, in support of and against the return.
From Id., § 51.

§ 2043. [Am'd, 1913.] Id.; when discharge to be granted; when proceedings to cease.
If it appears, that the prisoner is unlawfully imprisoned or restrained in his liberty, the court or judge must make a final order, discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, the court or judge must make a final order, dismissing the proceedings.
A final order made in a proceeding brought on behalf of a person imprisoned or detained in any of the state hospitals mentioned in section forty of the insanity law or in the Matteawan State Hospital or in the Dannemora hospital for insane convicts, shall be conclusive evidence, upon a hearing of any subsequent proceeding involving the detention of the same person, of all the facts determined by the court, unless such final order shall otherwise specify.
From Id., § 52. Am'd by L. 1913, c. 544 (in effect May 15, 1913).

§ 2044. When certiorari does not prevent habeas corpus.
Notwithstanding a writ of certiorari has been issued or returned, as prescribed in this article, the court or judge, before which or whom it is returnable, may issue a writ of habeas corpus, which is, in all respects, subject to the foregoing provisions of this article, relating to the latter writ. If the court or judge refuses a writ of certiorari, or, upon the return thereof, refuses to discharge the prisoner, the latter may claim, and is entitled to, the writ of habeas corpus, as prescribed in this article.
From Id., § 53.

§ 2045. Bail on certiorari; when and how ordered.
If, upon the return to a writ of certiorari, issued as prescribed in this article, it appears, that the person imprisoned or detained

is entitled to be bailed, the court or judge must make a final order, fixing the sum in which he is to be admitted to bail; specifying the court, and the term thereof, at which he is required to appear; and directing his discharge, upon bail being given accordingly, as required by law. If sufficient bail is immediately offered, the court or judge must take it; otherwise, bail may be given afterwards, as prescribed in the next section.

From Id., § 54.

§ 2046. [Am'd, 1895.] Id.; by whom and how taken.

Upon the production of the order, or, if it was made by a court, of a certified copy thereof, to a justice of the supreme court, or to the county judge or special county judge of the county, where the prisoner is detained, the judge must take the recognizance of the prisoner, with two sureties, in the sum so fixed, conditioned for the appearance of the prisoner, as prescribed in the order. Each person, offering himself as a surety, must show, by his oath, to the satisfaction of the judge, that he is a householder in the county, and worth twice the sum in which he is required to be bound, over and above all demands against him. It is not necessary, that the prisoner should appear in person before the judge, to acknowledge the recognizance; but it may be acknowledged by the prisoner, and certified, in like manner as a deed to be recorded in the county.

From Id., § 55. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2047. Discharge of prisoner bailed.

The judge must immediately file the recognizance with the clerk of the court, before which the prisoner is bound to appear. He must also make a certificate upon the order, or the certified copy thereof, to the effect that it has been complied with. Upon production of the certificate, the prisoner is entitled to his discharge from imprisonment, for any cause stated in the return to the certiorari.

From 2 R. S. 570, § 56.

§ 2048. Order substituted for writ of discharge; service and effect thereof.

The writ of discharge is abolished. A final order to discharge a prisoner, made as prescribed in this article, may be served in like manner as an injunction order, and when so served, it may be enforced in the same manner as a final judgment in a civil action, except where special provision for its enforcement is otherwise made in this act. Where such an order directs a discharge, upon giving bail, the service thereof is not complete until service of the certificate, or other proof prescribed by law, showing that bail has been given, as required thereby.

New.

§ 2049. Enforcing order for discharge; penalty, etc.

Obedience to a final order to discharge a prisoner, made as prescribed in this article, may be enforced by the court which, or the judge who, made the same, by attachment, as for a neglect to make a return to a writ of habeas corpus, and with like effect. A person guilty of such disobedience forfeits, to the prisoner aggrieved, one thousand two hundred and fifty dollars, in addition to the damages which the latter sustains.

From 2 R. S. 570, § 57.

§ 2050. When prisoner discharged not to be re-imprisoned; when he may be.

A prisoner, who has been discharged by a final order, made upon a writ of habeas corpus or certiorari, issued as prescribed in this article, shall not be again imprisoned, restrained, or kept in custody, for the same cause. But it is not deemed to be the same cause, in either of the following cases:

1. Where he has been discharged from a commitment on a criminal charge; and is afterwards committed for the same offence, by the lawful order or other mandate of the court, wherein he was bound by recognizance to appear, or in which he has been indicted or convicted for the same offence.

2. Where he has been discharged, in a criminal cause, for defect of proof, or for a material defect in the commitment; and is afterwards arrested on sufficient proof, and committed by a lawful mandate, for the same offence.

3. Where he has been discharged, in a civil action or special proceeding, for an illegality in the judgment, final order, or other mandate, as prescribed in this article; and is afterwards imprisoned, by virtue of a lawful judgment, final order, or other mandate, for the same cause of action.

4. Where he has been discharged, in a civil action or special proceeding from imprisonment by virtue of an order of arrest; and is afterwards taken in execution, or other final process, in the same action or special proceeding, or arrested in another action or special proceeding, after the first was discontinued.

From 1., § 59.

§ 2051. Penalty for violating the last section.

If a court, or judge, or any other person, in the execution of a judgment, order, or other mandate, or otherwise, knowingly violates, causes to be violated, or assists in the violation of, the last section, he, or if the act or omission was that of a court, each member of the court assenting thereto, forfeits, to the prisoner aggrieved, one thousand two hundred and fifty dollars. He is also guilty of a misdemeanor; and, upon conviction thereof, shall be punished by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding six months, or by both, in the discretion of the court.

From id., §§ 60, 64.

§ 2052. Id.; for concealing prisoner, etc., to avoid writ.

Any one, having in his custody, or under his power, a person entitled to a writ of habeas corpus or a writ of certiorari, as prescribed in this article, or a person for whose relief a writ of habeas corpus or a writ of certiorari has been duly issued, as prescribed in this article, who, with intent to elude the service of the writ, or to avoid the effect thereof, transfers the prisoner to the custody, or places him under the power or control, of another, or conceals him, or changes the place of his confinement, is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section.

From id., §§ 61, 62, 64.

§ 2053. Id.; for aiding, etc.

A person who knowingly assists in the violation of the last section, is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section but one.

From id., § 63.

§ 2054. Warrant to bring up prisoner about being removed. — Where it appears, by proof satisfactory to a court or judge, authorised to grant either writ, that a person is held in unlawful confinement or custody, and that there is good reason to believe that he will be carried out of the State, or suffer irreparable injury, before he can be relieved by a writ of habeas corpus or a writ of certiorari; the court or judge must issue a warrant, reciting the facts, directed to a particular sheriff, or generally to any sheriff or constable, or to a person specially designated therein; and commanding him to take, and forthwith to bring before the court or judge, the prisoner, to be dealt with according to law. If the warrant is issued by a court, it must be under the seal thereof; if by a judge, it must be under his hand.

From Id., § 65.

§ 2055. When offender to be arrested.

Where the proof, specified in the last section, is also sufficient to justify an arrest of the person having the prisoner in his custody, as for a criminal offence, committed in taking or detaining him, the warrant must also contain a direction to arrest that person, for the offence.

From Id., § 66.

§ 2056. Execution of warrant; proceedings to relieve prisoner.

The officer or other person, to whom the warrant is directed and delivered, must execute it by bringing the prisoner therein named, and also, if so commanded in the warrant, the person who detains him, before the court or judge issuing it; and thereupon the person detaining the prisoner must make a return, in like manner, and the like proceedings must be taken, as if a writ of habeas corpus had been issued in the first instance.

From Id., § 67.

§ 2057. Id.; proceedings to punish offender.

If the person, having the prisoner in his custody, is brought before the court or judge, as for a criminal offence, he is entitled to be examined, and must be committed, bailed, or discharged, by the court or judge, as in any other criminal case of the same nature.

From Id., § 68.

§ 2058. When appeal may be taken in cases under this article.

An appeal may be taken from an order refusing to grant a writ of habeas corpus, or a writ of certiorari, as prescribed in this article, or from a final order, made upon the return of such a writ, to discharge or remand a prisoner, or to dismiss the proceedings. Where a final order is made, to discharge a prisoner, upon his giving bail, an appeal therefrom may be taken, before bail is given; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie, from an order of the court or judge, before which or whom the writ is made returnable, except as prescribed in this section.

From Id., § 69.

§ 2059. Id.; by people.

An appeal from a final order, discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order, may be taken, in the name of the people, by the attorney-general or the district-attorney.

From Id., §§ 70, 71.

§ 2060. Prisoner who appeals may be admitted to bail.

Where a prisoner, who stands charged, upon a criminal accusation, with a bailable offence, has perfected, or intends to take, an appeal from a final order dismissing the proceedings, remanding him, or otherwise refusing to discharge him, made as prescribed in this article, the court or judge, upon his application, either before or after the final order, must, upon such notice to the district-attorney as the court or judge thinks proper, make an order, fixing the sum in which the applicant shall be admitted to bail, pending the appeal; and thereupon, when his appeal is perfected, he must be admitted to bail accordingly.

From L. 1873, c. 663, § 1.

§ 2061. [Am'd, 1895.] Id.; recognizance, etc.

The recognizance for that purpose must be conditioned, that the prisoner will appear, at a term of the appellate division of the supreme court to be held at a time and place designated in the order, and abide by and perform the judgment of[1] order of the appellate court. It must be taken and approved by a justice of the supreme court, or by the court or judge from whose order the appeal is taken, or by the county judge of the county in which the order was made. In all other respects, the proceedings are the same as prescribed in this article, where it appears, upon the return of a writ of certiorari, that the prisoner is entitled to be admitted to bail.

From Id. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2062. [Am'd, 1895.] Id.; on appeal to court of appeals.

Where a prisoner, who stands charged with an offence, specified in the last section, has perfected an appeal, to the court of appeals, from a final order of the supreme court, affirming an order refusing his discharge, or reversing an order granting his discharge; the court, from whose order the appeal is taken, or a judge thereof, must, upon his application, admit him to bail, as prescribed in the last section; except that the recognizance must be conditioned to appear, at a term of the appellate division of the supreme court from which the appeal is taken, to abide by and perform its judgment or order, made after the determination of the appeal.

From L. 1873, c. 663, § 1. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2063. Custody of prisoner until he gives bail.

Where the sum, in which a prisoner shall be admitted to bail, has been fixed, as prescribed in either of the last two sections, he must remain in the custody of the sheriff of the county in which he then is, until he is admitted to bail, as therein prescribed; or, if he does not give the requisite bail, until the time to appeal has expired or the appeal is disposed of, and the further direction of the court, made thereupon.

From L. 1873, c. 663, § 1.

[1] So in the original ("of" for "or").

§ 2064. [Am'd, 1895.] Recognizance valid for adjourned terms.

Where no order or other direction of the court, relating to the disposition of the prisoner, is made at the term specified in a recognizance, given as prescribed in section 2061 or section 2062 of this act, the matter is deemed adjourned, without an order to that effect, to the next term of the appellate division of the supreme court, to be held in the same department; and thereafter to each successive term, until such an order or direction is made. The prisoner is bound to attend at each successive term of the appellate division; and the recognizance is valid for his attendance accordingly, without any notice or other formal proceedings.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2065. Penalty for refusing copy of process, etc.

An officer or other person, who detains any one by virtue of a mandate, or other written authority, must; upon reasonable demand, and tender of his fees, deliver a copy thereof to any person who applies therefor, for the purpose of procuring a writ of habeas corpus or a writ of certiorari, in behalf of the prisoner. If he knowingly refuses so to do, he forfeits two hundred dollars to the prisoner.

From 2 R. S. 573, § 72.

§ 2066. Application of this article to other writs of habeas corpus.

Except as otherwise expressly prescribed by statute, the provisions of this article apply to and regulate the proceedings upon every common law or statutory writ of habeas corpus, as far as they are applicable; and the authority of a court or a judge, to grant such a writ, or to proceed thereupon, by statute or the common law, must be exercised in conformity to this article, in any case therein provided for.

From Id., §§ 78, 86.

ARTICLE FOURTH.

The writ of mandamus.

Sec. 2067. Kinds of writ; how alternative writ granted.
2068. When writ granted at special term.
2069. Id.; at term of the appellate division of the supreme court.
2070. When peremptory mandamus to issue in first instance.
2071. Alternative writ; how served.
2072. Writ; how returnable.
2073. Return or demurrer to first writ.
2074. Return; how made.
2075. Motion to set aside writ.
2076. Contents of alternative writ; demurrer thereto.
2077. Form and contents of return.
2078. Further return cannot be compelled; demurrer to return.
2079. Issue of fact; when it arises.
2080. Application of certain provisions of chapter sixth.
2081. Service of notice of filing return and demurrer.
2082. Subsequent proceedings the same as in an action.
2083. Issue of fact; how triable.
2084. Id.; where triable.
2085. Issue of law upon appellate division mandamus; how and when triable.
2086. Costs.
2087. Appeals.
2088. When relator to recover damages.
2089. Stay of proceedings; enlargement of time.
2090. Fine in certain cases.

§ 2067. [Am'd, 1913.] Kinds of writ; how alternative writ granted.

A writ of mandamus is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor. Previous notice of the application must be given to a judge of the court, or to the corporation board, or other body, officer, or other person to which or to whom it is directed.

New. Am'd by L. 1913, c. 574 (in effect Sept. 1, 1913).

§ 2068. [Am'd, 1895.] When writ granted at special term.

Except where special provision therefor is otherwise made in this article, a writ of mandamus can be granted only at a special term of the supreme court held within the judicial district embracing the county, wherein an issue of fact, joined upon an alternative writ of mandamus is triable, as prescribed in this article.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2069. [Am'd, 1895.] Id.; at term of the appellate division of the supreme court.

A writ of mandamus may be granted, at a term of the appellate division of the supreme court only, directed generally to any judge holding, or to hold, a special term of the same court, or directed to one or more judges of the same court named therein, in any case where such a writ may be issued out of the supreme court, directed to any other court, or to a judge thereof. Such a writ can be granted only at a term of the appellate division of the judicial department embracing the county, wherein the action is triable, or the special proceeding is brought, in the course of which the matter sought to be enforced by the mandamus originated, unless that term is not in session; in which case, it may be granted at a term of the appellate division of an adjoining judicial department.

From L. 1878, c. 70, § 1. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2070. [Am'd, 1895.] When peremptory mandamus to issue in first instance.

A peremptory writ of mandamus may be issued, in the first instance, where the applicant's right to the mandamus depends only upon questions of law, and notice of the application has been given to a judge of the court, or to the corporation, board, or other body, officer, or other person, to which or to whom it is directed. The notice must be served, at least eight days before the application is heard; unless a shorter time is prescribed by an order to show cause, made, where the application is to the special term, by the court, or a judge thereof; or where the application is to the appellate division, by the appellate division, or a justice of the appellate division of that judicial department. In such a case the application must be founded upon affidavits, or other written proofs, a copy of which must be served with the notice, or order to show cause. Where the court, board or other body to be served, consists of three or more members, the notice or order to show cause, and the papers upon which the application is to be made, may be served, as prescribed in the next section for service of an alternative writ of mandamus. Except as prescribed in this section, or by special provision of law, a peremptory mandamus cannot be issued, until an alternative mandamus has been issued and duly served, and the return day thereof has elapsed.

New. Am'd by L. 1895, c. 946.

§ 2071. Alternative writ; how served.

An alternative writ of mandamus must be served, by showing the original writ, and delivering a copy thereof, to the person to be served. Where it is directed to a court, or to the judge or judges of a court, it must be served, either in term time or in vacation, upon the judge or judges of the court; except that, where the court consists of three or more judges, service upon a majority of them is sufficient. Where it is to be served upon a board or body, other than a corporation, service must be made upon a majority of the members thereof, unless the board or body was created by law, and has a chairman or other presiding officer, appointed pursuant to law; in which case, service upon him is sufficient. Where the writ is to be served upon a corporation, service thereof may be made upon any officer, upon whom a summons, issued out of the supreme court, may be served. Where one or more of the persons, upon whom to make service, as prescribed in this section, cannot, after due diligence, be found, the exhibition of the original writ may be dispensed with, and service may be made upon him or them, as prescribed by law for the service of a summons, issued out of the supreme court.

New.

§ 2072. [Am'd, 1895.] Writ; how returnable.

An alternative writ must be made returnable twenty days after the service thereof, at the office of the clerk of the county, designated therein, in which an issue of fact joined thereupon is triable. A peremptory writ must be made returnable at a special term or a term of the appellate division of the supreme court, designated therein, to which application for the alternative writ might have been made.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2073. Return or demurrer to first writ.

Where the first writ of mandamus has been duly served, a return must be made to the same, as therein required, unless it is an alternative writ, and a demurrer thereto is taken. In default of a return, the person or persons, upon whom the writ was served, may be punished, upon the application of the people, or of the relator, for a contempt of court.

From 2 R. S. 586 (Part 3, c. 9, tit. 2), § 54.

§ 2074. [Am'd, 1895.] Return, how made.

The return to an alternative writ of mandamus must be annexed to a copy of the writ; and must be filed, in the office of the clerk, where it is returnable, within the time specified in the writ. The return to a peremptory writ of mandamus must be likewise annexed to a copy thereof; and must, before the expiration of the first day of the term at which it is returnable, be either delivered in open court, or filed in the office of the clerk of the county wherein the term is to be held.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2075. Motion to set aside writ.

An alternative writ of mandamus cannot be quashed or set aside upon motion, for any matter involving the merits. A motion to set aside such a writ, for any other cause, or to set aside or quash a peremptory writ of mandamus, or to set aside the service of either writ, must be made at a term, whereat the writ might have been granted.

New.

§ 2076. Contents of alternative writ; demurrer thereto.

The statement, contained in an alternative writ of mandamus, of the facts constituting the grievance, to redress which it is issued; the joinder therein of two or more such grievances; and the command of the writ, are subject to the provisions of chapter sixth of this act, respecting the statement, in a complaint, of the facts constituting a cause of action; the joinder therein of two or more causes of action; and the demand of judgment thereupon. The person, upon whom the writ is served, instead of making a return thereto, may file in the office where the writ is returnable, a demurrer to the writ; or he may file a demurrer to a complete statement of facts contained in the writ, as constituting a separate grievance, and make a return to the remainder of the writ. A demurrer may be thus taken, in a case where a defendant may demur to a complaint, or to a cause of action separately stated in a complaint, as prescribed in chapter sixth of this act; and it must be in like form.

New.

§ 2077. Form and contents of return.

The provisions of chapter sixth of this act, relating to the form and contents of an answer, containing denials and allegations of new matter, except those provisions which relate to the verification of an answer, and to a counterclaim contained therein, apply to a return to an alternative writ of mandamus, showing cause against obeying the command of the writ. For the purpose of the application, each complete statement of facts, assigning a cause why the command of the writ ought not to be obeyed, is regarded as a separate defence, and must be separately stated, and numbered.

New.

§ 2078. Further return cannot be compelled; demurrer to return.

A person, who has made a return to an alternative mandamus, cannot be compelled to make a further return. The people, or the relator, may demur to the return, or to any complete statement of facts, therein separately assigned as a cause for disobeying the command of the writ, on the ground that the same is insufficient in law, upon the face thereof.

New.

§ 2079. Issue of fact; when it arises.

An issue of fact arises upon a denial, contained in the return, of a material allegation of the writ, or upon a material allegation of new matter, contained in a return; unless a demurrer thereto is taken. Where the people or the relator demur to a complete statement of facts, separately assigned as cause for disobeying the command of the writ, an issue of fact arises, with respect to the remainder of the return.

New.

§ 2080. Application of certain provisions of chapter sixth.

Oral pleadings upon a writ of mandamus are abolished, and no pleadings are allowed, except as prescribed in the foregoing sections of this article. The provisions of title second of chapter sixth of this act apply to the writ and the return; except that it is not necessary to serve a copy of either, upon the attorney for the adverse party, or to verify either, and that neither can be amended, without special application to the court, or stricken out as sham.

New.

§ 2081. Service of notice of filing return, and demurrer.

Where a return to an alternative writ of mandamus has been filed, the attorney for the defendant making it must serve, upon the attorney for the people or the relator, a notice of the filing thereof. Where the people or the relator demur to the return, or to a part thereof, a copy of the demurrer must be served upon the attorney for the defendant, within twenty days after the service of such a notice. Where the defendant demurs to the writ, or to a part thereof, a copy of the demurrer must be served upon the attorney for the people or the relator, within the time prescribed by law for filing it.

New.

§ 2082. Subsequent proceedings the same as in an action.

Except as otherwise expressly prescribed in this act, the proceedings, after issue is joined, upon the facts or upon the law, are, in all respects, the same as in an action; and each provision of this act, relating to the proceedings in an action, apply thereto. For the purpose of the application, the writ, the return, and the demurrer are deemed to be pleadings in an action; and the final order is deemed to be a final judgment, and may be entered and docketed, and enforced, with respect to such parts thereof as are not enforced by a peremptory mandamus, as a final judgment in an action. But before the final order can be docketed, or an execution issued thereupon, an enrollment must be filed thereupon, as a judgment-roll in an action. For that purpose, the clerk must attach together and file in his office, a certified copy of the final order; the writ and the return, or copies thereof; together with

the same papers, which are required by law to be incorporated into a judgment-roll in an action. Where the final order is in favor of the people or the relator, it must award a peremptory mandamus, to be forthwith issued.

From 2 R. S. 586 (Part 3, c. 9, tit. 2), §§ 55, 57; Co. Proc., § 471.

§ 2083. Issue of fact; how triable.

An issue of fact, joined upon an alternative writ of mandamus, must be tried by a jury, as if it was an issue joined in an action specified in section 968 of this act; unless a jury trial is waived, or a reference is directed by consent of parties. Where the writ was issued upon the relation of a private person, the relator or the defendant is entitled to a verdict, report or decision, where he would be entitled thereto, if the issue was joined in an action, brought by the relator against the defendant, to recover damages for making a false return.

From 2 R. S. 586, § 55.

§ 2084. [Am'd, 1895.] Id.; where triable.

An issue of fact, joined upon an alternative writ of mandamus, granted at a special term of the supreme court, is triable in the county, wherein it is alleged in the writ, that the material facts took place, unless the court directs it to be tried elsewhere. An issue of fact, joined upon an alternative writ of mandamus, granted at a term of the appellate division of the supreme court, is triable in the county, which determines the judicial department wherein the application for the writ must be made; unless the appellate division directs it to be tried in another county of the same judicial department. Upon the trial of an issue of fact, joined upon an alternative writ of mandamus, the verdict, report or decision must be returned to, and the final order thereupon must be made by, the appellate division or the special term, as the case requires.

From Id., § 56. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2085. [Am'd, 1895.] Issue of law upon appellate division mandamus; how and where triable.

An issue of law, joined upon an alternative writ of mandamus, granted by the appellate division, must be tried, and the final order thereupon must be made, by the appellate division.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2086. [Am'd, 1899.] Costs.

Where an alternative writ of mandamus has been issued, costs may be awarded, as in an action; except that, upon making a final order, the costs are in the discretion of the court. Where an application for a peremptory writ of mandamus is granted or denied, without a previous alternative mandamus, costs not exceeding fifty dollars and disbursements, may be awarded to either party, as upon a motion.

From L. 1883, c. 271, § 6; L. 1854, c. 270, § 8. Am'd by L. 1899, c. 527 (in effect Sept. 1, 1899).

§ 2087. [Am'd, 1895, 1913.] Appeals.

An appeal from an order granting a peremptory writ of mandamus, where an alternative writ of mandamus was not previously issued, and an appeal from an order granting or denying an application for an alternative writ of mandamus, must be taken as from a final order made in a special proceeding. An appeal from a final order made upon an alternative mandamus, must be taken, as an appeal from a judgment; and

each provision of law, relating to an appeal from a judgment, either to the appellate division or to the court of appeals, is applicable thereto. But where an appeal is taken, as prescribed in this section, from an order of the appellate division, granting a peremptory mandamus, made upon an original application, or from a final order, made upon an alternative mandamus, granted at the appellate division, the execution of the order appealed from shall not be stayed, except by the order of the same appellate division, made upon such terms, as to security or otherwise, as justice requires.

From L. 1859, c. 174, § 3; L. 1854, c. 270, § 1; L. 1873, c. 70, § 3. Am'd by L. 1895, c. 946; L. 1913, c. 574 (in effect Sept. 1, 1913).

§ 2088. [Am'd, 1913.] When relator to recover damages.

Where a return has been made to an alternative writ of mandamus, issued upon the relation of a private person, the court, upon making a final order for a peremptory mandamus, must also, except where said writ is directed to a state officer or officers, or an officer or officers of a municipal or private corporation, if the relator so elects, award to the relator, against the defendant who made the return, the same damages, if any, which the relator might recover, in an action against that defendant, for a false return. The relator may require his damages where entitled thereto as aforesaid, to be assessed upon the trial of an issue of fact, if the verdict, report, or decision is in his favor. Such an assessment of damages bars an action for a false return.

From 2 R. S. 587 (Part 3, c. 9, tit. 2), §§ 57, 58. Am'd by L. 1913, c. 574 (in effect Sept. 1, 1913).

§ 2089. [Am'd, 1895.] Stay of proceedings; enlargement of time.

The proceedings upon a writ of mandamus, granted at a special term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by a judge of the court, but not by any other officer. Where the writ was granted at a term of the appellate division, an order staying the proceedings, or enlarging the time to make a return, can be made only by a justice of the appellate division of the same department; and where notice has been given of an application for a mandamus at a term of the appellate division of the supreme court, or an order has been made to show cause, at such term, why a mandamus should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.

From Id., § 59; L. 1873, c. 70, § 3. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2090. Fine in certain cases.

Where a final order awards a peremptory mandamus, directed to a public officer, board, or other body, commanding him or them to perform a public duty, enjoined upon him or them by special provision of law, if it appears to the court, that the officer, or one or more members of the board or body, have, without just excuse, refused or neglected to perform the duty so enjoined, the court, besides awarding to the relator his damages and costs, as prescribed in this article, may, in the same order, impose a fine, not exceeding two hundred and fifty dollars, upon the officer, or upon each member of the board, who has so refused or neglected. The fine, when collected, must be paid into the treasury of the State; and the payment thereof bars any action for a penalty, incurred by the person so fined, by reason of his refusal or neglect to perform the duty so enjoined.

From 2 R. S. 587, § 60.

ARTICLE FIFTH.

The writ of prohibition.

Sec. 2091. Kinds of writ; how granted.
2092. When writ granted at special term.
2093. Id.; by the appellate division of the supreme court.
2094. Alternative writ must issue first; its contents.
2095. Id.; when returnable; how served.
2096. Absolute writ issues, unless return made.
2097. Legal objections, how taken; motion to quash or set aside writ.
2098. Return by party; proceedings when he adopts judge's return.
2099. Proceedings after return; trial by jury.
2100. Final order; costs.
2101. Appeals.
2102. Stay of proceedings; enlargement of time.

§ 2091. [Am'd, 1913.] Kinds of writ; how granted.

A writ of prohibition is either alternative or absolute. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor. Previous notice of the application must be given to a judge of the court, or to the corporation board, or other body, officer, or other person to which or to whom it is directed.

From 2 R. S. 587 (Part 3, c. 9, tit. 2), § 61. Am'd by L. 1913, c. 573 (in effect Sept. 1, 1913).

§ 2092. When writ granted at special term.

Except where special provision therefor is otherwise made in this article, an alternative writ of prohibition can be granted only at a special term of the court. In the supreme court, the special term must be one held within the judicial district, embracing the county, wherein the action is triable, or the special proceeding is brought, in the course of which the matter, sought to be prohibited by the writ, originated.

New.

§ 2093. [Am'd, 1895.] Id.; by the appellate division of the supreme court.

An alternative writ of prohibition may be granted at a term of the appellate division of the supreme court only, directed generally to any judge holding, or to hold, a special term of the same court, or directed to one or more judges of the same court, named therein, in any case where such a writ may be issued out of the supreme court, directed to any other court, or to a judge thereof. Such a writ can be granted only at the term of the appellate division of the judicial department, embracing the county, wherein the action is triable, or the special proceeding is brought, in the course of which the matter, sought to be prohibited by the writ, originated, unless a term of the appellate division of said department is not in session; in which case, it may be granted at a term of the appellate division in an adjoining judicial department.

From L. 1873, c. 70, § 1. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2094. Alternative writ must issue first; its contents.

Except as otherwise specially prescribed by law, an absolute writ of prohibition cannot be issued, until an alternative writ has been issued and duly served, and the return day thereof has elapsed. The alternative writ must be directed to the court in which, or to the judge before whom, and also to the party in whose favor, the proceedings to be restrained were taken, or are about to be taken. It must command the court or judge, and also the party, to desist and refrain from any further proceedings in

the action or special proceeding, or with respect to the particular matter or thing described therein, as the case may be, until the further direction of the court issuing the writ; and also to show cause, at the time when, and the place where, the writ is made returnable, why they should not be absolutely restrained from any further proceedings in that action, special proceeding, or matter. The writ need not contain any statement of the facts or legal objections, upon which the relator founds his claim to relief.

From 2 R. S. 587, § 61.

§ 2095. [Am'd, 1895.] Id.; when returnable; how served.

The writ must be made returnable, either forthwith or at a day certain, before the term which granted it, or upon the first day of a future term, therein specified, at which application for the writ might have been made. Where it is granted at a term of the appellate division in a judicial department, adjoining that wherein the matter originated, it may, in the discretion of the court, be made returnable at a term of the appellate division of either department. The writ must be served on the court or judge, and also upon the party, as prescribed by law for the service of an alternative writ of mandamus. A copy of the papers, upon which it was granted, must be delivered with each copy of the writ.

From Id., § 61; L. 1873, c. 70, §§ 1, 4. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2096. [Am'd, 1895.] Absolute writ issues, unless return made.

Where the alternative writ has been duly served upon the court or judge, and upon the party, the relator is entitled to an absolute writ, unless a return is made by the court or judge, and by the party, according to the exigency of the alternative writ, or within such further time as may be granted for the purpose. The return must be annexed to a copy of the writ; and it must be either delivered in open court, or filed in the office of the clerk of the county where the writ is returnable. Where the party makes a return, the court or judge must also make a return. In default thereof, the judge, or the members of the court, may be punished, upon the application of the people or of the relator, for a contempt of the court issuing the writ. A return to an alternative writ of prohibition cannot be compelled in any other case.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2097. Legal objections, how taken; motion to quash or set aside writ.

An alternative writ of prohibition cannot be quashed or set aside, upon motion, for any matter involving the merits. An objection to the legal sufficiency of the papers, upon which the writ was granted, may be taken in the return. A motion to quash an absolute writ of prohibition, or to set aside an alternative writ, for any matter not involving the merits, must be made at a term where the writ might have been granted.

New.

§ 2098. Return by party; proceedings when he adopts judge's return.

A return to an alternative writ, when made by a party, must be verified by his affidavit, as required for the verification of a pleading in a court of record; unless it consists only of objections

to the legal sufficiency of the papers upon which the writ was granted. Where the party unites with the court or judge in a return, or annexes, to the court's or the judge's return, an instrument in writing, subscribed by him, to the effect that he adopts it, and relies upon the matters therein contained, as sufficient cause why the court or judge should not be restrained, as mentioned in the writ, he is thenceforth deemed the sole defendant in the special proceeding; except that where a final order is made, awarding an absolute writ of prohibition, such a writ must be directed to the party, and also to the court or the judge.

From 2 R. S. 587, § 63.

§ 2099. [Am'd, 1895.] Proceedings after return; trial by jury.

Pleadings are not allowed upon a writ of prohibition. Where an alternative writ has been issued, the cause may be disposed of without further notice, at the term at which the writ is returnable. If it is not then disposed of, it may be brought to a hearing, upon notice, at a subsequent term. It must be heard at a term of the appellate division in the same judicial department, or at a special term held in the same judicial district, as the case may be. The relator may controvert, by affidavit, any allegation of new matter contained in the return. The court may direct the trial of any question of fact by a jury, in like manner and with like effect, as where an order is made for the trial, by a jury, of issues of fact, joined in an action triable by the court. Where such a direction is given, the proceedings must be the same, as upon the trial of issues so joined in an action.

From Id., § 64. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2100. Final order; costs.

Where a final order is made in favor of the relator, it must award an absolute writ of prohibition; and it may also direct that all proceedings, or any specified proceeding, theretofore taken in the action, special proceeding, or matter, as to which the prohibition absolute issues, be vacated and annulled. The writ of consultation is abolished. Where a final order is made against the relator, it must authorize the court or judge, and the adverse party, to proceed in the action, special proceeding, or matter, as if the alternative writ had not been issued. Costs, not exceeding fifty dollars and disbursements, may be awarded to either party, as upon a motion.

From Id., §§ 63, 64, 65.

§ 2101. [Am'd, 1895, 1913.] Appeals.

An order granting or denying an application for an alternative writ of prohibition, and a final order, made as prescribed in the last section, can be reviewed only by appeal. Where the order was made by the appellate division, the execution of the order appealed from shall not be stayed, except by an order made at a term of the appellate division in the same department upon such terms as to security, or otherwise, as justice requires.

From L. 1873, c. 70, § 3. Am'd by L. 1895, c. 946. Am'd by L. 1913, c. 573 (in effect Sept. 1, 1913).

§ 2102. [Am'd, 1895.] Stay of proceedings; enlargement of time.

The proceedings upon a writ of prohibition, granted at a special term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by the judge of the court, but not by any other officer. Where the writ was

granted at a term of the appellate division, an order staying the proceedings, or enlarging the time to make a return, can be made only by a justice of the appellate division of the judicial department within which the writ is returnable; and where notice has been given of an application for a prohibition at a term of the appellate division, or an order has been made to show cause at such term, why a prohibition should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896). See § 2089, ante.

ARTICLE SIXTH.

The writ of assessment of damages.

Sec. 2103. Writ defined.
2104. Application therefor.
2105. When made by attorney-general or district-attorney.
2106. Writ; to whom directed.
2107. Contents of writ.
2108. Notice of execution.
2109. Jury; how procured.
2110. Juror to be sworn.
2111. Jury to make inquisition.
2112. Notice of application to court thereupon.
2113. Court may set aside inquisition.
2114. Order on confirming inquisition.
2115. State treasurer to pay damages, etc., to governor.
2116. Governor to pay damages into court.
2117. Investment of money so paid.
2118. How obtained by claimant.
2119. Taking lands by United States.

§ 2103. Writ defined.

The writ, heretofore known as the writ of ad quod damnum, shall hereafter be styled the writ of assessment of damages.

New.

§ 2104. Application therefor.

Whenever the governor of the State is authorized by law, to take possession of any real property within the State, for the use of the people of the State, and he cannot agree with the owner or owners thereof for its purchase, he may cause application to be made to the supreme court, at a special term thereof, for a writ of assessment of damages, which must be granted accordingly.

From 2 R. S. 588 (Part 3, c. 9, tit. 2), § 66.

§ 2105. When made by attorney-general or district-attorney.

The attorney-general, or the district-attorney of the county in which the real property is situated, must, when the governor so directs, make the application, in the name of the governor; and must conduct the subsequent proceedings, under the governor's direction.

New.

§ 2106. Writ; to whom directed.

The writ must be directed to the sheriff of the county in which the real property to be taken is situated, unless the court directs the damages for the taking to be assessed by a jury of another county; in which case, the writ must be issued to the sheriff of the county, from which the jury is directed to be taken.

From 2 R. S. 588, § 66.

§ 2107. Contents of writ.

The writ must describe the real property to be taken, with the like certainty as is required in a complaint in an action of ejectment. It must command the sheriff, to whom it is directed, to inquire, by the oaths of twelve men of his county, qualified to act as trial jurors in a court of record, whether the owner or owners of the real property, or any of them, will sustain any damages by the taking thereof, for the use of the people of the State; and, if so, the amount thereof; and that he return the

writ to the supreme court, without delay, with the finding of the jury thereupon.

From Id., § 67.

§ 2108. Notice of execution.

The sheriff, immediately after the delivery of the writ to him, must give notice of the time when, and the place where, the writ will be executed, by publishing the notice, once in each week, for at least three successive weeks, in a newspaper printed in his county.

From Id., § 68.

§ 2109. [Am'd, 1895.] Jury; how procured.

The sheriff must notify twelve men of his county, qualified to act as trial jurors in a court of record, to attend at the time and place, and for the purpose specified in the notice. Each juror must be notified, as a juror is notified to attend a trial term of the supreme court. Upon his failure to attend, when duly notified, his attendance may be compelled by attachment, and proceedings may be taken against him, and he may be punished thereupon, by the supreme court, as where a juror, duly notified, fails to attend at a trial term thereof. The sheriff may require the attendance of a talesman, in place of a juror notified and not appearing; or he may adjourn the proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance.

From Id., § 69. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2110. Juror to be sworn.

When a jury has been procured, the sheriff must, before the jurors proceed to the inquiry commanded by the writ, administer to each of them an oath, that he will diligently inquire concerning the matters specified in the writ, and will give a true verdict, according to the best of his judgment, without favor or partiality.

From 2 R. S. 588, § 69.

§ 2111. Jury to make inquisition.

After being sworn as prescribed in the last section, the jury must view all the real property described in the writ, and consider the value thereof. They may, in the discretion of a majority of them, hear such testimony as may be offered by any person appearing, respecting the value. They must thereupon assess the damages, which the owner or owners of the real property will sustain, by being deprived thereof. When the real property consists of two or more distinct parcels, owned, or claimed to be owned, by different persons, the jury must assess separately the value of each distinct parcel, if the writ requires them so to do, or if a majority of them think proper so to do. If they cannot agree, after a reasonable time, the sheriff may discharge them, and publish a new notice, and procure a new jury. When the jurors have agreed, they must make an inquisition, stating the sum to be paid, by the people of the State, for taking each distinct parcel, or the whole, as the case requires. The inquisition must be signed by each juror, and by the sheriff; and the sheriff must immediately thereafter file the inquisition and the writ, with his return to the writ, in the office of the clerk of the county in which the real property is situated.

From Id., § 70.

§ 2112. Notice of application to court thereupon.

Within three months after the writ, and the return thereto with the inquisition thereupon, have been filed, as prescribed in the last section, the attorney-general, or district-attorney, having charge of the proceedings, must cause to be published, a notice, directed, generally, to all the owners and persons interested in the real property; describing the property, in general concise terms; stating when and where the writ, return, and inquisition were filed; and requiring the persons notified to show cause, at a special term of the supreme court, to be held at a time and at a place specified in the notice, why the inquisition should not be confirmed; or, if the governor so directs, why the inquisition should not be set aside. The notice must be published, at least once in each week, for three successive weeks, in a newspaper printed in the county, and also in the newspaper printed at Albany, in which legal notices are required to be published.

New.

§ 2113. Court may set aside inquisition.

At the time and place specified in the notice, the court must examine into the inquisition, and hear such allegations, and affidavits, or other written proofs, as may be presented in behalf of the people, or any owner, or person interested. If the court then, or at the time and place to which the matter is adjourned, determines that the inquisition is, in any respect, excessive, unjust, or otherwise materially defective, it may set aside the whole or any part thereof; and may direct that another writ issue, or another inquisition be taken, to supply the defects.

From 2 R. S. 588, § 71.

§ 2114. Order on confirming inquisition.

If it appears to the court, that the writ has been duly executed, an order must be made, and entered in the office of the clerk of the county, in which the real property to be taken is situated, declaring that the people of the State, upon paying into court the amount of the damages assessed by the inquisition, shall be entitled to an absolute estate in the real property described in the writ, and in the appurtenances belonging thereto.

From id., § 72.

§ 2115. State treasurer to pay damages, etc., to governor.

The State treasurer, on the warrant of the comptroller, must pay to the governor, out of any money in the treasury, appropriated for that purpose, sufficient money to pay the damages assessed, pursuant to the foregoing provisions of this article, and the costs and expenses of the proceedings.

From id., § 73; 1 R. S. 170, 177 (Part 1, c. 8, tit. 3 and tit. 4), § 1, subd. 9, and § 5.

§ 2116. Governor to pay damages into court.

Immediately after the receipt by the governor, as prescribed in the last section, of sufficient money to pay the damages, he must pay it into court; and thereupon the absolute title to the real property so to be taken, vests in the people of the State.

From 2 R. S. 588, § 72.

§ 2117. [Am'd, 1895.] Investment of money so paid.

If an application for the money paid into court is not made, as prescribed in the next section, within sixty days after the payment into court, the appellate division of the supreme court

in that judicial department, may provide, by order, for the investment, under the direction of the court, of the money, and of the interest to arise therefrom, in permanent securities, for the benefit of the owners.

From 2 R. S. 588, § 74. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2118. [Am'd, 1895.] How obtained by claimant.

A person claiming to have been an owner of or interested in, the property, when it was so taken, may present to the appellate division of the supreme court, at a term thereof, held in the judicial department embracing the county, wherein the property is situated, a petition, praying for the payment to him of the whole or any part of the money so paid into court, or of the income remaining uninvested, or both; or for the transfer to him of the whole or any part of the securities, in which it has been invested. The court must thereupon take such measures, as it deems proper, to ascertain the rights and interests of the petitioner, and of all other persons, who were owners of or interested in the property, or who are personal representatives, or heirs, of owners or persons so interested, and to cause notice of the application to be given to those persons; and it must cause the money to be paid, or the securities to be transferred, to the several persons entitled thereto, in accordance with the rights and interests thus ascertained.

From 2 R. S. 588, §§ 74, 75. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2119. Taking lands by United States.

When the legislature of the State consents to the taking of any real property within the State, for the use of the people of the United States, a writ of assessment of damages may be issued; and the proceedings thereupon must be in accordance with the provisions of this article; except that the application for the writ must be made, and the subsequent proceedings must be conducted, by the attorney of the United States, for the district embracing the county wherein the real property is situated.

From 2 R. S. 588, § 76.

ARTICLE SEVENTH.

The writ of certiorari, to review the determination of an inferior tribunal.

Sec. 2120. Cases where writ may issue.
2121, 2122. Cases where it cannot issue.
2123. When issued from supreme court.
2124. When from another court.
2125. Limitation of time for review.
2126. Id.; in case of disability.
2127. Application for writ; where and how made.
2128. When notice necessary; service thereof.
2129. To whom writ directed.
2130. Mode of service.
2131. Stay of proceedings.
2132. When and where writ returnable.
2133. Subsequent proceedings as in an action.
2134. Return; when and how made.
2135. Id ; how compelled; fees for making.
2136. Id.; after term of office expired.
2137. When third person may be brought in.
2138. Hearing upon return.
2139. Id.; upon affidavits.
2140. Questions to be determined.
2141. Final order upon the hearing.
2142. Restitution may be awarded.
2143. Costs.
2144. Entry and enrollment of final order.
2145. Effect thereof.
2146. "Body or officer"; "determination"; what they include.
2147. Application of this article to certain special cases.
2148. Id.; to civil cases only.
2148a. Substitution by amendment of remedy by mandamus for that by certiorari, and vice versa.

§ 2120. Cases where writ may issue.

The writ of certiorari regulated in this article, except the writ specified in section 2124 of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only:

1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized, by a statute.

2. Where the writ may be issued at common law, by a court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute.

New.

§ 2121. Cases where it cannot issue.

A writ of certiorari cannot be issued, to review a determination, made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record.

New.

§ 2122. The same.

Except as otherwise expressly prescribed by a statute, a writ of certiorari cannot be issued, in either of the following cases:

1. To review a determination, which does not finally determine the rights of the parties, with respect to the matter to be reviewed.

2. Where the determination can be adequately reviewed, by an appeal to a court, or to some other body or officer.

3. Where the body or officer, making the determination, is expressly authorized, by statute, to rehear the matter, upon the relator's application; unless the determination to be reviewed was

made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed.

New.

§ 2123. [Am'd, 1895.] When issued from supreme court.

A writ of certiorari can be issued only out of the supreme court, except in a case where another court is expressly authorized by statute to issue it.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2124. When from another court.

Any court of record, exercising jurisdiction of an appellate nature, may issue a writ of certiorari, requiring the body or officer whose proceedings are under review, to make a return to the court issuing the writ, at a time and place, fixed by the court, and designated in the writ, for the purpose of supplying any diminution, variance, or other defect, in the record or other papers, before the court issuing the writ, in any case where justice requires that the defect should be supplied, and adequate relief cannot be obtained by means of an order.

From 2 R. S. 599 (Part 3, c. 9, tit. 3), § 45.

§ 2125. Limitation of time for review.

Subject to the provisions of the next section, a writ of certiorari to review a determination must be granted and served, within four calendar months after the determination to be reviewed becomes final and binding, upon the relator, or the person whom he represents, either in law or in fact.

New.

§ 2126. [Am'd, 1895.] Id.; in case of disability.

The appellate division of the supreme court may grant the writ, at any time within twenty months after the expiration of the time limited in the last section, where the relator, or the person whom he represents, was at the time when the determination to be reviewed became final and binding upon him, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2127. [Am'd, 1895.] Application for writ; where and how made.

An application for the writ must be made by, or in behalf of, a person aggrieved by the determination to be reviewed; must be founded upon affidavit, or a verified petition, which may be accompanied by other written proof; and must show a proper case for the issuing of the writ. It can be granted only at a term of the appellate division of the supreme court or at special term; and the granting or refusal thereof is discretionary with the court.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2128. When notice necessary; service thereof.

Until provision is made, in the general rules of practice, for requiring, or dispensing with notice of the application for the writ, the court, to which the application for the writ is made, may, in its discretion, require or dispense with notice. A notice, when it is necessary, must be served, with copies of the papers upon which the application is to be made, upon the body or

officer, whose determination is to be reviewed, or upon such other person as the court directs, as prescribed in this article for the service of a writ of certiorari. The service must be made, at least eight days before the application, unless the court, by an order to show cause, prescribes a shorter time. Where notice is given, the person served may produce affidavits or other written proofs, upon the merits, in opposition to the application.

New.

§ 2129. To whom writ directed.

The writ must be directed to the body or officer, whose determination is to be reviewed; or to any other person having the custody of the record or other papers to be certified; or to both, if necessary. Where it is brought to review the determination of a board or body, other than a court, if an action would lie against the board or body, in its associate or official name, it must be directed to the board or body, by that name; otherwise it must be directed to the members thereof, by their names.

New.

§ 2130. Mode of service.

A writ of certiorari must be served as follows, except where different directions, respecting the mode of service thereof, are given by the court granting it:

1. Where it is directed to a person or persons by name, or by his or their official title or titles, or to a municipal corporation, it must be served, upon each officer or other person, to whom it is so directed, or upon the corporation, in the same manner as a summons in an action brought in the supreme court, except as prescribed in the next two subdivisions of this section.

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court, or the judges thereof, may be made by filing the writ with the clerk.

3. Where it is to be served upon any other board or body, or upon the members thereof, it may be served as prescribed in section 2071 of this act, for service, upon a like board or body, of an alternative writ of mandamus.

New. See 2 R. S. 602, § 68, and Id., 599, § 45.

§ 2131. Stay of proceedings.

Except as prescribed in this section, a writ of certiorari does not stay the execution of the determination to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed. The court, which grants the writ, may, in its discretion, and upon such terms, as to security or otherwise, as justice requires, direct, by a clause in the writ, or by a separate order, that the execution of the determination be stayed, pending the certiorari, and until the further direction of the court. A bond, undertaking, or other security, given to procure such a stay, is valid and effectual, according to its terms, in favor of a person beneficially interested in upholding the determination to be reviewed, who is admitted as a party to the special proceeding, as prescribed in section 2137 of this act.

New.

§ 2132. When and where writ returnable.

A writ of certiorari must be made returnable, within twenty days after the service thereof, at the office of the clerk of the

court. If it was issued from the supreme court, it must be made returnable at the office of the clerk of the county, designated therein, wherein the determination to be reviewed was made; and if the county, designated in the writ, is not the proper county, the court, upon motion, may amend the writ accordingly. Thereupon all papers on file must be transferred to the clerk of the county, where the writ is made returnable by the amendment.

New.

§ 2133. Subsequent proceedings as in an action.

After a writ of certiorari has been issued, the time to make a return thereto may be enlarged, or any other order may be made, or proceeding taken, in the cause, in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action, brought in the same court, and triable in the county where the writ is returnable.

New.

§ 2134. Return; when and how made.

The clerk, with whom a writ of certiorari is filed, and each person, upon whom a writ of certiorari is served, as prescribed in section 2130 of this act, must make and annex to the writ, or to the copy thereof served upon him, a return, with a transcript annexed, and certified by him, of the record or proceedings, and a statement of the other matters, specified in and required by the writ. The return must be filed in the office where the writ is returnable, according to the command thereof.

From 2 R. S. 599 (Part 3, c. 9, tit. 3), §§ 45, 46.

§ 2135. Id.; how compelled; fees for making.

If a return is defective, the court may direct a further return. An omission to make a return, as required by a writ of certiorari, or by an order for a further return, may be punished, as a contempt of the court. But a judge or clerk shall not be thus punished, unless the relator, before the time when the return is required, pays him, for his return, the sum of two dollars, and, in addition, ten cents for each folio of the copies of papers required to be returned.

New. See § 2005, ante.

§ 2136. Id.; after term of office expired.

A writ of certiorari may be issued to, and a return to a writ of certiorari may be made by, an officer, whose term of office has expired. Such an officer may be punished for a failure to make a return to the writ, as required thereby; or to make a further return, as required by an order for that purpose.

New.

§ 2137. [Am'd, 1895.] When third person may be brought in.

Upon the application of a person, specially and beneficially interested in upholding the determination to be reviewed, the court may, in its discretion, admit him as a party defendant in the special proceedings, upon such terms as justice requires. And a term of the appellate division of the supreme court, at which the cause is noticed for hearing, and is placed upon the calendar, may, in a proper case, direct that notice of the pendency of the special proceeding be given to any person, in such a manner as it thinks proper; and may suspend the hearing until notice is given accordingly.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2138. [Am'd, 1895.] Hearing upon return.

The cause must be heard at a term of the appellate division of the supreme court, held within the judicial department, embracing the county where the writ was returnable. Either party may notice it for hearing, at any time after the return is complete. Except as prescribed in the next section, it must be heard upon the writ and return, and the papers upon which the writ was granted.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2139. Id.; upon affidavits.

If the officer or other person, whose duty it is to make a return, dies, absconds, removes from the State, or becomes insane, after the writ is issued, and before making a return, or after making an insufficient return; and it appears that there is no other officer or person, from whom a sufficient return can be procured by means of a new certiorari; the court may, in its discretion, permit affidavits, or other written proofs, relating to the matters not sufficiently returned, to be produced, and may hear the cause accordingly. The court may also, in its discretion, permit either party to produce affidavits, or other written proofs, relating to any alleged error of fact, or any other question of fact, which is essential to the jurisdiction of the body or officer, to make the determination to be reviewed, where the facts, in relation thereto, are not sufficiently stated in the return, and the court is satisfied that they cannot be made to appear, by means of an order for a further return.

New. See 2 R. S. 271 (Part 3, c. 2, tit. 4), § 261; Co. Proc., § 368.

§ 2140. Questions to be determined.

The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.
2. Whether the authority, conferred upon the body or officer, in relation to that subject-matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination.
3. Whether, in making the determination, any rule of law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.
4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.
5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence.

New.

§ 2141. Final order upon the hearing.

The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties.

New.

§ 2142. Restitution may be awarded.

Where the determination reviewed is annulled or modified, the court may order and enforce restitution, in like manner, with like effect and subject to the same conditions, as where a judgment is reversed upon appeal.

New.

§ 2143. Costs.

Costs, not exceeding fifty dollars and disbursements, may be awarded by the final order, in favor of or against either party, in the discretion of the court.

New.

§ 2144. Entry and enrollment of final order.

The final order of the court upon the certiorari must be entered in the office of the clerk where the writ was returnable. But before it can be enforced, an enrollment thereof must be filed. For that purpose, the clerk must attach together, and file in his office, the papers upon which the cause was heard; a certified copy of the final order; and a certified copy of each order, which in any way involves the merits, or necessarily affects the final order.

New.

§ 2145. Effect thereof.

The filing of the enrollment in the office of the clerk where the final order is entered, as prescribed in the last section, is a sufficient authority for any proceeding, by or before the body which, or the officer who, made the determination reviewed, which the final order of the court directs or permits. But where the execution of the final order is stayed by an appeal to the court of appeals, the proceedings below are stayed in like manner.

New.

§ 2146. "Body or officer"; "determination"; what they include.

The expression, "body or officer", as used in this article, includes every court, tribunal, board, corporation, or other person, or aggregation of persons, whose determination may be reviewed by a writ of certiorari; and the word, "determination", as used in this article, includes every judgment, order, decision, adjudication, or other act of such a body or officer, which is subject to be so reviewed.

New.

§ 2147. Application of this article to certain special cases.

Where the right to a writ of certiorari is expressly conferred, or the issuing thereof is expressly authorized, by a statute, passed before, and remaining in force after, this article takes effect, this article does not vary, or affect in any manner, any provision of the former statute, which expressly prescribes a different regula-

tion, with respect to any of the proceedings upon the certiorari to be issued thereunder.

New.

§ 2148. Id.; to civil cases only.

This article is not applicable to a writ of certiorari, brought to review a determination made in any criminal matter, except a criminal contempt of court.

New.

§ 2148a. [Added, 1915.] Substitution by amendment of remedy by mandamus for that by certiorari, and vice versa.

Whenever a writ of certiorari shall be applied for or granted under this article, and it shall appear at any stage of the proceedings, or upon appeal, that the appropriate remedy upon the facts pleaded or proved is mandamus, the proceedings may be amended upon such terms as may be just, and may be continued and determined by the court and at the term where then pending, or remitted to the proper term or court to be disposed of, in order that the relief may be finally granted which is appropriate to the facts, to the same extent as if the application had been in the first instance for a writ of mandamus under article four of this title; and likewise, if a writ of mandamus is applied for or issued under article four of this title, and it shall appear, at any stage of the proceedings, or upon appeal, that certiorari under this article is the appropriate remedy, the proceedings may be amended accordingly upon such terms as are just, and continued and determined by the court and at the term where then pending, or be remitted to the proper term or court to be disposed of; and such relief may be finally ordered as might have been granted if such writ of certiorari had been issued or applied for in the first instance. And in either case, the court may correct by amendment all defects and irregularities in matters of form, or procedure, and may bring in all parties necessary to completely determine the matter and award the appropriate relief upon the facts established.

Added by L. 1915, c. 231 (in effect April 7, 1915.)

CHAPTER XVII.

Certain Special Proceedings Instituted Without Writ.

TITLE I.— Proceedings Relating to Insolvent Debtors and to Prisoners.
TITLE II.— Summary Proceedings to Recover the Possession of Real Property.
TITLE III.— Proceedings to Punish a Contempt of Court, other than a Criminal Contempt.
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TITLE I.

Proceedings relating to insolvent debtors and to prisoners.

Article 1. Discharge of an insolvent from his debts.
2. Exemption from arrest, or discharge from imprisonment, of an insolvent debtor.
3. Discharge of an imprisoned judgment debtor from imprisonment.
4. Care of the property of a person confined for crime.

[N. B.—The whole of this Title, including all its Articles (comprising §§ 2149-2230), has been transferred to the **Debtor and Creditor Law** and the **Prison Law** of the "**Consolidated Laws.**"]

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§§ 2149-2230. [Omitted; see Table, p. iii.]

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TITLE II.

Summary proceedings to recover the possession of real property.

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§ 2231. [Am'd, 1885, 1894, 1913.] When tenant may be removed. In either of the following cases, a tenant or lessee at will, or at sufferance, or for part of a year, or for one or more years, of real property, including a specific or undivided portion of a house, or other dwelling, and his assigns, undertenants, or legal representatives, may be removed therefrom, as prescribed in this title:

1. When he holds over and continues in possession of the demised premises, or any portion thereof, after the expiration of his term,[1] without the permission of the landlord; including, elsewhere than in the city of New York and Brooklyn, a case where the person to be removed became the occupant of the premises as a servant or employee and the relation of master

[1] A special rule applies by statute to monthly tenants in New York city and Brooklyn. The statute is as follows:—"No monthly tenant shall hereafter be removed from any lands or tenements in the city of New York or in the city of Brooklyn on the grounds of holding over his term (except when the same expires on the first day of May) unless at least five days before the expiration of the term the landlord or his agent serves upon the tenant, in the same manner in which a summons in summary proceedings is now allowed to be served by law, a notice in writing to the effect that the landlord elects to terminate the tenancy, and that unless the tenant removes from said premises on the day on which his term expires the landlord will commence summary proceedings under the statute to remove such tenant therefrom." (L. 1889, c. 357.)

and servant or employer and employee has been lawfully terminated or the time fixed for such occupancy by the agreement between the parties, has expired; but if by such agreement the servant was to be permitted to occupy such premises for a period beyond the term of employment such removal shall not be had under this subdivision unless such period so permitted for occupancy has expired, or the relation of master and servant or employer and employee was lawfully terminated before the expiration of such term of employment; but nothing in this subdivision contained shall be construed as preventing the removal of such occupant in any other lawful manner.

2. Where he holds over, without the like permission, after a default in the payment of rent, pursuant to the agreement under which the demised premises are held, and a demand of the rent has been made, or at least three days' notice in writing, requiring, in the alternative, the payment of the rent, or the possession of the premises, has been served, in behalf of the person entitled to the rent, upon the person owing it, as prescribed in this title for the service of a precept.

3. Where in any city in this State he holds over and continues in possession of the demised premises, or any portion thereof, after default in the payment, for sixty days after the same shall be payable, of any taxes or assessments levied on such demised premises which he has agreed in writing to pay pursuant to the agreement under which the demised premises are held, and a demand for the payment of such taxes or assessments has been made, or at least three days' notice in writing, requiring, in the alternative, the payment thereof and of any interest and penalty thereon, or the possession of the premises, has been served, in behalf of the landlord, upon the lessee, as prescribed in this title for the service of a precept. An acceptance of any rent by the lessor or his legal representatives shall not be construed as a waiver of the agreement of the lessee to pay taxes or assessments, so as to preclude the lessor from the benefits of this chapter.

4. Where he, being in possession under a lease for a term of three years or less, has, during the term, taken the benefit of an insolvent act, or has been adjudicated a bankrupt, under a bankrupt law of the United States.

5. Where the demised premises, or any part thereof, are used or occupied as a bawdy-house or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business.

From 2 R. S. 512 (Part 3, c. 8, tit. 10), § 28; L. 1849, c. 193; L. 1868, c. 764, § 1; L. 1873, c. 583, § 1; see also L. 1879, c. 101. Am'd by L. 1885, c. 13; L. 1894, c. 333; L. 1913, c. 448 (in effect Sept. 1, 1913).

§ 2232. [Am'd, 1894.] Person holding over land sold, etc., may be removed.

In either of the following cases, a person, who holds over and continues in possession of real property, after notice to quit the same has been given, as prescribed in section 2236 of this act, and his assigns, tenants, or legal representatives, may be removed therefrom, as prescribed in this title:

1. Where the property has been sold by virtue of an execution against him, or a person under whom he claims, and a title under the sale has been perfected.

2. Where the property has been duly sold, upon the foreclosure, by proceedings taken as prescribed in title ninth of this chapter, of a mortgage, executed by him, or a person under whom he claims, and the title under the foreclosure has been duly perfected.

3. Where he occupies or holds the property, under an agreement with the owner to occupy and cultivate it upon shares, or for a share of the crops, and the time, fixed in the agreement for his occupancy, has expired.

4. Where he, or the person to whom he has succeeded, has intruded into, or squatted upon, any real property, without the permission of the person entitled to the possession thereof, and the occupancy, thus commenced, has continued without permission from the latter; or, after a permission given by him has been revoked, and notice of the revocation given to the person or persons to be removed.

From 2 R. S. 512, §§ 28, 31; L. 1874, c. 208 and c. 471. Am'd by L. 1894, c. 232.

§ 2233. Id.; in case of forcible entry or detainer.

An entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with multitude of people. A person who makes a forcible entry forbidden by this section, or who, having peaceably entered upon real property, holds the possession thereof by force, and his assigns, undertenants, and legal representatives, may be removed therefrom, as prescribed in this title.

From 2 R. S. 507 (Part 3, c. 8, tit. 10), §§ 1, 2.

§ 2234. [Am'd, 1881, 1884, 1895.] Application; to whom made.

Application for removal of a person from real property, as prescribed in this title, may be made to the county judge or special county judge of the county or a justice of the peace of the city or town or the mayor or recorder of the city wherein the real property, or a portion thereof, is situated. Application may also be made, if the property, or a portion thereof, be situated in the city of New York, to a judge of the city court of the city of New York or the district court of the district within which the property, or a portion thereof, is situated; or if the judge of such court be for any reason disqualified, to the district court of an adjoining district; if in the city of Brooklyn, to a police justice of that city; if in the city of Albany, or the city of Troy, to a justice of the justices' court of that city; if in the city of Yonkers, to the city judge of that city; if in the cities of Syracuse, Rochester or Buffalo, to a judge of the municipal court of said cities. Where the property is situated in an incorporated village, the boundaries of which embrace portions of two or more towns, application may be made to a justice of the peace of either town, who keeps an office in the village.

From 2 R. S. 512, § 28. Am'd by L. 1881, c. 122; L. 1884, c. 405; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2235. [Am'd, 1913.] Who can maintain proceedings. Contents of petition.

The application may be made by the landlord or lessor of the demised premises; the purchaser upon the execution or foreclosure sale; the person forcibly put out or kept out; the person with whom, as owner, the agreement was made, or the owner of the property occupied under an agreement, to cultivate the property upon shares, or for a share of the crops; or the person lawfully entitled to the possession of the property intruded into or squatted upon, as the case requires; or by the legal representative, agent, or assignee of the landlord, purchaser, or other person, so entitled to apply; or by the person or corporation authorized to proceed under section 2237 of this act. The applicant must present to the judge or justice, a written petition, verified in like manner as a verified complaint in an action brought in the supreme court; describing the premises of which the possession is claimed, and the interest therein of the petitioner, or the person whom he represents; stating the facts, which, according to

the provisions of this title, authorize the application by the petitioner, and the removal of the person in possession; naming, or otherwise intelligibly designating, the person or persons against whom the special proceeding is instituted, and, if there are two or more such persons, and some are undertenants or assigns, specifying who are principals or tenants, and who are undertenants or assigns; and praying for a final order to remove him or them respectively.

From 2 R. S. 507 (Part 3, c. 8, tit. 10), §§ 2, 3; Id., 513, § 29. Am'd by L. 1913, c. 448 (in effect Sept. 1, 1913).

§ 2236. Notice to be given in certain cases.

Where the person to be removed is a tenant at will, or at sufferance, the petition must state the facts, showing that the tenancy has been terminated, by giving notice, as required by law.[1] Where the application is made in a case specified in section 2232 of this act, the petition must state that a notice, in behalf of the applicant, requiring all persons occupying the property to quit the same, by a day therein specified, has been either served personally upon the person or persons to be removed, or affixed conspicuously upon the property, at least ten days before the day specified therein.

From Id., 513, § 31; L. 1857, c. 396, §§ 2, 3.

§ 2237. [Am'd, 1913.] Petition by neighbor of bawdy-house, etc.

An owner or tenant including a tenant of one or more rooms of an apartment house or tenement house, of any premises within two hundred feet from other demised real property used or occupied in whole or in part, as a bawdy-house, or house, or place of assignation for lewd persons, or for purposes of prostitution, or any domestic corporation organized for the suppression of vice, subject to or which submits to visitation by the state board of charities, and possesses a certificate from such board of such fact and of conformity with its regulations, may serve personally upon the owner or landlord of the premises, so used or occupied, or upon his agent, a written notice, requiring the owner or landlord to make an application for the removal of the person so using or occupying the same. If the owner or landlord, or his agent, does not make such application, within five days thereafter; or, having made it, does not in good faith diligently prosecute it; the person or corporation giving the notice may make an application for such removal on a petition stating the jurisdictional facts, which application shall have the same effect, except as otherwise expressly prescribed in this title, as though the applicant were the owner or landlord of the premises, and shall have precedence over any similar application thereafter made by such owner or landlord or to one theretofore made by him and not prosecuted diligently and in good faith. Proof of the ill repute of the demised premises or of the inmates thereof or of those resorting thereto shall constitute presumptive evidence of the unlawful use of the demised premises, required to be stated in the petition for removal.

From L. 1868, c. 764, §§ 56, 61. Am'd by L. 1913, c. 448 (in effect Sept. 1, 1913).

§ 2238. Precept.

The judge or justice, to whom a petition is presented, as prescribed in either of the foregoing sections of this title, must thereupon issue a precept, directed to the person or persons designated in the petition, as being in possession of the property,

[1] This has reference to the statutory provision now found in section 228 of the Real Property Law that "a tenancy at will or by sufferance may be terminated by a written notice of not less than thirty days given in behalf of the landlord, to the tenant, requiring him to remove from the premises; which notice must be served, either by delivering it to the tenant or to a person of suitable age and discretion, residing upon the premises, or if neither the tenant nor such a person can be found, by affixing it upon a conspicuous part of the premises, where it may be conveniently read."

and requiring him or them forthwith to remove from the property, describing it, or to show cause, before him, at a time and place specified in the precept, why possession of the property should not be delivered to the petitioner, or, in the case specified in the last section, to the owner or landlord. The precept must be returnable, not less than three nor more than five days after it is issued; except that, where the proceeding is taken, upon the ground that a tenant continues in possession of demised premises, after the expiration of his term, without the permission of his landlord, and the application is made on the day of the expiration of the lease, or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued, at any time after twelve o'clock, noon, and before six o'clock in the afternoon.

From 2 R. S. 513, § 30; L. 1851, c. 460; L. 1868, c. 828, § 1.

§ 2239. Id.; in New York city.

In the city of New York, where the application is made to a district court, the petition must be filed with, and the precept must be issued by, the clerk of the court; and the precept must be made returnable before the court, at the place designated, pursuant to law, for holding the court; and all subsequent proceedings in the cause must be had at that place, except as otherwise prescribed in § 2246 of this act. If, upon the return of the precept or upon an adjourned day, the justice is unable, by reason of absence from the court room or sickness, to hear the cause, or it is shown by affidavit that he is for any reason disqualified to sit in the cause, or is a necessary and material witness for either party, a justice of any other district court of the city may act in his place at the same court room.

From L. 1863, c. 189; Co. Proc., § 66; L. 1876, c. 356, § 1; L. 1877, c. 187, § 1.

§ 2240. [Am'd, 1913.] Id.; how served.

The precept must be served as follows:

1. By delivering, to the person to whom it is directed, or, if it is directed to a corporation, to an officer of the corporation, upon whom a summons, issued out of the supreme court, in an action against the corporation, might be served, a copy of the precept, together with a copy of the petition, and at the same time showing him the original precept.

2. If the person, to whom the precept is directed, resides in the city or town in which the property is situated, but is absent from his dwelling-house, service may be made by delivering a copy thereof, together with a copy of the petition, at his dwelling-house, to a person of suitable age and discretion, who resides there; or, if no such person can, with reasonable diligence, be found there, upon whom to make service, then by delivering a copy of the precept and petition, at the property sought to be recovered, either to some person of suitable age and discretion residing there, or if no such person can be found there, to any person of suitable age and discretion employed there.

3. Where service cannot, with reasonable diligence, be made, as prescribed in either of the foregoing subdivisions of this section, by affixing a copy of the precept and petition upon a conspicuous part of the property.

If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable; in every other case, it must be served at least two days before the day on which it is returnable.

From 2 R. S. 513, § 32; L. 1857, c. 684; L. 1868, c. 828. Am'd by L. 1913, c. 277 (in effect Sept. 1, 1913).

§ 2241. Duty of person to whom copy of precept is delivered.

A person, to whom a copy of a precept, directed to another, is delivered, as prescribed in this title, must, without any avoidable delay, deliver it to the person to whom it is directed, if he can be found within the same town or city; or, if he cannot be so found, to his agent therein; and if neither can be so found, after the exercise of reasonable diligence, before the time when the precept is returnable, to the judge or justice who issued the same, at the time of the return thereof, with a written statement indorsed thereupon, that he has been unable, after the exercise of reasonable diligence, to find the person to whom the precept is directed, or his agent, within the town or city. A person, who wilfully violates any provision of this section, is guilty of a misdemeanor; and, if he is a tenant upon the property, forfeits to his landlord the value of three years' rent of the premises occupied by him. A copy of this section must be indorsed upon each copy of a precept, served otherwise than personally upon the person to whom it is directed.

From L. 1868, c. 828, § 8; 1 R. S. 748 (Part 2, c. 1, tit. 4), § 27.

§ 2242. When precept to be served on landlord of bawdy-house, etc.

Where the case is within section 2237 of this act, the precept must be directed to and served upon the owner or landlord, or his agent, and also upon the tenant or occupant of the property. Either or both of them may, upon the return day, appear and show cause why the tenant or occupant should not be removed from the property.

From L. 1868, c. 764, §§ 63, 64.

§ 2243. Proof of service of precept.

At the time when the precept is returnable, the petitioner must, unless the adverse party appears, make due proof of the service thereof, showing the time, and the place and manner of service; and, unless service was made personally upon the adverse party, or by affixing a copy of the precept, the name of the person to whom a copy of the precept was delivered, if his name can be ascertained with reasonable diligence. Where service is made by a sheriff, constable, or marshal, it may be proved by his certificate, stating the facts.

From 2 R. S. 513, §§ 32, 33; L. 1868, c. 828.

§ 2244. [Am'd, 1882, 1893.] Answer.

At the time when the precept is returnable without waiting as prescribed in an action before a justice of the peace, or in a district court in the city of New York, the person to whom it is directed or his landlord, or any person in possession or claiming possession of the premises, or a part thereof, may file with the judge or justice who issued the precept, or with the clerk of the court, a written answer, verified in like manner as a verified answer in an action in the supreme court, denying generally the allegations, or specifically any material allegation of the petition, or setting forth a statement of any new matter constituting a legal or equitable defence, or counterclaim. Such defence or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action.

From 2 R. S. 508, § 7; Id., 513, § 34. Am'd by L. 1882, c. 399; L. 1893, c. 705.

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§ 2245. Issues upon forcible entry or detainer.

Where the application is founded upon an allegation of forcible entry or forcible holding out, the petitioner must allege and prove that he was peaceably in actual possession of the property, at the time of a forcible entry, or in constructive possession, at the time of a forcible holding out; and the adverse party must either deny the forcible entry, or the forcible holding out, or allege, in his defence, that he, or his ancestor, or those whose interest he claims, had been in quiet possession of the property, for three years together next before the alleged forcible entry or detainer; and that his interest is not ended or determined, at the time of the trial.

From 2 R. S. 508, 509, §§ 6, 11.

§ 2246. In N. Y. district court, cause may be transferred to another court for trial.

In a district court of the city of New-York, at the time of joining issue, the justice sitting in the cause may, in his discretion, upon motion of either party, or, if no justice is present, the clerk may, by consent of both parties, make an order transferring the cause for trial, to a district court of an adjoining district, which thereupon has the same jurisdiction and power, at its own court house, as if the property was situated within its district.

From L. 1877, c. 187, § 2.

§ 2247. [Am'd, 1881, 1882.] Trial.

The issues joined by the petition and answer must be tried by the judge or justice, unless either party to such proceedings shall, at the time designated in such precept for showing cause, demand a jury, and at the time of such demand pay to such judge or justice the necessary costs and expenses of obtaining such jury. If a jury be demanded, and such costs and expenses be paid, the judge or justice with whom such petition shall be filed shall nominate twelve reputable persons, qualified to serve as jurors in courts of record, and shall issue his precept, directed to the sheriff or one of the constables of the county, or any constable or marshal of the city or town, commanding him to summon the persons so nominated to appear before such judge or justice, at such time or place as he shall therein appoint, not more than three days from the date thereof, for the purpose of trying the said matters in difference. Six of the persons so summoned shall be drawn in like manner as jurors in justices' courts, and shall be sworn by such judge or justice well and truly to hear, try and determine the matters in difference between the parties. After hearing the allegations and proofs of the parties, the said jury shall be kept together until they agree on their verdict, by the sheriff or one of his deputies, or a constable, or by some proper person appointed by the judge or justice for that purpose, who shall be sworn to keep such jury, as is usual in like cases of courts of record. If such jury cannot agree, after being kept together for such time as such judge or justice shall deem reasonable, he may discharge them and nominate a new jury, and issue a new precept in manner aforesaid.

From 2 R. S. 514, §§ 34-38; L. 1862, c. 368. Am'd by L. 1881, c. 122; L. 1882, c. 114.

§ 2248. Adjournment.

At the time when issue is joined, the judge or justice may, in his discretion, at the request of either party, and upon proof to his satisfaction, by affidavit or orally, that an adjournment is

necessary, to enable the applicant to procure his necessary witnesses, or by consent of all the parties who appear, adjourn the trial of the issue, but not more than ten days; except by consent of all parties.

From 2 R. S. 515 (Part 3, c. 8, tit. 10), § 41.

§ 2249. Final order upon trial.

If sufficient cause is not shown upon the return of the precept; or if the verdict of the jury, or the decision of the judge or justice, upon a trial without a jury, is in favor of the petitioner; the judge or justice must make a final order, awarding to the petitioner the delivery of the possession of the property; except that, where the case is within section 2237 of this act, the final order must direct the removal of the occupant. In either case, the final order must award to the petitioner the costs of the special proceeding. If the verdict or decision is in favor of the person answering, the judge or justice must make a final order accordingly, and awarding to him the costs of the special proceeding.

From Id., §§ 33, 39, 51; L. 1849, c. 193.

§ 2250. [Am'd, 1882.] Amount of costs; how collected.

Costs, when allowed, and the fees of officers, except where a fee is specially given in chapter twenty-one of this act, must be at the rate allowed by law in an action in a justice's court, and are limited in like manner; unless the application is founded upon an allegation of forcible entry or forcible holding out; in which case, the judge or justice may award to the successful party a fixed sum as costs, not exceeding fifty dollars, in addition to his disbursements. If the final order is made by a county judge, or a special county judge, or by a mayor or recorder, an execution to collect the costs may be issued thereupon, as if it was a judgment of a justice of the peace of the same city or county; and for that purpose the officer takes the place of a justice of the peace. In every other case an execution may be issued to collect the costs awarded thereby, in like manner as if the final order was a judgment, rendered in the court, of which the judge or justice is the presiding officer.

From 2 R. S. 509, 511, 516, §§ 12, 13, 22, 51. Am'd by L. 1882, c. 399.

§ 2251. [Am'd, 1882.] Warrant to dispossess defendant.

Where the final order is in favor of the petitioner, the judge or justice must thereupon issue a warrant under his hand, directed to the sheriff of the county, or to any constable or marshal of the city, in which the property, or a portion thereof, is situated, or if it is not situated in a city, to any constable of any town in the county, describing the property, and commanding the officer to remove all persons therefrom, and also, except where the case is within section 2237 of this act, to put the petitioner into the full possession thereof.

From 2 R. S. 509, 513, §§ 13, 33, 39; L. 1857, c. 684; L. 1868, c. 764, §§ 58, 59, 63, 64. Am'd by L. 1882, c. 399.

§ 2252. Execution of warrant.

The officer, to whom the warrant is directed and delivered, must execute it, according to the command thereof, between the hours of sunrise and sunset.

From 2 R. S. 515, § 40.

§ 2253. When warrant cancels lease; exception.

The issuing of a warrant, for the removal of a tenant from demised premises, cancels the agreement for the use of the prem-

ises, if any, under which the person removed held them; and annuls accordingly the relation of landlord and tenant, except that it does not prevent a landlord from recovering, by action, any sum of money, which was, at the time when the precept was issued, payable by the terms of the agreement, as rent for the premises; or the reasonable value of the use and occupation thereof, to the time when the warrant was issued, for any period of time, with respect to which the agreement does not make any special provision for payment of rent.

From Id., § 43; L. 1868, c. 764, § 60.

§ 2254. [Am'd, 1885.] Warrant; when and how stayed.

The party, against whom a final order is made, requiring the delivery of possession to the petitioner, may, at any time before a warrant is issued, stay the issuing thereof; and also stay an execution to collect the costs, as follows:

1. Where the final order establishes that a lessee or tenant holds over, after a default in the payment of rent, or of taxes or assessments, he may effect a stay, by payment of the rent due, or of such taxes or assessments, and interest and penalty, if any thereon due, and the costs of the special proceeding; or by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such sum and with such sureties as the judge or justice approves, to the effect that he will pay the rent, or such taxes or assessments, and interest and penalty and costs, within ten days, at the expiration of which time a warrant may issue, unless he produces to the judge or justice satisfactory evidence of the payment.

2. Where the final order establishes that a lessee or tenant has taken the benefit of an insolvent act, or has been adjudicated a bankrupt, he may effect a stay, by paying the costs of the special proceeding, and by delivering to the judge or justice, or the clerk of the court, his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay the rent of the premises, as it has become, or thereafter becomes due.

3. Where the final order establishes that the person, against whom it is made, continues in possession of real property, which has been sold by virtue of an execution against his property, he may effect a stay, by paying the costs of the special proceeding, and delivering to the judge or justice, or the clerk of the court, an affidavit, that he claims the possession of the property, by virtue of a right or title, acquired after the sale, or as guardian or trustee for another; together with his undertaking to the petitioner, in such a sum and with such sureties as the judge or justice approves, to the effect, that he will pay any costs and damages, which may be recovered against him, in an action of ejectment to recover the property, brought against him by the petitioner within six months thereafter; and that he will not commit any waste upon or injury to the property, during his occupation thereof.

From 2 R. S. 515, §§ 44, 45, 46; L. 1857, c. 684. Am'd by L. 1885, c. 13.

§ 2255. Undertaking; how disposed of.

Where an undertaking is given, in a case specified in subdivision first of the last section, the judge or justice must deliver it to the person against whom the final order was made, upon his producing the evidence of payment, mentioned in that subdivision. If he does not produce such evidence within ten days, the judge or justice must deliver it to the petitioner. In every

other case specified in the last section, the judge or justice must deliver the undertaking to the petitioner, immediately after his approval thereof.

New.

§ 2256. Redemption by lessee.

Where the special proceeding is founded upon an allegation that a lessee holds over, after a default in the payment of rent, and the unexpired term of the lease, under which the premises are held, exceeds five years, at the time when the warrant is issued; the lessee, his executor, administrator, or assignee, may, at any time within one year after the execution of the warrant, pay or tender to the petitioner, his heir, executor, administrator, or assignee, or if, within five days before the expiration of the year, he cannot, with reasonable diligence, be found within the city or town, wherein the property, or a portion thereof, is situated, then to the judge or justice who issued the warrant, or his successor in office, all rent in arrear at the time of the payment or tender, with interest thereupon, and the costs and charges incurred by the petitioner. Thereupon the person, making the payment or tender, shall be entitled to the possession of the demised premises, under the lease, and may hold and enjoy the same, according to the terms of the original demise, except as otherwise prescribed in the next section but one.

From L. 1842, c. 240, § 1.

§ 2257. Id.; by creditor of lessee.

In a case specified in the last section, a judgment creditor of the lessee, whose judgment was docketed in the county, before the precept was issued, or a mortgagee of the lease, whose mortgage was duly recorded, in the county, before the precept was issued, may, at any time before the expiration of one year after the execution of the warrant, unless a redemption has been made as prescribed in the last section, file with the judge or justice who issued the warrant, or with his successor in office, a notice, specifying his interest and the sum due to him; describing the premises; and stating that it is his intention to redeem, as prescribed in this section. If a redemption is not made by the lessee, his executor, administrator, or assignee, within a year after the execution of the warrant, the person so filing a notice, or, if two or more persons have filed such notices, the one who holds the first lien, may, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding the last day of the year, redeem for his own benefit, in like manner as the lessee, his executor, administrator, or assignee might have so redeemed. Where two or more judgment creditors or mortgagees have filed such notices, the holder of the second lien may so redeem, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which the holder of the first lien might have redeemed; and the holder of the third and each subsequent lien, may redeem, in like manner, at any time before two o'clock of the day, not a Sunday or a public holiday, next succeeding that in which his predecessor might have redeemed. But a second or subsequent redemption is not valid, unless the person redeeming pays or tenders to each of his predecessors who has redeemed, the sum paid by him to redeem, and also the sum due upon his judgment or mortgage; or deposits those sums with the judge or justice, for the benefit of his predecessor or predecessors.

From L. 1842, c. 240.

§ 2258. The last two sections qualified.

Where a redemption is made, as prescribed in either of the last two sections, the rights of the person redeeming are subject to a lease, if any, executed by the petitioner, since the warrant was issued, so far that the new lessee, his assigns, undertenants, or other representatives, may, upon complying with the terms of the lease, hold the premises so leased until twelve o'clock, noon, of the first day of May, next succeeding the redemption. And, in all other respects, the person so redeeming, his assigns and representatives, succeed to all the rights and liabilities of the petitioner, under such a lease.

New.

§ 2259. Order to be made thereupon; liability of person redeeming.

The person redeeming, as prescribed in the last three sections, or the owner of the property so redeemed, may present to the judge or justice who issued the warrant, or to his successor in office, a petition, duly verified, setting forth the facts of the redemption, and praying for an order, establishing the rights and liabilities of the parties upon the redemption. Whereupon the judge or justice must make an order, requiring the other party to the redemption to show cause before him, at a time and place therein specified, why the prayer of the petition should not be granted. The order to show cause must be made returnable, not less than two nor more than ten days, after it is granted; and it must be served at least two days before it is returnable. Upon the return thereof, the judge or justice must hear the allegations and proofs of the parties, and must make such a final order as justice requires. The costs and expenses must be paid by the petitioner. The final order, or a certified copy thereof, may be recorded in like manner as a deed. A person, other than the lessee, who redeems as prescribed in the last three sections, succeeds to all the duties and liabilities of the lessee, accruing after the redemption, as if he was named as lessee in the lease.

New.

§ 2260. Appeal.

An appeal may be taken from a final order, made as prescribed in this title, to the same court, within the same time, and in the same manner, as where an appeal is taken from a judgment rendered in the court, of which the judge or justice is the presiding officer, and with like effect; except as otherwise prescribed in the next two sections.

Substituted for 2 R. S. 516, § 47; L. 1868, c. 828; L. 1849, c. 193.

§ 2261. [Am'd, 1868, 1895.] Effect of appeal limited in certain cases.

The issuing or execution of the warrant cannot be stayed by such an appeal, or by the giving of an undertaking thereupon, otherwise than as prescribed in the next section. An appeal cannot be taken to the court of appeals, from a final determination of the appellate division of the supreme court upon such an appeal, unless the latter court, by an order, made at the term of the appellate division where the final order is made, or the next term thereafter, allows it to be taken.

From Id. Am'd by L. 1893, c. 705; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2262. [Am'd, 1868, 1895.] Warrants; how stayed on appeal.

Where an appeal is taken from a final order, awarding delivery of possession to the petitioner, which establishes that a lessee or

tenant holds over, after a default in payment of rent or from an order or judgment affirming such final order, the issuing and execution of the warrant may be stayed by the order of the county judge, and in the city and county of New York by a justice of the supreme court, upon the appellant's giving the security required to perfect the appeal, and to stay the execution of the order appealed from and also an undertaking to the petitioner in a sum and with sureties approved by the county judge or in the city and county of New York by a justice of the supreme court to the effect that if, upon the appeal, a final determination is rendered against the appellant he will pay all rents accruing or to accrue upon the premises, or if there is no lease thereof, the value of the use and occupation of the premises subsequent to the institution of the special proceedings.

From 2 R. S. 516, § 52; L. 1849, c. 193. Am'd by L. 1893, c. 705; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2263. Appellate court may award restitution; action for damages.

If the final order is reversed upon the appeal, the appellate court may award restitution to the party injured, with costs; and it may make any order, or issue any other mandate, necessary to carry its determination into effect. The person dispossessed may also maintain an action, to recover the damages which he has sustained by the dispossession.

From 2 R. S. 516, §§ 48, 49.

§ 2264. Application of this title; effect of final order.

This title does not impair the rights of a landlord, lessor, or tenant, in a case not therein provided for. Where a special statutory provision confers a right to take proceedings, in the manner heretofore prescribed by law, for the summary removal of a person in possession of real property, the proceedings thereunder must be taken as prescribed in this title. A final order, made in a special proceeding, taken as prescribed in this title, is not a bar to an action of ejectment, to recover the property affected thereby.

From Id., § 50.

§ 2265. How proceedings under this title to be stayed.

Where a petition is presented, as prescribed in this title, the proceedings thereupon before the final order, and, if the final order awards delivery of the possession to the petitioner, the issuing or execution of the warrant thereupon, cannot be stayed or suspended by any court or judge, except in one of the following methods:

1. By an order made, or an undertaking filed, upon an appeal, in a case and in the manner specially prescribed for that purpose in this title.

2. By an injunction order, granted in an action against the petitioner. Such an injunction shall not be granted before the final order in the special proceeding, except in a case where an injunction would be granted to stay the proceedings, in an action of ejectment, brought by the petitioner, and upon the like terms; or after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment in such an action, and upon the like terms.

From 2 R. S. 516, § 47.

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TITLE III.

Proceedings to punish a contempt of court, other than a criminal contempt.

Sec. 2266. Cases to which this title applies.
2267. When punishment may be summary.
2268. When warrant to commit may issue without notice.
2269. Order to show cause, or warrant to attach offender.
2270. Notice to delinquent officer to show cause.
2271. Order or warrant; when granted out of court.
2272. Id.; when contempt was committed before a referee.
2273. Effect of order to show cause, and of warrant.
2274. Copy affidavit, etc., to be served with warrant.
2275. Indorsement upon warrant.
2276. Warrant; how executed.
2277. Undertaking to procure discharge.
2278. When habeas corpus may issue.
2279. Sheriff to file undertaking with return.
2280. Interrogatories and proofs.
2281. When and how accused to be punished.
2282. Id.; upon return of habeas corpus.
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2284. Amount of fine.
2285. Length of imprisonment.
2286. When court may release offender.
2287. Offender liable to indictment.
2288. Proceedings when accused does not appear.
2289. Undertaking; when prosecuted by person aggrieved.
2290. Id.; by attorney-general, etc.
2291. Sheriff liable for taking insufficient sureties.
2292. Punishment of misconduct at trial term.

§ 2266. [Omitted; see Table, p. iii.] Cases to which this title applies.

In a case specified in section 14 of this act, or in any other case where it is specially prescribed by law, that a court of record, or a judge thereof, or a referee appointed by the court, has power to punish, by fine and imprisonment, or either, or generally as a contempt, a neglect or violation of duty, or other misconduct; and a right or remedy of a party to a civil action or special proceeding pending in the court, or before the judge or the referee, may be defeated, impaired, impeded, or prejudiced thereby, the offence must be punished as prescribed in this title.

New.

§ 2267. [Omitted; see Table, p. iii.] When punishment may be summary.

Where the offence is committed in the immediate view and presence of the court, or of the judge or referee, upon a trial or hearing, it may be punished summarily. For that purpose, an order must be made by the court, judge, or referee, stating the facts which constitute the offence, and bring the case within the provisions of this section, and plainly and specifically prescribing the punishment to be inflicted therefor.

From 2 R. S. 535 (Part 3, c. 8, tit. 13), § 2.

§ 2268. [Omitted; see Table, p. iii.] When warrant to commit may issue without notice.

Where the offence consists of a neglect or refusal to obey an order of the court, requiring the payment of costs, or of a specified sum of money, and the court is satisfied, by proof, by affidavit, that a personal demand thereof has been made, and that payment thereof has been refused or neglected; it may issue, without notice, a warrant to commit the offender to prison, until the costs or

other sum of money, and the costs and expenses of the proceeding, are paid, or until he is discharged according to law.

From Id., § 4. See L. 1847, c. 390, § 2.

§ 2269. [Omitted; see Table, p. iii.] Order to show cause, or warrant to attach offender.

The court or judge, authorized to punish for the offence, may, in its or his discretion, where the case is one of those specified in either of the last two sections, and, in every other case, must, upon being satisfied, by affidavit, of the commission of the offence, either

1. Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offence; or

2. Issue a warrant of attachment, directed to the sheriff of a particular county, or, generally, to the sheriff of any county where the accused may be found, commanding him to arrest the accused, and bring him before the court or judge, either forthwith, or at a time and place therein specified, to answer for the alleged offence.

From 2 R. S. 535, §§ 3, 5.

§ 2270. [Omitted; see Table, p. iii.] Notice to delinquent officer to show cause.

Where it is prescribed by law, or by the general rules of practice, that a notice may be served in behalf of a party, upon a sheriff or other person, requiring him to return a mandate, delivered to him, or to show cause, at a term of a court, why he should not be punished, or why an attachment should not be issued against him, for a contempt of the court; the party, in whose behalf the notice is served, may, at the time specified therein, file with the clerk, proof, by affidavit or other written evidence, of the delivery of the mandate to the accused; of the default or other act, upon the occurrence of which, he was entitled to serve the notice; of the service of the notice; and of the failure to comply therewith. Thereupon the proceedings are the same, as where an order to show cause is made, and it, and a copy of the affidavits upon which it is granted, are served upon the accused.

From Id., § 6.

§ 2271. [Omitted; see Table, p. iii.] Order or warrant; when granted out of court.

Where the order to show cause, or the warrant, is returnable before the court, it may be made, or issued, as prescribed in the last section but one, by any judge authorized to grant an order without notice, in an action pending in the court; and it must be made returnable at a term of the court, at which a contested motion may be heard.

New. See 37 N. Y. 235.

§ 2272. [Omitted; see Table, p. iii.] Id.; when contempt was committed before a referee.

An order to show cause may be made, or a warrant may be issued, as prescribed in section 2269 of this act, by a referee appointed by the court, where the offence is committed upon the

trial of an issue referred to him, or consists of a witness's non-attendance, or refusal to be sworn or to testify, before him. The order or warrant may, in the discretion of the referee, be made returnable before him, or before the court. Where it is made returnable before the referee, he has all the power and authority of the court, with respect to the motion or special proceeding, instituted thereby.

New.

§ 2273. [Omitted; see Table, p. iii.] Effect of order to show cause, and of warrant.

An order to show cause may be made, either before or after the final judgment in the action, or the final order in the special proceeding. It is equivalent to a notice of motion; and the subsequent proceedings thereupon are taken in the action or special proceeding, as upon a motion made therein. A warrant of attachment is a mandate, whereby an original special proceeding is instituted against the accused, in behalf of the people, upon the relation of the complainant.

New. See 37 N. Y. 235.

§ 2274. [Omitted; see Table, p. iii.] Copy affidavit, etc., to be served with warrant.

A copy of the warrant, and of the affidavit upon which it is issued, must be served upon the accused, when he is arrested by virtue thereof.

From 2 R. S. 535, § 3. See 37 N. Y. 235.

§ 2275. [Omitted; see Table, p. iii.] Indorsement upon warrant.

Where a warrant of attachment is issued, the court, judge, or referee, may, in its or his discretion, by an indorsement thereupon, fix a sum, in which the accused may give an undertaking for his appearance to answer.

From 2 R. S. 535 (Part 3, c. 8, tit. 13), § 10.

§ 2276. [Omitted; see Table, p. iii.] Warrant; how executed.

If an indorsement is not made upon the warrant, as prescribed in the last section; or if such an indorsement is made and an undertaking is not given, as prescribed in the next section; the sheriff, after making the arrest, as required by the warrant, must keep the accused in his custody, until the further direction of the court, judge, or referee. Where, from sickness or any other cause, the accused is physically unable to attend before the court, judge, or referee, that fact is a sufficient excuse to the sheriff for not producing him as required by the warrant. In that case, the sheriff must produce him, as directed by the court, judge, or referee, after he becomes able to attend. The sheriff need not, in any case, confine the accused in prison, or otherwise restrain him of his liberty, except as far as it is necessary so to do, in order to secure his personal attendance.

From Id., §§ 12, 14, 37.

§ 2277. [Omitted; see Table, p. iii.] Undertaking to procure discharge.

Where an indorsement is made upon the warrant, as prescribed in the last section but one, the accused must be discharged from arrest, upon his executing and delivering to the sheriff, at any time before the return day of the warrant, an undertaking to the people, in the sum specified in the indorsement, with two sufficient sureties, to the effect that he will appear, at the time when, and the place where, the warrant is returnable, and then and there abide the direction of the court, judge, or referee, as the case requires. The officer, taking the acknowledgment of the undertaking, must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offered as sureties, concerning their property and circumstances.

From Id., § 13.

§ 2278. [Omitted; see Table, p. iii.] When habeas corpus may issue.

If the accused is in the custody of a sheriff, or other officer, by virtue of an execution against his person, or by virtue of a mandate for any other contempt or misconduct, or a commitment on a criminal charge, a warrant of attachment cannot be issued. In that case, the court, upon proof of the facts, must issue a writ of habeas corpus, directed to the officer, requiring him to bring the accused before it, to answer for the offence charged. The officer to whom the writ is directed, or upon whom it is served, must, except in a case where the production of the accused under a warrant of attachment would be dispensed with, bring him before the court, and detain him at the place where the court is sitting, until the further order of the court.

From Id., §§ 7, 9.

§ 2279. [Omitted; see Table, p. iii.] Sheriff to file undertaking with return.

The sheriff or other officer must file the undertaking, if any, taken by him, with the return to the warrant or writ of habeas corpus.

From Id., § 16.

§ 2280. [Omitted; see Table, p. iii.] Interrogatories and proofs.

When the accused is produced, by virtue of a warrant, or a writ of habeas corpus, or appears upon the return of a warrant, the court, judge, or referee, must, unless he admits the offence charged, cause interrogatories to be filed, specifying the facts and circumstances of the offence charged against him. The accused must make written answers thereto, under oath, within such reasonable time as the court, judge, or referee allows therefor; and either party may produce affidavits, or other proofs, contradicting or corroborating any answer. Upon the original affidavits, the answers, and subsequent proofs, the court, judge, or referee must determine, whether the accused has committed the offence charged.

From Id., § 18.

§ 2281. [Omitted; see Table, p. iii.] When and how accused to be punished.

If it is determined that the accused has committed the offence charged; and that it was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding, brought in the court, or before the judge or referee; the court, judge, or referee must make a final order accordingly, and directing that he be punished by fine or imprisonment, or both, as the nature of the case requires. A warrant of commitment must issue accordingly.

From Id., § 20.

§ 2282. [Omitted; see Table, p. iii.] Id.; upon return of habeas corpus.

Where the accused is brought up by virtue of a writ of habeas corpus, he must, after the final order is made, be remanded to the custody of the sheriff, or other officer, to whom the writ was directed. If the final order directs that he be punished by imprisonment, or committed until the payment of a sum of money, he must be so imprisoned or committed, upon his discharge from custody under the mandate, by virtue of which he is held by the sheriff, or other officer.

See 2 R. S. 560 (Part 3, c. 9, tit. 1), § 5.

§ 2283. [Omitted; see Table, p. iii.] Id.; upon return of order to show cause.

Upon the return of an order to show cause, the questions which arise must be determined, as upon any other motion; and, if the determination is to the effect specified in the last section but one, the order thereupon must be to the same effect as the final order therein prescribed. Upon a certified copy of the order so made, the offender may be committed, without further process.

New. See 37 N. Y. 285.

§ 2284. [Omitted; see Table, p. iii.] Amount of fine.

If an actual loss or injury has been produced to a party to an action or special proceeding, by reason of the misconduct proved against the offender, and the case is not one where it is specially prescribed by law, that an action may be maintained to recover damages for the loss or injury, a fine, sufficient to indemnify the aggrieved party, must be imposed upon the offender, and collected, and paid over to the aggrieved party, under the direction of the court. The payment and acceptance of such a fine constitute a bar to an action by the aggrieved party, to recover damages for the loss or injury. Where it is not shown that such an actual loss or injury has been produced, a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto, and must be collected and paid, in like manner. A corporation may be fined as prescribed in this section.

From 2 R. S. 538, §§ 21, 22.

§ 2285. [Omitted; see Table, p. iii.] Length of imprisonment

Where the misconduct proved consists of an omission to perform an act or duty, which it is yet in the power of the offender to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed. In such a case, the order, and the warrant of commitment, if one is issued, must specify the act or duty to be performed, and the sum to be paid. In every other case, where special provision is not otherwise made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment.

From Id., §§ 23, 24, 25.

§ 2286. [Omitted; see Table, p. iii.] When court may release offender.

Where an offender, imprisoned as prescribed in this title, is unable to endure the imprisonment, or to pay the sum, or perform the act or duty, required to be paid or performed, in order to entitle him to be released, the court, judge, or referee, or, where the commitment was made as prescribed in section 2457 of this act, the court, out of which the execution was issued, may, in its or his discretion, and upon such terms as justice requires, make an order, directing him to be discharged from the imprisonment.

From Id., § 20; L. 1848, c. 9; Co. Proc., § 302.

§ 2287. [Omitted; see Table, p. iii.] Offender liable to indictment.

A person, punished as prescribed in this title, may, notwithstanding, be indicted for the same misconduct, if it is an indictable offence; but the court, before which he is convicted, must, in forming its sentence, take into consideration the previous punishment.

From 2 R. S. 538, § 26.

§ 2288. [Omitted; see Table, p. iii.] Proceedings when accused does not appear.

Where a person, arrested by virtue of a warrant of attachment, has given an undertaking for his appearance, as prescribed in this title and fails to appear, on the return day of the warrant, the court may either issue another warrant, or make an order, directing the undertaking to be prosecuted; or both.

From Id., § 27.

§ 2289. [Omitted; see Table, p. iii.] Undertaking; when prosecuted by person aggrieved.

The order directing the undertaking to be prosecuted, may, in the discretion of the court, direct the prosecution thereof, by and in the name of any party aggrieved by the misconduct of the

accused. In such a case, the plaintiff may recover damages, to the extent of the loss or injury sustained by him, by reason of the misconduct, together with the costs and expenses of prosecuting the special proceeding in which the warrant was issued; not exceeding the sum specified in the undertaking.

From Id., §§ 28, 29.

§ 2290. [Omitted; see Table, p. iii.] Id.; by attorney-general, etc.

If no party is aggrieved by the misconduct of the accused, the order must, and, in any case where the court thinks proper so to direct, it may, direct the prosecution of the undertaking, by the attorney-general, or by the district-attorney of the county in which it was given, in the name of the people. In an action, brought pursuant to the order, the people are entitled to recover the entire sum, specified in the undertaking. Out of the money collected, the court, which directed the prosecution, must direct that the person, at whose instance the warrant was issued, be paid such a sum as it thinks proper, to satisfy the costs and expenses incurred by him, and to compensate him for any loss or injury sustained by him, by reason of the misconduct. The residue of the money must be paid into the treasury of the State.

From Id., §§ 30, 31.

§ 2291. [Omitted; see Table, p. iii.] Sheriff liable for taking insufficient sureties.

After the return of an execution, issued upon a judgment, rendered in an action upon the undertaking, an action, to recover the amount of the judgment, may be maintained against the sheriff, where it appears that, at the time when the undertaking was given, the sureties were insufficient, and the sheriff had reasonable grounds to doubt their sufficiency. Such an action may be maintained by the plaintiff, in whose favor the judgment was recovered. If the people were plaintiffs, the action must be prosecuted by the attorney-general or the district-attorney; and any money collected therein must be disposed of, as prescribed in the last section.

From Id., § 32.

§ 2292. [Omitted; see Table, p. iii.] Punishment of misconduct at trial term.

Where a misconduct, which is punishable by fine or imprisonment, as prescribed in this title, occurs at a trial term, or with respect to a mandate returnable at such term, and was not punished at the term at which it occurred; the supreme court may inquire into and punish the misconduct, as if it had occurred at a special term of the supreme court, held in the same county, or with respect to a mandate returnable at such a special term.

From Id., § 33. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

TITLE IV.

Proceedings to collect a fine.

[N. B.—This Title (comprising §§ 2293-2301) has been transferred to the **Judiciary Law** of the "**Consolidated Laws.**"]

§§ 2293-2301. [Omitted; see Table, p. iii.]

TITLE V.

Proceedings to discover the death of a tenant for life.

Sec. 2302. Petition for production of tenant for life.
2303. Contents of petition.
2304. Service of petition and notice.
2305. Proceedings upon presentation of petition.
2306. Service of order; powers, etc., of referee.
2307. Habeas corpus.
2308. Report of referee.
2309. Dismissal of petition when order complied with.
2310. When life-tenant deemed dead, and petitioner let into possession.
2311. Commission to be issued if life-tenant is without the State.
2312. General provisions respecting the commission.
2313. Petitioner to give notice of its execution.
2314. Execution thereof.
2315. Proceedings on return of commission.
2316. Costs.
2317. Property; when restored.
2318. Remedy of person evicted for profits, etc.
2319. Order not conclusive in ejectment.

§ 2302. Petition for production of tenant for life.

A person entitled to claim real property, after the death of another who has a prior estate therein, may, not oftener than once in each calendar year, apply by petition to the supreme court, at a special term thereof, held within the judicial district, wherein the property, or a part thereof, is situated, for an order, directing the production of the tenant for life, as prescribed in this title, by a person, named in the petition, against whom an action of ejectment to recover the real property can be maintained, if the tenant for life is dead; or, where there is no such person, by the guardian, husband, trustee, or other person, who has, or is entitled to, the custody of the person of the tenant for life, or the care of his estate.

From 2 R. S. 343 (Part 3, c. 5, tit. 8), § 1.

§ 2303. Contents of petition.

The petition must be in writing, and verified by the affidavit of the petitioner, to the effect, that the matters of fact therein set forth are true. It must contain:

1. A description of the real property, and a statement of the petitioner's interest therein, and of such other facts as show that the case is within the provisions of the last section.

2. An averment that the petitioner believes that the person, upon whose life the prior estate depends, is dead, together with a statement of the grounds upon which the petitioner's belief is founded.

From Id., §§ 2, 3.

§ 2304. Service of petition and notice.

A copy of the petition, including the affidavit, together with notice of the time and place at which the petition will be presented, must be personally served, at least fourteen days before its presentation, upon the person required, by the prayer thereof, to produce the tenant for life.

From Id., § 3.

§ 2305. Proceedings upon presentation of petition.

Upon the presentation of the petition and affidavit, with due proof, by affidavit, of service of a copy thereof, and of the notice, if sufficient cause to the contrary is not shown by the adverse

party, the court must either issue a commission, as prescribed in the following sections of this title; or make an order, directing the adverse party, at a time and place therein specified, before the court, or a referee therein designated, to produce the person upon whose life the prior estate depends, or, in default thereof, to prove that he is living.

From Id., § 4.

§ 2306. Service of order; powers, etc., of referee.

Where an order, requiring the production of the tenant for life, or proof that he is living, is made as prescribed in the last section, a certified copy thereof must be served, at least fourteen days before the time therein specified, upon the person required to make the production or proof, or upon his attorney. Upon presentation of proof of service, by affidavit, the court or the referee must, at the time and place specified in the order, or at the time and place to which the hearing may be adjourned, hear the allegations and proofs of the parties, respecting the identity of any person produced, with the person whose death is in question; or, if the latter person is not produced, respecting the reasons for the failure to produce him, and whether he is living. Where a referee is appointed, he has the same powers, and is entitled to the same compensation, as a referee appointed for the trial of an issue in an action.

From Id., § 5.

§ 2307. Habeas corpus.

If it appears, by affidavit, to the satisfaction of the court, that the person required to be produced is imprisoned within the State, for any cause, except upon a sentence for a felony, or is kept or detained, within the State, by any person, the court may, either before or after making the order for production, issue a writ of habeas corpus to bring him before it, or before the referee, as the case requires. The writ must be served and executed, and disobedience thereto may be punished, as where a writ of habeas corpus is issued, to inquire into the cause of the detention of a prisoner.

From Id., § 7.

§ 2308. Report of referee.

The referee must deliver his report to the petitioner, or file it with the clerk, within ten days after the case is closed. He must state therein, whether any person was or was not produced before him, as being the person whose death is in question. He must append thereto, in the form of depositions, the proofs, if any, respecting the identity of any person so produced, with the person whose death is in question; or, if no one is so produced, upon the question whether the latter person is living. He must also state, in his report, his conclusions upon the questions controverted before him.

From Id., § 8.

§ 2309. Dismissal of petition when order complied with.

If it appears, to the satisfaction of the court, upon the referee's report, and the proofs thereto appended; or, where a referee is not appointed, upon the allegations and proofs of the parties before the court; that the party, required to produce the tenant for life, or to prove his existence, has fully complied with the order, the court must make an order, dismissing the petition, and requiring the petitioner to pay the costs of the proceedings.

From Id., § 9.

§ 2310. When life-tenant deemed dead, and petitioner let into possession.

If it appears, from the referee's report, or upon the hearing before the court, that the person, upon whose life the prior estate depends, was not produced; and if the party required to produce him, or to prove his existence, has not proved, to the satisfaction of the court, that he is living; a final order must be made, declaring that he is presumed to be dead, for the purpose of the proceedings, and directing that the petitioner be forthwith let into possession of the real property, as if that person was actually dead.

From Id., § 10.

§ 2311. Commission to be issued if life-tenant is without the State.

If before or at the time of the presentation of the referee's report to the court, or, where a referee is not appointed, at any time before the final order is made, the party, upon whom the petition and notice are served, presents to the court presumptive proof, by affidavit, that the person, whose death is in question, is, or lately was, at a place certain, without the State, the court must make an order, requiring the petitioner to take out a commission, directed to one or more persons, residing at or near that place, either designated in the order, or to be appointed upon a subsequent application for the commission, for the purpose of obtaining a view of the person, whose death is in question, and of taking such testimony, respecting his identity, as the parties produce. The order must also direct that the proceedings upon the petition be stayed, until the return of the commission; and that the petition be dismissed with costs, unless the petitioner takes out the commission, within a time specified in the order, and diligently procures it to be executed and returned, at his own expense.

From Id., § 11.

§ 2312. General provisions respecting the commission.

It is not necessary, unless the court specially so directs, that the witnesses to be examined should be named in the commission, or that interrogatories should be annexed thereto. The commission must be executed and returned, and the deposition taken must be filed and used, as prescribed for those purposes in article second of title third of chapter ninth of this act, except as otherwise specially prescribed in this title.

New.

§ 2313. Petitioner to give notice of its execution.

The petitioner must give to the adverse party, or his attorney, written notice of the time when, and the place where, the commissioner or commissioners will attend, for the purpose of executing the commission, as follows:

1. If the place, where the commission is to be executed, is within the United States, or the dominion of Canada, he must give at least two months' notice.

2. If it is within either of the West India islands, he must give at least three months' notice.

3. In every other case, he must give at least four months' notice.

Notice may be given, as required by this section, by serving it as prescribed in this act for the service of a paper upon an attorney, in an action in the supreme court.

From 2 R. S. 343 (Part 3, c. 5, tit. 9), § 12.

§ 2314. Execution thereof.

The commissioner or commissioners possess the same powers, and must proceed in the same manner, as a referee, appointed by an order requiring the production of the tenant for life, or proof of his existence; except that they cannot proceed, unless a person is produced before them, as being the person whose death is in question. The return to the commission must expressly state whether any person was or was not so produced. The testimony, respecting the identity of a person so produced, must be taken, unless otherwise specially directed by the court, as prescribed in chapter ninth of this act, for taking the deposition of a witness upon oral interrogatories; except that it is not necessary to give any other notice of the time and place of examination, than that prescribed in the last section.

From Id., § 13.

§ 2315. Proceedings on return of commission.

Upon the return of the commission, the proceedings are the same as upon the report of a referee, as prescribed in sections 2309 and 2310 of this act; but the court may, in its discretion, receive additional proofs from either party.

From Id., §§ 13, 14, 15, 16.

§ 2316. Costs.

Where costs of a special proceeding, taken as prescribed in this title, are awarded, they must be fixed by the court at a gross sum, not exceeding fifty dollars, in addition to disbursements. Where provision is not specially made in this title for the award of costs, they may be denied, or awarded to or against either party, as justice requires.

From Id., § 18.

§ 2317. Property; when restored.

The possession of real property, which has been awarded to the petitioner, as prescribed in this title, upon the presumption of the death of the person, upon whose life the prior estate depends, must be restored, by the order of the court, to the person evicted, or to his heirs or legal representatives, upon the petition of the latter, and proof, to the satisfaction of the court, that the person presumed to be dead is living. The proceedings upon such an application are the same, as prescribed in this title, upon the application of the person to whom possession is awarded.

From Id., § 19.

§ 2318. Remedy of person evicted for profits, etc.

A person evicted, as prescribed in this title, may, if the presumption, upon which he is evicted, is erroneous, maintain an action against the person who has occupied the property, or his executor or administrator, to recover the rents and profits of the property, during the occupation, while the person, upon whose life the prior estate depends, is or was living.

From Id., § 20.

§ 2319. Order not conclusive in ejectment.

A final order, made as prescribed in this title, awarding to the petitioner the possession of real property, is presumptive evidence only, in an action of ejectment, brought against him by the person evicted, or in an action brought as prescribed in the last section, of the life or death of the person, upon whose life the prior estate depends.

New.

TITLE VI.

Proceedings for the appointment of a committee of the person, and of the property, of a lunatic, idiot, or habitual drunkard; general powers and duties of the committee.

Sec. 2320. Jurisdiction; concurrent jurisdiction.
2321. Duty of court having jurisdiction.
2322. Committee may be appointed.
2323. Application for committee; by whom made.
2323a. Application when incompetent person is in a State institution; petition, by whom made; contents and proceedings upon presentation thereof.
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2336a. Sections of this title not applicable when application for committee is made under authority of this State.
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2340. Committee of property may maintain actions, etc.
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2343. Property, when to be restored.
2344. Id.; disposition in case of death.
2344a. Court may compel performance of contract made by incompetent person in certain cases.

§ 2320. [Am'd, 1894, 1895.] Jurisdiction; concurrent jurisdiction.

The jurisdiction of the supreme court extends to the custody of the person, and the care of the property, of a person incompetent to manage himself or his affairs, in consequence of lunacy, idiocy, habitual drunkenness, or imbecility arising from old age or loss of memory and understanding, or other cause. Where a county court has jurisdiction of those matters, concurrent with that of the supreme court, the jurisdiction of the court first exercising it, as prescribed in this title, is exclusive of that of the others, with respect to any matter within its jurisdiction, for which provision is made in this title. In all proceedings under this title for the appointment of a committee of such a person, he shall be designated "an alleged incompetent person;" and after the appointment of a committee of such person, in all subsequent proceedings the lunatic, idiot, habitual drunkard or imbecile shall be designated "an incompetent person."

From L. 1874, c. 446, tit. 2, § 1. Am'd by L. 1894, c. 504; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2321. Duty of court having jurisdiction.

The court exercising jurisdiction over the property of either of the incompetent persons, specified in the last section, must preserve his property from waste or destruction; and, out of the proceeds thereof, must provide for the payment of his debts, and

for the safe keeping and maintenance, and the education, when required, of the incompetent person and his family.

From L. 1874, c. 446, tit. 2, § 1.

§ 2322. Committee may be appointed.

The jurisdiction, specified in the last two sections, must be exercised by means of a committee of the person, or a committee of the property, or of a particular portion of the property, of the incompetent person, appointed as prescribed in this title. The committee of the person and the committee of the property may be the same individual, or different individuals, in the discretion of the court.

New.

§ 2323. [Am'd, 1895.] Application for committee; by whom made.

An application for the appointment of such a committee must be made by petition, which may be presented by any person. Except as provided in the next section, where the application is made to the supreme court, the petition must be presented at a special term held within the judicial district, or to a justice of said court within such judicial district at chambers, where the person alleged to be incompetent resides; or if he is not a resident of the State, or the place of his residence cannot be ascertained, where some of his property is situated, or the State institution is situated of which he is an inmate.

New. Am'd by L. 1895, c. 824 (in effect June 18, 1895).

§ 2323a. [Added, 1895; am'd, 1897, 1904, 1912.] Application when incompetent person is in a state institution; petition, by whom made; contents and proceedings upon presentation thereof.

Where an incompetent person has been committed to a state institution in any manner provided by law, and is an inmate thereof, the petition may be presented on behalf of the state by a state officer having special jurisdiction over the institution where the incompetent person is confined or the superintendent or acting superintendent of said institution; the petition must be in writing and verified by the affidavit of the petitioner or his attorney, to the effect that the matters therein stated are true to the best of his information or belief; it must show that the person for whose person or property, or both, a committee is asked has been legally committed to a state institution over which the petitioner has special jurisdiction, or of which he is superintendent or acting superintendent, and is at the time an inmate thereof; it must also state the institution in which he is an inmate, the date of his admission, his last known place of residence, the name and residence of the husband or wife, if any, of such person, if known to the petitioner, and if there be none known to the petitioner, the name and residence of the next of kin of such person living in this state so far as known to the petitioner; the nature, extent and income of his property, so far as the same is known to the petitioner, or can with reasonable diligence be ascertained by him. The petition may be presented to the supreme court at any special term thereof, held either in the judicial district in which such incompetent person last resided, or in the district in which the state institution in which he is committed is situated, or to a justice of the supreme court at chambers within such judicial district, or to the county court of the county in which the incompetent person resided at the time of such commitment, or of the county in which said institution is situated. Notice of the presentation of such petition shall be personally given to such person, and also to the husband or wife, if known to the petitioner, or if none is known to the petitioner, to the next of kin named in the petition and to the officer in charge of the institution in which

such person is an inmate, unless sufficient reasons for dispensing therewith are set forth in the petition or shown by affidavit. When notice is required, it may be given in any manner which the court deems proper. Upon the presentation of such petition, and proof of the service of such notice, the court or justice may, if satisfied of the truth of the facts required to be stated in such petition, immediately appoint a committee of the person or property, or both, of such incompetent person or may require any further proof which it or he may deem necessary before making such appointment.

Added by L. 1895, c. 824. Am'd by L. 1897, c. 149; L. 1904, c. 509; L. 1912, c. 98 (in effect Sept. 1, 1912).

§ 2323b. [Added, 1895.] Costs of proceeding.

Upon the presentation of a petition and the appointment of a committee, as provided in section 2323a, the court or justice may award costs of the proceeding, not exceeding twenty-five dollars in addition to necessary disbursements, to the petitioner, payable from the estate of the incompetent person, and upon denial of an application to set the same aside, costs as of a motion.

Added by L. 1895, c. 824.

§ 2324. Duty of certain officers to apply.

Where the incompetent person has property, which may be endangered in consequence of his incompetency, and no relative or other person applies for the appointment of a committee of his property, the overseer or superintendent of the poor of the town, district, county, or city, in which he resides, or, where there is no such officer, the officer or officers performing corresponding functions under another official title, must apply to the proper court, for the appointment of such a committee. The expenses of conducting the proceedings thereupon must be audited and allowed, in the same manner as other official expenses of those officers are audited and allowed.

From 2 R. S. 52, 53 (Part 2, c. 5, tit. 2), §§ 2–7.

§ 2325. [Am'd, 1891.] Contents, etc., of petition; proceedings upon presentation thereof.

The petition must be in writing, and verified by the affidavit of the petitioner, or his attorney, to the effect that the matters of fact therein stated are true. It must be accompanied with proof, by affidavit, that the case is one of those specified in this title. It must set forth the names and residences of the husband or wife, if any, and of the next of kin and heirs, of the person alleged to be incompetent, as far as the same are known to the petitioner, or can, with reasonable diligence, be ascertained by him; and also the probable value of the property possessed and owned by the alleged incompetent person, and what property has been conveyed during said alleged incompetency and to whom, and its value and what consideration was paid for it, if any, or was agreed to be paid. The court must, unless sufficient reasons for dispensing therewith are set forth, in the petition or accompanying affidavit, require notice of the presentation of the petition to be given to the husband or wife, if any, or to one or more of the relatives of the person alleged to be incompetent, or to an officer specified in the last section. When notice is required, it may be given in any manner, which the court deems proper; and for that purpose, the hearing may be adjourned to a subsequent day, or to another term, at which the petition might have been presented.

Substituted for 2 R. S. (Part 2, c. 5, tit. 2), §§ 2–7. Am'd by L. 1891, c. 263.

§ 2325a. [Added, 1913.] Notice to be filed, recorded and indexed.

In all proceedings taken under this title, if real property or any interest therein is intended to be affected, the petitioner shall file in the clerk's office of each county where the property is situated, a notice of the pendency of such proceeding, which shall set forth the general nature and object of the proceeding and a brief description of the real property in that county to be affected thereby, and which notice must be filed

with the petition or any time thereafter and before any final adjudication in the proceeding. The clerk shall index such notice against the name of the alleged incompetent. The pendency of the proceeding is constructive notice from the time of so filing the notice only to a purchaser or incumbrancer of the property affected thereby from or against the alleged incompetent with respect to whom the notice is directed to be indexed as aforesaid. A person whose conveyance or incumbrance is subsequently executed or subsequently recorded is bound by all proceedings taken after the filing of the notice to the same extent as if he was a party to the proceeding. But this provision shall not prevent a jury in a proper proceeding, on sufficient proof, from rendering a verdict that shall overreach any conveyance or incumbrance theretofore executed by the alleged incompetent, so as to make such conveyance or incumbrance *prima facie* void.

Added by L. 1913, c. 69 (in effect Sept. 1, 1913).

§ 2326. [Am'd, 1898.] When foreign committee may be appointed.

Where the person alleged to be incompetent resides without the state, and a committee, curator or guardian of his property, by whatever name such officer may be designated, has been duly appointed pursuant to the laws of any other state, territory or country where he resides, the court may, in its discretion, make an order appointing the foreign committee, curator or guardian, the committee of all or of a particular portion of the property of the incompetent person, within the state, on his giving such security for the discharge of his trust as the court thinks proper.

New. Am'd by L. 1898, c. 294 (in effect Sept. 1, 1898).

§ 2327. [Am'd, 1891, 1895.] Order for commission, or for trial by jury in courts.

Unless an order is made, as prescribed in the last section, if it presumptively appears, to the satisfaction of the court, from the petition and the proofs accompanying it, that the case is one of those specified in this title; and that a committee ought, in the exercise of a sound discretion, to be appointed; the court must make an order, directing, either

1. That a commission issue, as prescribed in the next section, to one or more fit persons, designated in the order; or

2. That the question of fact, arising upon the competency of the person, with respect to whom the petition prays for the appointment of a committee, be tried by a jury at a trial term of the court.

3. When it satisfactorily appears from the petition and accompanying affidavits that any person or persons having acquired from the alleged incompetent person, real or personal property during the time of such alleged incompetency without adequate consideration, the court may issue an order, with or without security, restraining such person or persons from selling, assigning, disposing of or incumbering said property, or confessing judgment which shall become a lien upon said property, during the pendency of the proceeding for the appointment of a committee, and said order may in the discretion of the court be continued for ten days after the appointment of such committee. Notice of the execution of the commission shall be given to the person or persons enjoined in such manner as the court may direct.

New. Am'd by L. 1891, c. 263; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2328. Contents of commission.

The commission must direct the commissioners to cause the sheriff of a county, specified therein, to procure a jury; and that they inquire, by the jury, into the matters set forth in the petition; and also into the value of the real and personal property of the person alleged to be incompetent, and the amount of his income. It may contain such other directions, with respect to the subjects of inquiry, or the manner of executing the commission, as the court directs to be inserted therein.

New.

§ 2329. Commissioners to be sworn; vacancies, how filled.

Each commissioner, before entering upon the execution of his duties,

must subscribe and take, before one of the officers specified in section 842 of this act, and file with the clerk, an oath, faithfully, honestly, and impartially to discharge the trust committed to him. If a commissioner becomes incompetent, or neglects or refuses to serve, or removes from the State, the court may remove him. The court may, from time to time, fill any vacancy created by death, removal, or resignation.

New.

§ 2330. [Am'd, 1895.] Jury to be procured; proceedings thereupon.

The commissioners, or a majority of them, must immediately issue a precept to the sheriff, designated in the commission, requiring him to notify, not less than twelve nor more than twenty-four indifferent persons, qualified to serve, and not exempt from serving, as trial jurors in the same court, to appear before the commissioners, at a specified time and place, within the county, to make inquiry, as commanded by the commission. The sheriff must notify the jurors accordingly; and must return the precept, and the names of the persons notified, to the commissioners at the time and place specified in the precept. The commissioners, or a majority of them, must determine a challenge made to a juror. Upon the failure to attend, of a person who has been duly notified, his attendance may be compelled; and he may be punished by the court for a contempt, as where a juror, duly notified, fails to attend at a trial term of the court. The commissioners may require a sheriff to cause a talesman to attend, in place of a juror notified, and not attending, or who is excused or discharged; or they may adjourn the proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance. But it is not necessary to cause any talesman to attend, if at least twelve of the persons, notified by the sheriff, appear and are sworn.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2331. Proceedings upon the hearing.

All the commissioners must attend and preside at the hearing; and they, or a majority of them, have, with respect to the proceedings upon the hearing, all the power and authority of a judge of the court, holding a trial term, subject to the directions contained in the commission. Either of the commissioners may administer the usual oath to the jurors. At least twelve jurors must concur in a finding. If twelve do not concur, the jurors must report their disagreement to the commissioners, who must thereupon discharge them, and issue a new precept to the sheriff, to procure another jury.

New.

§ 2332. Return of inquisition and commission.

The inquisition must be signed by the jurors concurring therein, and by the commissioners, or a majority of them, and annexed to the commission. The commission and inquisition must be returned by the commissioners, and filed with the clerk.

New.

§ 2333. Expenses of commission.

The commissioners are entitled to such compensation for their services, as the court directs. The jurors are entitled to the same compensation, as jurors upon the trial of an issue in an action in the same court. The petitioner must pay the compensation of the commissioners, sheriff, and jurors.

New.

§ 2334. [Am'd, 1895.] Proceedings upon trial by jury in court.

Where an order is made, directing the trial, by a jury, at a trial term, of the questions of fact, arising upon the competency of the person, with

respect to whom the petition prays for the appointment of a committee, the order must state, distinctly and plainly, the questions of fact to be tried; which may be settled as where an order for a similar trial is made in an action. The court may, in that or in a subsequent order, direct that notice of the trial be given to such persons, and in such a manner as is deemed proper. The trial must be reviewed in the same manner, with like effect, and, except as otherwise directed in the order, the proceedings thereupon are, in all respects, the same as where questions of fact are tried, pursuant to an order for that purpose. The court may make inquiry by means of a reference or otherwise, as it thinks proper, with respect to any matter, not involved in the questions tried by the jury, the determination of which is necessary in the course of the proceedings. The expenses of the trial, and of such an inquiry, must be paid by the petitioner.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2335. [Am'd, 1895.] Subject of inquiry in cases of lunacy.

Where the petition alleges, that the person, with respect to whom it prays for the appointment of a committee, is incompetent, by reason of lunacy, the inquiry with respect to his competency, upon the execution of a commission, or the trial at a trial term, as prescribed in this title, must be confined to the question, whether he is so incompetent, at the time of the inquiry; and testimony, respecting any thing said or done by him, or his demeanor or state of mind, more than two years before the hearing or trial, shall not be received as proof of lunacy, unless the court otherwise specially directs, in the order granting the commission, or directing the trial by jury.

From L. 1874, c. 446, § 2. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2336. Proceedings upon verdict, or return of commission.

Upon the return of the commission, with the inquisition taken thereunder, or the rendering of the verdict of the jury, upon the questions submitted to it by the order for a trial by a jury, the court must either direct a new trial or hearing, or make such a final order upon the petition, as justice requires. Where a final order is made, dismissing a petition, the court may, in its discretion, award in the order a fixed sum, as costs, not exceeding fifty dollars and disbursements, to be paid by the petitioner to the adverse party. Where a committee of the property is appointed, the court must direct the payment by him, out of the funds in his hands, of the necessary disbursements of the petitioner, and of such a sum, for his costs and counsel fees, as it thinks reasonable; and it may, in its discretion, direct the committee to pay a sum, not exceeding fifty dollars and disbursements, to the attorney for any adverse party.

New.

§ 2336a. [Added, 1895.] Sections of this title not applicable when application for committee is made under authority of this State.

Sections 2325 to 2336, both inclusive, of this title shall not apply to applications for the appointment of a committee made by it on behalf of the State to secure reimbursement, in whole or in part, for maintenance and support in a State institution.

Added by L. 1895, c. 824.

§ 2337. [Am'd, 1887, 1915.] Security to be given by committee.

The provisions of sections 2576, 2650 and 2652 of this act, respecting the security to be given by the guardian of the person or of the property of an infant, appointed by a surrogate's court, except that part thereof authorizing the appointment of an associate with the guardian and the security to be given in such a case, apply to a committee of the person or of the property, appointed as prescribed in this article. A committee of the property cannot enter upon the execution of his duties, until security is given, as prescribed by the court. A committee of the person

cannot enter upon the execution of his duties, until security is given, if required by the court.

New. Am'd by L. 1887, c. 681; L. 1915, c. 637 (in effect May 14, 1915).

§ 2338. [Am'd, 1890, 1895, 1915.] Compensation of committee.

A committee of the property is entitled to the same compensation as an executor, administrator, or testamentary trustee. But in a special case, where his services exceed those of an executor or administrator, the supreme court or a county court within the county may allow him such an additional compensation for such additional services, as it deems just. The compensation of a committee of the person must be fixed by the court, and paid by the committee of the property, if any, out of the funds in his hands. The additional compensation authorized by this section may be allowed to the committee upon any judicial settlement made by him, and shall be for such additional services up to and including such settlement.

New. Am'd by L. 1890, c. 516; L. 1895, c. 946; L. 1915, c. 652 (in effect Sept. 1, 1915).

§ 2339. Committee under control of court; limitation of powers.

A committee, either of the person or of the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; and he may be suspended, removed, or allowed to resign, in the discretion of the court. A vacancy created by death, removal, or resignation may be filled by the court. But a committee of the property cannot alien, mortgage, or otherwise dispose of, real property, except to lease it for a term not exceeding five years, without the special direction of the court, obtained upon proceedings taken for that purpose, as prescribed in title seventh of this chapter.

In part from L. 1874, c. 446, tit. 2, § 27.

§ 2340. Committee of property may maintain actions, etc.

A committee of the property, appointed as prescribed in this title, may maintain, in his own name, adding his official title, any action or special proceeding, which the person, with respect to whom he is appointed, might have maintained, if the appointment had not been made.

From Id., § 5.

§ 2341. [Am'd, 1894, 1906, 1915.] Id.; to file inventory and account.

The provisions of sections 2660 and 2661 of this act, requiring the general guardian of an infant's property, appointed by a surrogate's court, to file in the month of January in each year an inventory, account and affidavit, and prescribing the form of the papers so to be filed, apply to a committee of the property appointed, as prescribed in this title. For the purpose of making that application the committee is deemed a general guardian of the property; the person with respect to whom he is appointed, is deemed a ward and the papers must be filed in the office of the clerk of the court by which the committee was appointed, or if he was appointed by the supreme court, in the clerk's office where the order appointing him is entered, and, if the incompetent person for whom such committee is appointed has been committed to a state institution, and is an inmate thereof, a duplicate of such inventory, account, and affidavit, shall be filed also by said committee with the superintendent or officer having special jurisdiction over the institution where the incompetent person is confined. In every case where a committee has used or employed the services of an incompetent person, with respect to whom he has been appointed a committee, or where moneys have been earned by or received on behalf of such incompetent person, the committee must account for any moneys so earned or derived from such services, the same as for other property or assets of the incompetent person.

Substituted for 2 R. S. 53 (part 2, c. 5, tit. 2), §§ 8, 9. Am'd by L. 1894, c. 51; L. 1906, c. 181; L. 1915, c. 630 (in effect May 14, 1915).

§ 2342. [Am'd, 1895, 1899, 1914, 1916.] Id.; may be compelled to file the same, or to render an additional account, etc.

In the month of February of each year, the presiding judge of the court, by which the committee of the property was appointed, or if he was appointed by the supreme court, the county judge of the county where the order appointing him is entered, must examine, or cause to be examined under his direction, all accounts and inventories filed by committees of the person and property, since the first day of February of the preceding year. If it appears, upon the examination, that a committee appointed as prescribed in this title, has omitted to file his annual inventory or accounting, or the affidavit relating thereto, as prescribed in the last section, or if the judge is of the opinion that the interest of the person, with respect to whom the committee was appointed, requires that he should render a more full or satisfactory inventory or account, the judge must make an order requiring the committee to supply the deficiency, and also, in his discretion, personally to pay the expense of serving the order upon him. An order so made may be entered and enforced, and the failure to obey it may be punished, as if it were made by the court. Where the committee fails to comply with the order, within three months after it is made, or, where the judge has reason to believe that sufficient cause exists for the removal of the committee, the judge may, in his discretion, appoint a fit person special guardian of the incompetent person with respect to whom the committee was appointed, for the purpose of filing a petition in his behalf for the removal of the committee and prosecuting the necessary proceedings for that purpose. The committee may be compelled in the discretion of the court, to pay personally the costs of the proceedings so instituted. Where the examination of the accounts and inventories of committees of incompetent persons provided for herein is made pursuant to the order or direction of a county judge, the expense of such examination as allowed by the county judge directing the examination shall be payable by the county treasurer of the county out of any court funds in his hands upon the order of the county judge directing such examination. The committee of the property of an incompetent person appointed as prescribed in this title, may apply to the court making the appointment, for an order to permit him to render to such court an intermediate judicial account of all his proceedings affecting the property of the incompetent person to the date of the filing thereof. And the court upon examination may, in its discretion, make an order directing that such account be filed with the clerk of the court where the application is made, on or before the date determined by the order.

The account to be filed pursuant to such order shall be verified and contain a just, true and proper statement of all the acts of the committee, and an itemized statement of the receipts and disbursements of any and all moneys and properties that have come into hand covering the whole of the period for which the accounting is asked. A summary statement shall be included in the account and all vouchers shall be filed therewith. Notice of the filing of such account pursuant to such order and of an application for the judicial settlement thereof shall be given in the manner in which and to the persons to whom notice of application for the appointment of a committee of the person or property of an alleged incompetent person, lunatic, idiot or habitual drunkard is required to be given by title six of chapter 17 of the code of civil procedure. Upon the return day of the notice of such application the court shall have the power to appoint a referee to take and state such account and to report to the court with his opinion thereon as to all matters embraced in said account. The court shall have power and it shall be its duty to appoint a suitable person as special guardian of the incompetent person for the protection of his rights and interests in said proceeding.

Upon the motion for a confirmation of the report of a referee appointed pursuant to the provisions hereof or if the accounting be had before the court, upon the court's determination, said account shall be then judicially adjusted, determined, fixed and filed.

The compensation of the referee and of the special guardian appointed

under the provisions of this chapter shall in every instance be fixed by the court to be paid out of the estate, if any, of the incompetent person. The judicial settlement of the final account of a committee shall be made in the same manner, so far as may be applicable, as provided in this section for the judicial settlement of an intermediate account.

Substituted for L. 1874, c. 446, tit. 2, § 4, last sentence. Am'd by L. 1895, c. 746; L. 1899, c. 350; L. 1914, c. 344; L. 1916, c. 535 (in effect Sept. 1, 1916).

§ 2343. Property, when to be restored.

Where a person, with respect to whom a committee is appointed, as prescribed in this title, becomes competent to manage himself or his affairs, the court must make an order, discharging the committee of his property, or the committee of his person, or both, as the case requires, and requiring the former committee to restore to him the property, remaining in the committee's hands. Thereupon the property must be restored accordingly.

From L. 1874, c. 446, tit. 2, § 28.

§ 2344. [Am'd, 1908, 1915.] Id.; disposition in case of death.

Where a person, of whose property a committee has been appointed, as prescribed in this title, dies during his incompetency, the power of the committee ceases; and the property of the decedent must be administered and disposed of, as if a committee had not been appointed. The committee may, in such case, render to the court by which he was appointed, a final account of his proceedings touching the property of the incompetent. Such account shall contain an inventory in the form prescribed by section 2660 of this act and a full and true account in form of debtor and creditor of all his receipts and disbursements, and there shall be appended thereto an affidavit of the committee in the form prescribed by section 2661 of this act. Notice of the application for settlement of such account shall be given in such manner as the court may direct, to the sureties on the official bond of the committee or the legal representatives of such sureties, and to the executor or administrator of the decedent, if any; and, if there be no executor or administrator, to the decedent's husband or wife, and heirs and next of kin, or if any of those persons shall have died, to his executor or administrator. Such account shall be judicially settled, adjusted and determined, and, as to the proofs and vouchers in support thereof, shall be subject to the provisions of article one of title five of chapter eighteen of this act with respect to the accounting of executors and administrators.

From Id., § 29; 2 R. S. 55, § 25; L. 1865, c. 724. Am'd by L. 1908, c. 271; L. 1915, c. 632 (in effect May 14, 1915).

§ 2344a. [Added, 1900.] Court may compel performance of contract made by incompetent person in certain cases.

The supreme court shall have authority to decree and compel the specific performance of any bargain, contract or agreement which may have been made by any idiot, lunatic or habitual drunkard, while such person was capable to contract; and of any contract in relation to lands made by the ancestor of such person from whom such person inherits or takes as devisee or otherwise; and to direct the committee of such person to do and execute all necessary conveyances and acts for that purpose; and in case the person entitled to such conveyance is the committee of such incompetent person the said court may, upon the petition of said committee, appoint some suitable and proper person to execute the said conveyance in the name of such incompetent person upon payment by the vendee of any sum remaining due to such person upon said contract, or upon the fulfillment of the contract on the part of the party who contracted with the person represented by said committee.

From 2 R. S. (pt. 2, c. 5, tit. 2, § 22), as am'd by L. 1880, c. 423, § 1. Added by L. 1900, c. 65 (in effect Feb. 17, 1900).

TITLE VII.

Proceedings for the disposition of the real property of infant, lunatic, idiot, or habitual drunkard.

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§ 2345. Action to compel conveyance.

In either of the following cases, an action may be maintai against an infant, or a person incompetent to manage his aff by reason of lunacy, idiocy, or habitual drunkenness, to proc a judgment, directing a conveyance of real property, or of interest in real property:

1. Where the infant or incompetent person is seized or posse of the real property, or interest in real property, by way of m gage, or only in trust for another.

2. Where a valid contract for the sale or conveyance of the property, or interest in real property, has been made; but a veyance thereof cannot be made, by reason of the infancy or competency of the person in whom the title is vested.

From 2 R. S. 55 (Part 2, c. 5, tit. 2), §§ 20, 22; L. 1874, c. 446, ti §§ 9, 22-26; L. 1875, c. 574, §§ 7, 8; 2 R. S. 194 (Part 3, c. 1, tit. §§ 167, 169.

§ 2346. [Am'd, 1882.] Who may maintain action.

An action may be maintained, in a case specified in the section, by a person entitled to the conveyance; and, also, in a specified in subdivision second of that section, by the executo administrator of the person who made the contract, or of a pe who died seized or possessed of the real property, or interes real property, or by an heir or devisee of either of those pers to whom the real property has descended, or was devised. action may be maintained by the committee of the lunatic or o incompetent person; but in that case the court must appoin special guardian for the incompetent person as required by where an infant is defendant, and the proceedings are the s as in a like action against an infant.

From Id. Am'd by L. 1882, c. 399.

§ 2347. Judgment; effect thereof.

A judgment, directing such a conveyance, shall not be rende unless the court, after hearing the parties, is satisfied that conveyance ought to be made. Upon rendering final judgment that effect, the court has power to direct the guardian of the

fant's property, or the committee of the property of the lunatic or other incompetent person, or a special guardian appointed in the action, to execute any conveyance, or to do any other act, which is necessary, in order to carry the judgment into effect.

From 2 R. S. 194, § 169; Id., 55, §§ 19, 22.

§ 2348. [Am'd, 1890, 1893, 1903, 1907.] Application to dispose of real property or an interest therein.

In either of the following cases real property or a term, estate or other interest in real property of an infant in being or the contingent interest therein of an infant not in being or of a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness, or an inchoate right of dower in real property belonging to an infant or an incompetent person or the possibility that upon breach of a condition a right of re-entry will vest in or real property will revert to an infant or an incompetent person or his heirs solely or in common with others may be sold, conveyed, mortgaged, released or leased as prescribed in the following sections of this title:

1. Where the personal property, and the income of the real property, of the infant or incompetent person, are, together, insufficient for the payment of his debts, or for the maintenance and necessary education of himself and his family.

2. Where the interest of the infant in being or the contingent interest of an infant not in being, or the interest of an incompetent person require or will be substantially promoted by such disposition, on account of the real property or term, or estate, or other interest in real property being exposed to waste or dilapidation; or being wholly unproductive, or for the purpose of raising funds to preserve or to improve the same, or for other peculiar reasons, or on account of other peculiar circumstances.

3. Where an action might be maintained against the infant or incompetent person, to procure a judgment, directing the conveyance of the real property, or interest in real property, as prescribed in sections 2345 and 2346 of this act.

4. Where the interest of the infant or incompetent person will be substantially promoted by releasing or joining with others in releasing for a valuable consideration the possibility that upon breach of a condition a right of re-entry will vest in or real property will revert to the infant or incompetent person or his heirs solely or in common with others. Such possibility is referred to in the following sections of this title as a possibility of reverter.

From 2 R. S. 194, 195 (Part 3, c. 1, tit. 2), §§ 167, 170, 175; 2 R. S. 53-55 (Part 2, c. 5, tit. 2), §§ 11, 16, 19, 22; L. 1864, c. 417, §§ 1, 5; L. 1869, c. 627; L. 1870, c. 37; see L. 1874, c. 446, tit. 1, § 38, and Id., tit. 2, §§ 6, 9, 17, 28; L. 1875, c. 574, § 6; L. 1876, c. 267, § 2. Am'd by L. 1890, c. 237; L. 1893, c. 639; L. 1903, c. 154; L. 1907, c. 49 (in effect March 14, 1907).

§ 2349. [Am'd, 1905.] Id.; by whom; notice when incompetent is inmate of state institution.

An application, in either of the cases prescribed, in the last section, must be made by the petition of the general guardian, or the guardian of the property of the infant; or by the committee of the property of the lunatic or other incompetent person; or by any relative, or other person, in behalf of either. Where the application is in behalf of an infant of the age of fourteen years or upwards, the infant must join therein. Where the

application is made to the supreme court, the petition mus presented at a term held within the judicial district, in w the property, or a part thereof, is situated. Where such plication affects the interest of an incompetent person who been committed to a state institution and is an inmate the notice of such application must be given to the superinten acting superintendent, or state officer having special jurisdi over the institution where the incompetent person is confined.

From Id. Am'd by L. 1905, c. 434 (in effect Sept. 1, 1905).

§ 2350. [Am'd, 1893, 1910.] Contents of petition.

The petition must be verified in like manner as a verified p ing in an action in the supreme court. It must set forth grounds of the application; and in a case specified in subdivi first and second of the last section but one, other than a where the application is made for the sale of an undivided int of the infant or incompetent person in one or more parcels of in order to avoid an action of partition on the part of his c ants, or for the dower of a widow therein, it must also state particulars and value of the real and personal property, and amount of the income of the infant or incompetent person: disposition which has been made of his personal property, an account of the debts or demands, if any, existing against estate. In the case above specified where the application is for the sale of an undivided interest of the infant or incomp person, the petition must state the particulars and value of real property in respect to which a sale is desired.

From 2 R. S. 53, 54 (Part 2, c. 5, tit. 2), §§ 11, 16; L. 1874, c. 446, § 17. Am'd by L. 1893, c. 311; L. 1910, c. 225 (in effect Sept. 1, 1910

§ 2351. [Am'd, 1893, 1903, 1907, 1915.] Bond of committee of lunatic

An application to sell, mortgage, release, or lease real prop or an interest in real property, of a lunatic, idiot or habitual dr ard, cannot be granted, unless a committee of his property been appointed. Upon such an application, if it is made by committee, the court must make an order, directing him to with the clerk, a bond, with either individual or corporate su approved by the court as to form, amount and sufficiency of su conditioned for the faithful discharge of his trust; for the paying and investing of, and accounting for, all moneys received by hi the special proceeding, according to the direction of any court ha authority to give directions in the premises; and for the observ of the directions of the court, in relation to the trust. If the app tion is made by any other person, an order must be made thereu requiring the committee to show cause why he should not file a bond. If, after hearing the committee, the court is of the ion, that there is a probable cause for granting the applica it may make an order, requiring the committee to file such a b or, if the committee so elects, or fails to file the bond as dir in the order, it may appoint a suitable person to be the sp guardian of the incompetent person, with respect to the ceedings, who must thereupon file such a bond. Wher application is made to release an inchoate right of dower, app tion must be made by the husband of the lunatic, idiot or hab drunkard and may be made before or after a committee has

appointed, except that application may be made by the committee of the property of the lunatic, idiot, or habitual drunkard in any case where, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband and the wife has not joined in the conveyance or otherwise released her inchoate right of dower. When the application is made by the husband, the court may appoint him special guardian, and he must file a bond as herein provided.

From 2 R. S. 54, § 14; L. 1864, c. 417, § 2; L. 1874, c. 446, tit. 2, §§ 7, 20. Am'd by L. 1893, c. 639; L. 1903, c. 368; L. 1907, c. 49; L. 1915, c. 241 (in effect September 1, 1915).

§ 2352. [Am'd, 1893, 1907.] Id.; of guardian of infant.

Upon an application to sell, mortgage, release or lease real property or an interest in real property of an infant, the court must appoint a suitable person to be the special guardian of the infant with respect to the proceedings, who must thereupon file with the clerk a bond as prescribed in the last section. Any trust company authorized by the laws of this state to act as general guardian of the estate of an infant without giving security may be appointed such special guardian and in such case the court in the order of appointment may dispense with the giving and filing of any such bond.

From 2 R. S. 54, 55, §§ 13, 16, 18, 19, 22; Id., 194, §§ 167, 175; L. 1864, c. 417, § 5; L. 1874, c. 446, tit. 2, §§ 9, 19, 22, 23, 26; Id., tit. 1, § 38. Am'd by L. 1893, c. 268; L. 1907, c. 49 (in effect March 14, 1907).

§ 2353. Bond; how prosecuted.

Upon a breach of the condition of a bond, given as prescribed in either of the last two sections, the court must direct it to be prosecuted for the benefit of the person injured.

From 2 R. S. 194, § 173; L. 1864, c. 417, § 3; L. 1874, c. 446, tit. 2, § 8.

§ 2354. [Am'd, 1893.] Reference to inquire into the application.

Upon the presentation of the petition, and the filing of the bond, where the filing of such a bond shall be necessary, the court must make an order appointing a suitable person a referee to inquire into the merits of the application. The referee must examine into the truth of the allegations of the petition; hear the allegations and proofs of all persons interested in the property, or otherwise interested in the application; and report his opinion thereupon, together with the testimony, with all convenient speed.

From 2 R. S. 54, § 12; L. 1864, c. 417, § 4; L. 1874, c. 446, tit. 2, §§ 8, 18; Id., tit. 1, § 38; 2 R. S. 195, § 174. Am'd by L. 1893, c. 268.

§ 2355. [Am'd, 1893, 1907.] Final order.

Upon the filing of the referee's report, and after examining into the matter, the court must make a final order upon the application. In a proper case a final order, confirming the referee's report, must direct that the real property or term, estate, possibility of reverter or other interest in real property or a part thereof or an inchoate right of dower therein, as is necessary, or as justice requires, be mortgaged, let for a term of years, sold, released or conveyed by the special guardian appointed as pre-

scribed in this title, or by the committee of the property of the lunatic or other incompetent person. The final order must also contain such directions, respecting the time, manner and conditions of the sale, release or conveyance directed thereby, as the court thinks proper to insert therein.

From 2 R. S. 54, §§ 13, 16, 18, 19, 22; Id., 194, 195, §§ 167, 175; L. 1864, c. 417, § 5; L. 1874, c. 446, tit. 2, §§ 9, 19, 22, 23, 26; Id., tit. 1, § 38. Am'd by L. 1893, c. 639; L. 1907, c. 49 (in effect March 14, 1907).

§ 2356. [Am'd, 1893.] Report of sale, etc.

Before a sale, mortgage, release, or lease can be made pursuant to the final order, the special guardian or the committee must enter into an agreement therefor, subject to the approval of the court; and must report the agreement to the court under oath. Upon the confirmation thereof by the order of the court, he must execute, as directed by the court, a deed, mortgage, release or lease. Where the final order directs the execution of a conveyance in the first instance, for the purpose of fulfilling a contract, or because the property is held by way of mortgage, or in trust only, the guardian or committee, executing the conveyance, must report the conveyance to the court, under oath.

From 2 R. S. 195, § 177; L. 1864, c. 417, § 7; L. 1874, c. 446, tit. 2, § 11. Am'd by L. 1893, c. 639.

§ 2357. Certain sales, etc., prohibited.

Real property, or an interest in real property, shall not be sold, leased, or mortgaged, as prescribed in this title, contrary to the provisions of a will, by which it was devised, or of a conveyance or other instrument, by which it was transferred, to the infant or incompetent person.

From 2 R. S. 195, § 176; L. 1864, c. 417, § 6; L. 1874, c. 446, tit. 2, § 10.

§ 2358. [Am'd, 1893, 1906, 1907.] Effect of conveyance, etc.

A deed, mortgage, release or lease, made in good faith, as prescribed in this title, either upon an application in behalf of the infant or an incompetent person or pursuant to the directions contained in a judgment rendered against him, has the same validity and effect, as if executed by the person in whose behalf it was executed, and as if the infant was of full age or the lunatic, idiot, or habitual drunkard was of sound mind and competent to manage his or her affairs. And the same shall be valid and effectual to vest in any purchaser or purchasers any interest therein of any infant not in being, at the time of the said sale, and any mortgage so executed shall be a valid lien and charge upon the contingent interest of any infant not in being, at the time of the execution and delivery of the same. And a release of an inchoate right of dower as authorized by this title shall have the same effect as if the wife had joined with the husband in a deed or conveyance of the property affected thereby and had duly acknowledged the same in the manner required by law to pass the estate of married women.

From 2 R. S. 55, § 21; L. 1864, c. 417, § 8; L. 1874, c. 446, tit. 2, §§ 12, 25; 2 R. S. 194, §§ 168, 178. Am'd by L. 1893, c. 639; L. 1906, c. 127; L. 1907, c. 49 (in effect March 14, 1907).

§ 2359. [Am'd, 1892, 1907.] Proceeds of sale deemed real property.

A sale of real property, or of an interest in real property, other than a possibility of reverter of an infant or incompetent person,

made as prescribed in this title, does not give to the infant or incompetent person, any other or greater interest in the proceeds of the sale, than he or she had in the property or interest sold. Those proceeds are deemed property of the same nature, as the estate or interest sold, until the infant arrives at full age, or the incompetency is removed. The proceeds of the release of a possibility of reverter shall be deemed and treated as if they were proceeds of real property of which the infant was seized and possessed. If the infant should die before arriving at full age, or the incompetent person should die before the incompetency is removed not leaving any personal property, or not leaving sufficient personal property to pay funeral expenses and expenses that may be necessary or necessarily incurred, then in either or each case the proceeds are to be deemed personal property so far as may be necessary to pay the funeral and other necessary expenses. The proceeds are to be paid upon order of the surrogate's court or court having jurisdiction of the estate of the deceased, to an administrator appointed by the surrogate to administer upon decedent's estate, and after paying all funeral expenses and expenses of administration and any indebtedness, the remainder, if any there be, shall, upon the order of the surrogate, be paid into the hands of the trustee who held the same, to be distributed as the law directs. This act is to include the said proceeds of any infant or incompetent person that has died prior to this amendment, the proceeds now remaining in the hands of a trustee.

From 2 R. S. 195, § 180; L. 1864, c. 417, § 10; L. 1874, c. 446, tit. 2, § 14. Am'd by L. 1892, c. 523; L. 1907, c. 49 (in effect March 14, 1907).

§ 2360. Infant deemed a ward of court.

From the time of the filing of a petition, by or in behalf of an infant, praying for an order directing a conveyance, or a sale, mortgage, or lease of his real property, or of an interest in real property, the infant is considered a ward of the court, with respect to that real property or interest, and the income and proceeds thereof.

From 2 R. S. 195, § 179.

§ 2361. [Am'd, 1880, 1882, 1902, 1906, 1907, 1915.] Disposition of proceeds; accounting.

The court must, by order, direct the disposition of the proceeds of such a sale, mortgage, release or lease. It must direct the investment of any portion thereof belonging to the infant or incompetent person, which is not needed for the payment of debts or the safe keeping, or the immediate maintenance and education, of himself or his family, or for the preservation or improvement of his real property or his interest in real property. It must require a report, under oath, of the disposition and investment thereof, to be made as soon as practicable, and must compel periodical accounts to be rendered thereafter by each person, who is intrusted with the proceeds, or any part thereof. Where an inchoate right of dower is released as prescribed in this title and such release is to accompany a sale by the husband of the property to which the inchoate right of dower attaches, the court shall make an order requiring one-third of the amount realized on the sale of the prop-

erty to which the inchoate right of dower attached to be invested by the special guardian, or paid into the court to be held for the benefit of the husband during his life and upon his death for the benefit of the wife during her life, or the court may direct said amounts to be paid to the husband upon his giving a bond in the penalty of at least double the amount so received for such release, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the repayment as the court shall direct by his executors or administrators of such amount upon the death of the husband. Where an inchoate right of dower is released as prescribed in this title, and, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband, and the wife has not joined in the conveyance or otherwise released her inchoate right of dower, the court shall make an order that, as the consideration for the release, or as part of the consideration therefor, there be paid to the special guardian or into the court an amount to be fixed by the court as equal to one-third of the fair market value of the property, to be invested by the special guardian or held by the court for the benefit of the person making such payment during the life of the husband, and upon his death for the benefit of the wife during her life, and upon her death to be returned to the person making such payment or to his executors, administrators or assigns; or in lieu of such payment the court may allow a bond to be given in the penalty of at least double the amount so fixed as equal to one-third of the fair market value of the property, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the payment as the court shall direct, upon the death of the husband leaving the wife surviving, of the said sum so fixed as equal to one-third of the fair value of the property, to be held for the benefit of the wife during her life and upon her death to be returned to the person giving such bond or to his executors, administrators or assigns. In case by any contingency, infants not in being may thereafter become possessed of any interest in said premises so sold, mortgaged or leased, the court, in case of a sale, shall cause the proceeds of the sale, after paying the cost and expenses of the same, to be placed at interest for the benefit of the persons who are, or who may ultimately be entitled to the same, and shall not authorize the distribution of the same in advance of said contingency, except upon a petition of some person entitled thereto, and upon filing a bond in such penalty as the court shall direct, with two or more sureties approved by the court, and conditioned that in case of any contingency by which any infant not then in being shall thereafter become entitled to any of the proceeds of the sale, that said petitioner will pay to said person or persons his or their proportionate share of the money so paid over to said petitioner; and in the case of the mortgaging of said real estate the proceeds of the same, after paying costs and expenses, shall be paid out and disbursed under the direction of the court only for the purpose of paying

lawful charges thereon or repairing, improving, building upon or otherwise enhancing in value any real estate so mortgaged as aforesaid.

In the case of an infant residing without the state, and having in the state or country where he or she resides a general guardian or person duly appointed under the laws of such state or country, to the control and entitled, by the laws of such state or country, to the custody of the money of said infant, the court, upon satisfactory proof of such facts and the sufficiency of the bond or security given by such general guardian or person in such state or country by the certificate of a judge of a court of record of such state or country, or otherwise, may direct that the portion of such infant arising upon such sale shall be paid over to such general guardian or person.

From 2 R. S. 195, § 179; Id., 54, §§ 14, 17; L. 1864, c. 417, §§ 2, 9; L. 1874, c. 446, tit. 2, §§ 7, 13, 20. Am'd by L. 1890, c. 237; L. 1893, c. 639; L. 1903, c. 368; L. 1906, c. 127; L. 1907, c. 49; L. 1915, c. 629 (in effect Sept. 1, 1915).

§ 2362. Particular estates; when included in sale.

Where the real property, or the estate, term, or other interest in real property, directed to be sold, is subject, absolutely or contingently, to a right of dower, or an estate for life, or is subject to an estate for years, in the whole or any part thereof, the person, having the prior right or estate, may manifest in writing his consent, either to receive, from the proceeds of the sale, a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of his right or estate; or to have a proportionate share of the proceeds of the sale invested, and the interest thereof paid to him, from the time of the investment, or of the commencement of his right or estate, as justice requires, until the determination of his right or estate. Upon filing the consent with the clerk, the final order may, in the discretion of the court, direct a sale of the entire property, to which the right or estate attaches. In such a case, the court must, after the sale, ascertain the value of the right or interest of the person so consenting; and the final order must either direct the payment, from the proceeds of the sale, of the gross sum so ascertained as the value, or the investment of a just proportion of the proceeds, and the payment to him of the interest thereof. But such a gross sum shall not be paid, nor shall such an investment be made, until an effectual release of the right or estate of the person so consenting, executed to the satisfaction of the court, and duly acknowledged or proved, and certified, in like manner as a deed to be recorded in the county, has been filed with the clerk.

From 2 R. S. 196, §§ 181, 182; L. 1864, c. 417, §§ 11, 12; L. 1874, c. 446, tit. 2, §§ 13, 15, 16.

§ 2363. Id.; when belonging to infant, etc.

Where the interest of the infant, or of the lunatic or other incompetent person, consists of a right of dower, or an estate for life, or for years, the final order may authorize the special guardian or committee to join, with the person or persons holding the reversionary estate, in a conveyance of the property to which the interest attaches, so as to release the right of dower, or fully convey the particular estate, on receiving, from the proceeds of the sale, a gross sum, in satisfaction of that interest, or a proportionate part of the proceeds, to be invested until the determination of the particular estate; and, in either case, to be ascertained as prescribed in the last section. Where a proportion of the proceeds is so received by the guardian or committee, for investment, the final order must provide for the investment thereof, until the

determination of the particular estate; and then for the payment thereof to the person entitled thereto.

New.

§ 2364. Debts of infant, etc., to be paid equally.

In the application of money, arising from a sale, mortgage, or lease, made for the purpose of paying debts, as prescribed in this title, the special guardian of the infant, or the committee of the property of the incompetent person, must pay all debts, in equal proportion, without giving a preference to a debt founded upon a specialty, or upon which judgment has been taken.

From 2 R. S. 54, § 15; L. 1874, c. 446, tit. 2, § 21.

TITLE VIII.

Arbitrations.

Sec. 2365. When submission to arbitration cannot be made.
2366. What controversies may be submitted, and how.
2367. Appointment of additional arbitrator, or umpire.
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§ 2365. When submission to arbitration cannot be made.

A submission of a controversy to arbitration cannot be made, either as prescribed in this title or otherwise, in either of the following cases:

1. Where one of the parties to the controversy is an infant, or a person incompetent to manage his affairs, by reason of lunacy, idiocy, or habitual drunkenness.

2. Where the controversy arises respecting a claim to an estate in real property, in fee or for life.

But where a person, capable of entering into a submission, has knowingly entered into the same with a person incapable of so doing, as prescribed in subdivision first of this section, the objection, on the ground of incapacity, can be taken only in behalf of the person so incapacitated. And the second subdivision of this section does not prevent the submission of a claim to an estate for years, or other interest for a term of years, or for one year or less, in real property; or of a controversy respecting the partition of real property between joint tenants or tenants in common; or of a controversy respecting the boundaries of lands, or the admeasurement of dower.

From 2 R. S. 541 (Part 3, c. 8, tit. 14), §§ 1, 2.

§ 2366. What controversies may be submitted, and how.

Except as otherwise prescribed in the last section, two or more persons may, by an instrument in writing, duly acknowledged or proved, and certified, in like manner as a deed to be recorded, submit, to the arbitration of one or more arbitrators, any controversy, existing between them at the time of the submission, which might be the subject of an action. They may, in the submission, agree that a judgment of a court of record, specified in the instrument, shall be rendered upon the award, made pursuant to the submission. If the supreme court is thus specified, the submission may also specify the county in which the judgment shall be entered. If it does not, the judgment may be entered in any county.

From id., § 1.

§ 2367. Appointment of additional arbitrator, or umpire.

Where a submission is made as prescribed in this title, an additional arbitrator or an umpire cannot be selected or appointed, unless the submission expressly so provides. Where a submission, made either as prescribed in this title or otherwise, provides that two or more arbitrators, therein designated, may select or appoint a person as an additional arbitrator or as an umpire, the selection or appointment must be in writing. An additional arbitrator or umpire must sit with the original arbitrators upon the hearing. If testimony has been taken before his selection or appointment, the matter must be reheard, unless a rehearing is waived in the submission, or by the subsequent written consent of the parties, or their attorneys.

New.

§ 2368. Time for hearing; adjournment, etc.

Subject to the terms of the submission, if any are specified therein, the arbitrators, selected as prescribed in this title, must appoint a time and place for the hearing of the matters submitted to them; and must cause notice thereof to be given to each of the parties. They, or a majority of them, may adjourn the hearing, from time to time, upon the application of either party, for good cause shown, or upon their own motion; but not beyond the day fixed in the submission for rendering their award, unless the time so fixed is extended by the written consent of the parties to the submission, or their attorneys.

From 2 R. S. 541, § 3.

§ 2369. Arbitrators to be sworn.

Before hearing any testimony, arbitrators selected either as prescribed in this title or otherwise must be sworn, by an officer designated in section 842 of this act, faithfully and fairly to hear and examine the matters in controversy, and to make a just award, according to the best of their understanding; unless the oath is waived, by the written consent of the parties to the submission, or their attorneys.

From Id., §§ 4, 5.

§ 2370. Attendance of witnesses, etc.

The arbitrators, selected either as prescribed in this title, or otherwise, or a majority of them, may require any person to attend before them as a witness; and they have, and each of them has, the same powers, with respect to all the proceedings before them, which are conferred, by the provisions of title second of chapter ninth of this act, upon a board, or a member of a board, authorized by law to hear testimony.

From Id., § 6.

§ 2371. All the arbitrators to meet; when majority may award. Fees.

All the arbitrators, selected as prescribed in this title, must meet together, and hear all the allegations and proofs of the parties; but an award by a majority of them is valid, unless the concurrence of all is expressly required in the submission. Unless it is otherwise expressly provided in the submission, the award may require the payment, by either party, of the arbitrators' fees, not exceeding the fees allowed to a like number of referees in the supreme court; and also their expenses.

From Id., § 7.

§ 2372. Award; to be authenticated, etc.

To entitle the award to be enforced, as prescribed in this title, it must be in writing; and, within the time limited in the submission, if any, subscribed by the arbitrators making it; acknowledged or proved, and certified, in like manner as a deed to be recorded; and either filed in the office of the clerk of the court, in which, by the submission, judgment is authorized to be entered upon the award, or delivered to one of the parties, or his attorney.

From Id., §§ 8, 9.

§ 2373. Motion to confirm award.

At any time within one year after the award is made, as prescribed in the last section, any party to the submission may apply to the court, specified in the submission, for an order confirming the award; and thereupon the court must grant such an order, unless the award is vacated, modified or corrected, as prescribed in the next two sections. Notice of the motion must be served, upon the adverse party to the submission, or his attorney, as prescribed by law for service of notice of a motion upon an attorney in an action in the same court. In the supreme court, the motion must be made within the judicial district, embracing the county where the judgment is to be entered.

From Id., § 9.

§ 2374. Id.; to vacate award.

In either of the following cases, the court, specified in the submission, must make an order vacating the award, upon the application of either party to the submission:

1. Where the award was procured by corruption, fraud, or other undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject-matter submitted, was not made.

Where an award is vacated, and the time, within which the submission requires the award to be made, has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

From Id., §§ 10, 13.

§ 2375. Id.; to modify or correct award.

In either of the following cases, the court, specified in the submission, must make an order modifying or correcting the award, upon the application of either party to the submission:

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award.
2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted.
3. Where the award is imperfect in a matter of form, not affecting the merits of the controversy, and, if it had been a referee's report, the defect could have been amended or disregarded by the court.

The order may modify and correct the award, so as to affect the intent thereof, and promote justice between the parties.

From Id., §§ 11, 13.

§ 2376. Motions; when to be made.

Notice of a motion to vacate, modify, or correct an award, must be served upon the adverse party to the submission, or his attorney, within three months after the award is filed or delivered, as prescribed by law for service of notice of a motion upon an attorney in an action. For the purposes of the motion, any judge, who might make an order to stay the proceedings, in an action brought in the same court, may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

From Id., § 12.

§ 2377. Costs on vacating award.

Where the court vacates an award, costs, not exceeding twenty-five dollars and disbursements, may be awarded to the prevailing party; and the payment thereof may be enforced, in like manner as the payment of costs upon a motion in an action.

From Id., § 19.

§ 2378. Judgment on award; when and how entered. Costs.

Upon the granting of an order, confirming, modifying, or correcting an award, judgment may be entered in conformity therewith, as upon a referee's report in an action, except as is otherwise prescribed in this title. Costs of the application, and of the proceedings subsequent thereto, not exceeding twenty-five dollars and disbursements, may be awarded by the court, in its discretion. If awarded, the amount thereof must be included in the judgment.

From Id., § 14.

§ 2379. Judgment-roll.

Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:

1. The submission; the selection or appointment, if any, of an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award.
2. The award.
3. Each notice, affidavit, or other paper, used upon an application to confirm, modify, or correct the award, and a copy of each order of the court, upon such an application.
4. A copy of the judgment.

The judgment may be docketed, as if it was rendered in an action.

From Id., §§ 15, 16.

§ 2380. Effect of judgment; how enforced.

The judgment so entered has the same force and effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

From Id., § 15.

§ 2381. Appeal.

An appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action. The proceedings upon such an appeal, including the judgment thereupon, and the enforcement of the judgment, are governed by the provisions of chapter twelfth of this act, as far as they are applicable.

From Id., §§ 16, 17, 20, 21.

§ 2382. Effect of party's death, lunacy, etc.; proceedings thereupon.

The death of a party to a submission, made either as prescribed in this title or otherwise, or the appointment of a committee of the person or property of such a party, as prescribed in title sixth of this chapter, operates as a revocation of the submission, if it occurs before the award is filed or delivered; but not afterwards. Where a party dies afterwards, if the submission contains a stipulation, authorizing the entry of a judgment upon the award, the award may be confirmed, vacated, modified, or corrected, upon the application of, or upon notice to, his executor or administrator, or a temporary administrator of his estate; or, where it relates to real property, his heir or devisee, who has succeeded to his interest in the real property. Where a committee of the property, or of the person, of a party, is appointed, after the award is filed or delivered, the award may be confirmed, vacated, modified, or corrected, upon the application of, or notice to, a committee of the property; but not otherwise. In a case specified in this section, a judge of the court may make an order, extending the time within which notice of a motion to vacate, modify, or correct the award, must be served. Upon confirming an award, where a party has died since it was filed or delivered, the court must enter judgment in the name of the original party; and the proceedings thereupon are the same, as where a party dies after a verdict.

New.

§ 2383. Revocation of submission.

A submission to arbitration, made either as prescribed in this title or otherwise, cannot be revoked by either party, after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision. A revocation, when allowed, must be made by an instrument in writing, signed by the revoking party, or his authorized agent, and delivered to the arbitrators, or one of them; and it is not necessary, in any case, that the instrument of revocation should be under seal. Any party to a submission may thus revoke it; whether he is a sole party to the controversy, or one of two or more parties on the same side.

From Id., § 23

§ 2384. Liability of party who revokes.

Where a party expressly revokes a submission, made either as prescribed in this title or otherwise, any other party to the submission may maintain an action against him, and also against his sureties, if any, upon the submission, or any instrument collateral thereto, in which action the plaintiff may recover all the costs and other expenses, and all the damages, which he has incurred in preparing for the arbitration, and in conducting the proceedings to the time of the revocation. Either of the arbi-

trators may recover, in an action against the revoking party, his reasonable fees and expenses.

From Id., §§ 23, 24.

§ 2385. Limitation of recovery against him.

A sum, penalty, forfeiture, or damages, shall not be recovered for a revocation of a submission to arbitration, made either as prescribed in this title or otherwise, except as prescribed in the last section; notwithstanding any stipulated damages, penalty, or forfeiture, expressed in the submission, or in any instrument collateral thereto.

From Id., § 25.

§ 2386. Application of this title.

This title does not affect any right of action in affirmance, disaffirmance, or for the modification of a submission, made either as prescribed in this title or otherwise, or upon an instrument collateral thereto, or upon an award made or purporting to be made in pursuance thereof. And, except as otherwise expressly prescribed therein, this title does not affect a submission, made otherwise than as prescribed therein, or any proceedings taken pursuant to such a submission, or any instrument collateral thereto.

From Id., § 22.

TITLE IX.

Proceedings to foreclose a mortgage by advertisement.

Sec. 2387. When mortgage may be foreclosed.
2388. Notice of sale; how given.
2389. Id.; how served.
2390. Duty of county clerk.
2391. Contents of notice of sale.
2392. Sale; how postponed.
2393. Id.; how conducted.
2394. Mortgagee, etc., may purchase.
2395. Effect of sale.
2396. Affidavit of sale, and of posting, serving, etc., notices.
2397. When one affidavit suffices; printed notice to be annexed.
2398. Affidavits may be filed and recorded.
2399. Note upon record of mortgage.
2400. Deed not necessary.
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2403. Taxation thereof.
2404. Surplus money to be paid into supreme court.
2405. Claimant of surplus money to file petition.
2406. Application for surplus money.
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2408. Limitation of last four sections.
2408a. Delivery of certain affidavits to purchaser.
2409. Application of this title to mortgages to the State.

§ 2387. [Am'd, 1913.] When mortgage may be foreclosed.

A mortgage upon real property, situated within the State, containing therein a power to the mortgagee, or any other person, to sell the mortgaged property, upon default being made in a condition of the mortgage, may be foreclosed, in the manner prescribed in this title, where the following requisites concur:

1. Default has been made in a condition of the mortgage, whereby the power to sell has become operative.

2. An action has not been brought to recover the debt secured by the mortgage, or any part thereof, or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff, or an execution, issued upon a judgment rendered therein in favor of the plaintiff, has been returned wholly or partly unsatisfied.

3. The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.

4. The first notice required by subdivision one of the next section is published within the time in which an action could be maintained to foreclose such mortgage.

From 2 R. S. 545 (Part 3, c. 8, tit. 15), §§ 1, 2. Am'd by L. 1913, c. 486 (in effect Sept. 1, 1913).

§ 2388. [Am'd, 1894, 1900, 1904, 1905.] Notice of sale; how given.

The person entitled to execute the power or sale, must give notice, in the following manner, that the mortgage will be foreclosed, by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice:

1. A copy of the notice must be published, at least once in each of the twelve weeks, immediately preceding the day of sale, in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property to be sold, or a part thereof, is situated.

2. A copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or, in the city and county of New York, in a like

place, at or near the entrance of the building where the trial and special terms of the supreme court of the first judicial district are directed by law to be held.

3. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof, is situated.

4. A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed, and also upon his heirs, providing he died the owner of the mortgaged premises. A copy of the notice may also be served, in a like manner, upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded, in the proper office for recording it in the county, at the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgagee; or in the event of the death of the subsequent grantee who was at the time of his death the owner of the mortgaged premises, then upon his heirs; or upon any person, then having a lien upon the property, subsequent to the mortgage by virtue of a judgment or decree duly docketed in the county clerk's office and constituting a specific or general lien upon the property. The notice, specified in this section, must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

From Id., § 3; L. 1842, c. 277, § 5; L. 1844, c. 346, § 1; L. 1857, c. 308, § 1. Am'd by L. 1894, c. 730; L. 1900, c. 766; L. 1904, c. 49; L. 1905, c. 433 (in effect Sept. 1, 1905).

§ 2389. [Am'd, 1887.] Id.; how served.

Service of notice of the sale, as prescribed in subdivision fourth of the last section, must be made as follows:

1. Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow; by delivering a copy of the notice, as prescribed in article first of title first of chapter fifth of this act, for delivery of a copy of a summons, in order to make personal service thereof upon the person to be served; or by leaving such a copy, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion, at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a natural person, he, or his wife, widow, executor or administrator, or a subsequent grantee of the property whose conveyance is upon record, or his wife or widow, is not a resident of or within the State, then service thereof may be made upon them in like manner without the State, at least twenty-eight days prior to the day of sale.

2. Upon any other person, either in the same method, or by depositing a copy of the notice in the post-office, properly inclosed in a postpaid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.

From 2 R. S. 545, § 3; L. 1844, c. 346. Am'd by L. 1887, c. 685.

§ 2390. Duty of county clerk.

A county clerk, to whom a copy of a notice of sale is delivered, as prescribed in subdivision third of the last section but one, must forthwith affix it in a book, kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice to the name of the mortgagor.

From 2 R. S. 545, § 3; L. 1857, c. 308, § 1.

§ 2391. Contents of notice of sale.

The notice of sale must specify:

1. The names of the mortgagor, of the mortgagee, and of each assignee of the mortgage.

2. The date of the mortgage, and the time when, and the place where, it is recorded.

3. The sum claimed to be due upon the mortgage, at the time of the first publication of the notice; and, if any sum secured by the mortgage is not then due, the amount to become due thereupon.

4. A description of the mortgaged property, conforming substantially to that contained in the mortgage.

From 2 R. S. 545, § 4.

§ 2392. Sale; how postponed.

The sale may be postponed, from time to time. In that case, a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed.

From Id., § 5.

§ 2393. Id.; how conducted.

The sale must be at public auction, in the day-time, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated; except that, where the mortgage is to the people of the State, the sale may be made at the Capitol. If the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or lots, shall be sold, as it is necessary to sell, in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.

From Id., § 6.

§ 2394. Mortgagee, etc., may purchase.

The mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.

From Id., § 7.

§ 2395. [Am'd, 1889.] Effect of sale.

A sale, made and conducted as prescribed in this title, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons:

1. The mortgagor, his heir, devisee, executor, or administrator.

2. Each person, claiming under any of them, by virtue of a title, or of a lien by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served, as prescribed in this title.

3. Each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office, at the time

of the delivery of a copy of the notice of said sale to the clerk of the county; and the executor, administrator, or assignee of such a person.

4. Every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions of this section.

5. The wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this title, where the lien of the mortgage was superior to her contingent or vested right of dower, or her estate in dower.

From Id., § 8; L. 1842, c. 277; L. 1844, c. 346, § 4. Am'd by L. 1889, c. 209.

§ 2396. [Am'd, 1908, 1912.] Affidavit of sale, and of posting, serving, etc., notice.

An affidavit of the sale, stating the time when, and the place where, the sale was made; the sum bid for each distinct parcel, separately sold; the name of the purchaser of each distinct parcel, and the name of the person or persons, court officer or other officer, to whom the proceeds of the sale were paid, and the sums thereof must be made by the person, who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of sale, and of the notice or notices of postponement, if any, may be made by the publisher or printer of the newspaper in which they were published, or by his foreman or principal clerk. An affidavit of the affixing of a copy of the notice, at or near the entrance of the proper court-house, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the affixing of a copy of the notice in the book, kept by the county clerk, may be made by the county clerk, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the service of a copy of the notice upon the mortgagor, or upon any other person, upon whom the notice must or may be served, may be made by the person who made the service. Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels.

From 2 R. S. 545, §§ 9, 10; L. 1844, c. 346; L. 1857, c. 308. Am'd by L. 1908, c. 294; L. 1912, ch. 343 (in effect Sept. 1, 1912).

§ 2397. [Am'd, 1882.] When one affidavit suffices; printed notice to be annexed.

The matters, required to be contained in any or all of the affidavits, specified in the last section, may be contained in one affidavit, where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit; and a printed copy of each notice of postponement must be annexed to the affidavit of publication, and to the affidavit of sale. But one copy of the notice suffices for two or more affidavits, where they all refer to it, and are annexed to each other, and filed and recorded together.

In part from 2 R. S. 545, § 9. Am'd by L. 1882, c. 399.

§ 2398. [Am'd, 1904.] Affidavits may be filed and recorded.

The affidavits, specified in the last two sections, may be filed in the office for recording deeds and mortgages, in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording deeds. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated,

with respect to any property sold, which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein.

From 2 R. S. 547, §§ 11, 12. Am'd by L. 1904, c. 679 (in effect Sept. 1, 1904).

§ 2399. Note upon record of mortgage.

A clerk or a register, who records any affidavit, or a certified copy thereof, filed with him, must make a note, upon the margin of the record of the mortgage, in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded.

From Id., § 13.

§ 2400. Deed not necessary.

The purchaser of the mortgaged premises, upon a sale conducted as prescribed in this title, obtains title thereto, against all persons bound by the sale, without the execution of a conveyance. Except where he is the person authorized to execute the power of sale, such a purchaser also obtains title, in like manner, upon payment of the purchase-money, and compliance with the other terms of sale, if any, without the filing and recording of the affidavits, as prescribed in the last section but one. But he is not bound to pay the purchase-money, until the affidavits, specified in that section, with respect to the property purchased by him, are filed, or delivered or tendered to him for filing.

From Id., § 14; L. 1838, c. 266, § 8.

§ 2401. Costs allowed.

The following costs, in addition to the expenses specified in the next section, are allowed, in proceedings taken as prescribed in this title:

1. For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this title, for each folio, twenty-five cents; for making each necessary copy thereof, for each folio, thirteen cents.

2. For serving each copy of the notice of sale, required or expressly permitted to be served by this title, and for affixing each copy thereof, required to be affixed upon the court-house, as prescribed in this title, one dollar.

3. For superintending the sale, and attending to the excution of the necessary papers, ten dollars.

From 2 R. S. 552 (Part 3, c. 10, tit. 5), § 4, subds. 1, 2, 3; L. 1844, c. 346, § 3.

§ 2402. Expenses allowed.

The sums actually paid for the following services, not exceeding the fees allowed by law for those services, are allowed in proceedings, taken as prescribed in this title:

1. For publishing the notice of sale, and the notice or notices of postponement, if any, for a period not exceeding twenty-four weeks.

2. For the services specified in section 2390 of this act.
3. For recording the affidavits; and also, where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof.
4. For necessary postage and searches.

From 2 R. S. 652, § 4.

§ 2403. Taxation thereof.

The costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place, upon the request and at the expense of any person, interested in the payment thereof. Each provision of this act, relating to the taxation of costs in the supreme court, and the review thereof, applies to such a taxation.

From Id., § 3.

§ 2404. Surplus money to be paid into supreme court.

An attorney or other person who receives any money, arising upon a sale, made as prescribed in this title, must, within ten days after he receives it, pay into the supreme court the surplus, exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect, as if the proceedings to foreclose the mortgage were taken in an action, brought in the supreme court, and triable in the county where the sale took place.

From L. 1858, c. 804, §§ 1, 2, 4; L. 1870, c. 706, § 1.

§ 2405. Claimant of surplus money to file petition.

A person, who had, at the time of the sale, an interest in or lien upon the property sold, or a part thereof, may, at any time before an order is made, as prescribed in the next section but one, file in the office of the clerk of the county, where the sale took place, a petition, stating the nature and extent of his claim, and praying for an order, directing the payment to him of the surplus money, or a part thereof.

From L. 1858, c. 804, § 3.

§ 2406. Application for surplus money.

A person filing a petition, as prescribed in the last section, may, after the expiration of twenty days from the day of sale, apply to the supreme court, at a term held within the judicial district, embracing the county where his petition is filed, for an order, pursuant to the prayer of his petition. Notice of the application must be served, in the manner prescribed in this act for the service of a paper upon an attorney in an action, upon each person, who has filed a like petition, at least eight days before the application; and also upon each person, upon whom a notice of sale was served, as shown in the affidavit of sale, or upon his executor or administrator. But, if it is shown to the court, by affidavit, that service upon any person, required to be served, cannot be so made with due diligence, notice may be given to him in any manner which the court directs.

From Id., § 3.

§ 2407. Order for distribution.

Upon the presentation of the petition, with due proof of notice of application, the court must make an order referring it to a suitable person to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money; and the priorities of the several liens thereupon.

Upon the coming in and confirmation of the referee's report, the court must make such an order, for the distribution of the surplus money, as justice requires.

From id., § 8.

§ 2408. [Am'd, 1915.] Limitation of last four sections.

The last four sections do not apply to surplus money, arising upon the sale of real property, of which a decedent died seized, where letters testamentary or letters of administration, upon the decedent's estate, were, within two years before the sale, issued from a surrogate's court within the State, having jurisdiction to issue them.

See L. 1867, c. 658; L. 1870, c. 170; L. 1871, c. 834. Am'd by L. 1915, c. 626 (in effect May 14, 1915).

§ 2408a. [Added, 1909.] Delivery of certain affidavits to purchaser.

Each county clerk and register in this state, in whose office, affidavits in foreclosure of mortgages by advertisement, or the certified copies thereof, have been or shall be filed and recorded pursuant to the provisions of this title is hereby authorized to deliver the same to the purchaser of the mortgaged property on the foreclosure sale, and such purchaser shall be entitled to such delivery.

From L. 1900, c. 223, § 1. Added by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 2409. [Am'd, 1882.] Application of this title to mortgages to the State.

This title does not affect any provision of law, inconsistent therewith, especially relating to the foreclosure of mortgages to the people of the State, or to the commissioners for loaning certain moneys of the United States.

From 2 R. S. 547, § 15. Am'd by L. 1882, c. 399.

TITLE X.

Proceedings to change the name of an individual.

Sec. 2410. Petition by individual.
2411. [Omitted.]
2412. Contents of petition.
2413. Notice of presentation of petition.
2414. Order.
2415. When change to take effect.
2416, 2417. [Omitted.]
2418. [Repealed.]

[N. B.—The portions of §§ 2410-2417, which related to changing the name of a corporation, have been transferred to the **General Corporation Law**, the **County Law**, etc., of the "**Consolidated Laws**;" see Table, p. iii, ante.]

§ 2410. [Am'd, 1887, 1893, 1895.] Petition by individual.

A petition for leave to assume another name may be made by a resident of the state to the county court of the county in which he resides, or, if he resides in the city of New York, either to the supreme court, or to the city court of New York. The petition

of an infant shall be made by his general guardian, or by the guardian of his person, or by his next friend.

From L. 1847, c. 464, § 1; L. 1860, c. 80, § 1. Am'd by L. 1887, c. 194; L. 1893, c. 366; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 2411. [Omitted; see Table, p. iii.]

§ 2412. [Am'd, 1893, 1909.] Contents of petition.

The petition must be in writing, signed by the petitioner and verified in like manner as a pleading in a court of record, and must specify the grounds of the application, the name, age and residence of the individual whose name is proposed to be changed and the name which he proposes to assume.

From L. 1847, c. 464, § 2. Am'd by L. 1893, c. 366; L. 1909, c. 65. (See Table, p. iii, ante).

§ 2413. [Am'd, 1893, 1894, 1901, 1904, 1906, 1909.] Notice of presentation of petition.

If the petition be to change the name of an infant, and is made by the infant's next friend, notice of the time and place when and where the petition will be presented must be served upon the father, or if he is dead or cannot be found, upon the mother, or if both are dead or cannot be found, upon the general guardian or guardian of the person of the infant, in like manner as a notice of a motion upon an attorney in an action, unless it appears to the satisfaction of the court that the infant has no father or mother, or that both reside without the state or cannot be found, and that he has no guardian residing within this state, in which case the court may dispense with notice or require notice to be given to such persons and in such manner as the court thinks proper.

From L. 1847, c. 464, § 1. Am'd by L. 1893, c. 366; L. 1894, c. 264; L. 1901, c. 374; L. 1904, c. 110; L. 1906, c. 89; L. 1909, c. 65. (See Table, p. iii, ante).

§ 2414. [Am'd, 1893, 1895, 1901, 1909.] Order.

If the court to which the petition is presented is satisfied thereby, or by the affidavit and certificate presented therewith, that the petition is true, and that there is no reasonable objection to the change of name proposed, and if the petition be to change the name of an infant, that the interests of the infant will be substantially promoted by the change, the court shall make an order authorizing the petitioner to assume the name proposed on a day specified therein, not less than thirty days after the entry of the order. The order shall be directed to be entered and the papers on which it was granted to be filed within ten days thereafter in the clerk's office of the county in which the petitioner resides if he be an individual, or in the office of the clerk of the city court of New York if the order be made by that court. Such order shall also direct the publication, within ten days after the entry thereof of a copy thereof in a designated newspaper, in the county in which the order is directed to be entered, at least once.

From L. 1847, c. 464, § 3; L. 1860, c. 80, § 2. Am'd by L. 1893, c. 366; L. 1895, c. 946; L. 1901, c. 374; L. 1909, c. 65. (See Table, p. iii, ante).

§ 2415. [Am'd, 1887, 1893, 1894, 1909.] When change to take effect.

If the order shall be fully complied with, and within forty days after the making of the order, an affidavit of the publication thereof shall be filed and recorded in the office in which the order is entered, and in each office in which certified copies thereof are required to be filed, if any, the petitioner shall, on and after the day specified for that purpose in the order, be known by the name which is thereby authorized to be assumed, and by no other name.

From L. 1847, c. 464, § 6. Am'd by L. 1887, c. 194; L. 1893, c. 366; L. 1894, c. 264; L. 1909, c. 65. (See Table, p. iii, ante).

§§ 2416, 2417. [Omitted; see Table, p. iii.]

§ 2418. [Repealed by L. 1895, c. 946 (in effect Jan. 1, 1896).]

TITLE XI.

Proceedings for the voluntary dissolution of a corporation.

[N. B.—The whole of this Title (comprising §§ 2419-2431b) has been transferred to the General Corporation Law of the "Consolidated Laws."]

§§ 2419–2431b. [Omitted; see Table, p. iii.]

TITLE XII.

Proceedings supplementary to an execution against property.

Article 1. Proceedings to compel an examination of the judgment debtor, and of his debtor or bailee.
2. The receiver.

ARTICLE FIRST.

Proceedings to compel an examination of the judgment debtor, and of his debtor or bailee.

Sec. 2432. The different remedies under this title.
2433. Nature of the remedies. Review of orders.
2434. What judge may entertain the proceedings.
2435. Order to examine judgment debtor after return of execution.
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2458. Upon what judgment, and to what county, the execution must have issued.
2459. In what county judgment debtor, his bailee, etc., must attend.
2460. No person excused from answering on the ground of fraud.
2461. Proceedings where judgment is against joint debtors.
2462. Proceedings commenced before one judge may be continued before another.
2463. Cases where this chapter is not applicable; what property cannot be reached.

§ 2432. [Am'd, 1896.] The different remedies under this title.

This title provides for three distinct remedies, as follows:

1. An order made or a warrant issued against a judgment debtor, after return of an execution.

2. An order made, or a warrant issued against a judgment debtor, after the issuing and before the return of an execution.

3. An order, made after the issuing, and either before or after the return, of an execution, against the person who has property of the judgment debtor, or is indebted to him.

The proceedings under subdivision third of this section, may be pursued either alone or simultaneously with the proceedings under subdivision first or subdivision second. The party to whom costs are awarded in a special proceeding shall be entitled to the same remedies under this title, under the same circumstances, as near as may be, as a judgment creditor. And for the purposes of this

title, the party to whom such costs are awarded shall be deemed a judgment creditor, and the party against whom they are awarded shall be deemed a judgment debtor.

New. Am'd by L. 1896, c. 176 (in effect September 1, 1896).

§ 2433. Nature of the remedies. Review of orders.

Each of those remedies is a special proceeding. But an order, made in the course thereof, can be reviewed only as follows:

1. An order, made by a judge, out of court, may be vacated or modified by the judge who made it, as if it was made in an action: or it, or the order of the judge vacating or modifying it, may be vacated or modified, upon motion, by the court out of which the execution was issued.

2. Where the execution was issued out of a county court, an appeal from an order, made in the course of the proceedings, may be taken in like manner, as if the order was made in an action brought in the same court.

New.

§ 2434. [Am'd, 1881, 1884, 1895, 1897, 1911.] What judge may entertain the proceedings.

Either special proceedings may be instituted before a judge of the court, out of which, or the county judge, the special county judge, or the special surrogate, of the county to which the execution was issued, or where it was issued to the city and county of New York, from a court other than the city court of that city, before a justice of the supreme court for that city and county. Where the execution was issued out of a court other than the supreme court, and it is shown by affidavit, that each of the judges, before whom the special proceedings might be instituted, as prescribed by this section, is absent from the county, or, for any reason, unable or disqualified to act, the special proceedings may be instituted before a justice of the supreme court. In that case, if he does not reside within the judicial district embracing the county to which the execution was issued, the order made or warrants issued by him must be returnable to a justice of the supreme court, residing in that district, or the county judge, or the special[1] judge, or special surrogate, or that or an adjoining county, as directed in the order or warrant. Where the judgment upon which the execution was issued was recovered in a municipal court of the city of New York, either special proceeding shall be instituted before a justice of the city court of the city of New York.

From Co. Proc., § 292. Am'd by L. 1881, c. 683; L. 1884, c. 407; L. 1895, c. 946; L. 1897, c. 476; L. 1911, cc. 558 and 831 (in effect Sept. 1, 1911).

§ 2435. [Am'd, 1896.] Order to examine judgment debtor after return of execution.

At any time within ten years after the return, wholly or partly unsatisfied, of an execution against property, issued upon a judgment, as prescribed in section 2458 of this act, or, in case of an order, issued in the same manner so far as the provisions of said section can be applied in substance, the creditor under such judgment or order, upon proof of the facts, by affidavit or other competent written evidence, is entitled to an order, requiring the debtor under the judgment or order, to attend and be examined concerning his property, at a time and place specified in the order.

From Co. Proc., § 292. Am'd by L. 1896, c. 176 (in effect September 1, 1896).

[1] When this section was amended by L. 1895, c. 946, the word "county" was omitted at this point between "special" and "judge," apparently by mistake.

§ 2436. Id.; before return of execution.

At any time after the issuing of an execution against property, as prescribed in section 2458 of this act, and before the return thereof, the judgment creditor, upon proof, by affidavit, or other competent written evidence, that the judgment debtor has property, which he unjustly refuses to apply towards the satisfaction of the judgment, is entitled to an order, requiring the judgment debtor to attend and be examined concerning his property, at a time and place specified in the order.

From Co. Proc., § 292.

§ 2437. Warrant of arrest instead of order.

Upon proof entitling a judgment creditor to an order, under either of the last two sections; and also proof, by affidavit, to the satisfaction of the judge, that there is danger that the judgment debtor will leave the State, or conceal himself, and that there is reason to believe that he has property, which he unjustly refuses to apply to the payment of the judgment; the judge may, instead of making an order, issue a warrant under his hand, reciting the facts and requiring the sheriff of any county, where the judgment debtor may be found, to arrest him, and bring him before the same judge, or before another judge, if the case is one where the warrant must be returnable to another judge.

From Id., § 292.

§ 2438. Id.; after the order has been made.

Where the facts, specified in the last section, are made to appear, as therein stated, at any time after the making of an order, requiring the judgment debtor to attend and be examined, and before the close of his examination, the judge may issue a warrant, as therein prescribed; and, if necessary, may direct the adjournment, or, if the return day of the order has elapsed, the continuance of the proceedings under the order, until after the return of the warrant, and his decision thereupon.

New.

§ 2439. Warrant; how vacated, etc.

A warrant, issued as prescribed in the last two sections, may be vacated or modified, as prescribed in section 2433 of this act, with respect to an order.

New.

§ 2440. Undertaking may be required, etc.

Where a judgment debtor has been arrested and brought before a judge, by virtue of a warrant, issued as prescribed in this article; and it appears, to the satisfaction of the judge, from his examination, or other proof, that there is danger that he will leave the State, or conceal himself, and that he has property, which he has unjustly refused to apply to the satisfaction of the judgment; the judge may make an order, requiring him to give an undertaking, with one or more sureties, in a sum fixed and within a time specified in the order, to the effect, that he will, from time to time, as the judge directs, attend before the judge, or before a referee, appointed or to be appointed in the proceedings; and that he will not, until discharged from arrest by virtue of the warrant, dispose of any of his property, which is not exempted from seizure by section 2463 of this act. If he fails to comply with the order, the judge must forthwith, by warrant, commit him to prison, there to remain until the close of the

examination, or the giving of the required undertaking; except that the judge may direct the sheriff to produce him, from time to time, as required in the course of the proceedings.

From Co. Proc., § 292.

§ 2441. Order to examine person having property, etc., of judgment debtor.

Upon proof, by affidavit, or other competent written evidence, to the satisfaction of the judge, that an execution against property has been issued, as prescribed in section 2458 of this act, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned; and also that any person or corporation has personal property of the judgment debtor, exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars; the judgment creditor is entitled to an order, requiring that person or corporation to attend and be examined concerning the debt, or other property, at a time and place specified in the order. The judge may, in his discretion, require notice of the subsequent proceedings to be given to the judgment debtor, in such a manner as he deems just. But a receiver shall not be appointed without such a notice, except as otherwise prescribed in article second of this title.

From Co. Proc., § 294.

§ 2442. Either order may require attendance before a referee.

An order, requiring a person to attend and be examined, made pursuant to any provision of this article, must require him so to attend and be examined, either before the judge to whom the order is returnable, or before a referee designated therein. Where the examination is taken before a referee, he must certify, to the judge to whom the order is returnable, all the evidence and the other proceedings taken before him.

From Id., § 296.

§ 2443. Reference may be ordered at any time.

At any stage of the proceedings, the judge to whom the order is returnable may, in his discretion, make an order, directing that any other examination, or testimony, be taken by, or that a question arising be referred to, a referee, designated in the order. Where a question is so referred, the referee may be directed to report either the evidence or the facts.

From Id., § 300.

§ 2444. Proceedings upon examination; adjournment.

Upon an examination under this article, each answer of a party or witness examined must be under oath. A corporation must attend by, and answer under the oath of, an officer thereof; and the judge may, in his discretion, specify the officer. Either party may be examined as a witness, in his own behalf, and may produce and examine other witnesses, as upon the trial of an action. The judge or referee may adjourn any proceedings, under this article, from time to time, as he thinks proper.

See Co. Proc., §§ 292, 295, 296.

§ 2445. Referee to be sworn.

Unless the parties expressly waive the referee's oath, a referee, appointed as prescribed in this article, must, before entering upon an examination, or taking testimony, subscribe and take an oath, that he will faithfully and fairly discharge his duty upon the

reference, and make a just and true report, according to the best of his understanding. The oath may be administered by an officer designated in section 842 of this act, and must be returned to the judge, with the report or testimony.

New.

§ 2446. Order permitting person indebted to pay debt to sheriff.

At any time after the commencement of a special proceeding, authorized by this article, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, upon proof, by affidavit, to his satisfaction, that a person or corporation is indebted to the judgment debtor, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, permitting the person or corporation, to pay to a sheriff, designated in the order, a sum, on account of the alleged indebtedness, not exceeding the sum which will satisfy the execution. A payment thus made is, to the extent thereof, a discharge of the indebtedness, except as against a transferee from the judgment debtor, in good faith and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice, when the payment was made.

See Co. Proc., §§ 293, 297.

§ 2447. Order requiring delivery of money or property to sheriff or receiver.

Where it appears, from the examination or testimony taken in a special proceeding authorized by this article, that the judgment debtor has, in his possession or under his control, money or other personal property, belonging to him; or that one or more articles of personal property, capable of delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another person; the judge, by whom the order or warrant was granted, or to whom it is returnable, may, in his discretion, and upon such a notice, given to such persons, as he deems just, or without notice, make an order, directing the judgment debtor, or other person, immediately to pay the money, or deliver the articles of personal property, to a sheriff, designated in the order, unless a receiver has been appointed, or a receivership has been extended to the special proceeding, and in that case to the receiver.

Id.

§ 2448. Duty of the sheriff.

If the sheriff, to whom money is paid, or other property is delivered, pursuant to an order made as prescribed in either of the last two sections, does not then hold an execution upon the judgment against the property of the judgment debtor, he has the same rights and powers, and is subject to the same duties and liabilities, with respect to the money or property, as if the money had been collected, or the property had been levied upon by him, by virtue of such an execution; except as otherwise prescribed in the next section.

Id.

§ 2449. [Am'd, 1892.] How money or property applied to pay the judgment.

After a receiver has been appointed, or a receivership has been extended to the special proceeding, the judge must, by order,

direct the sheriff to pay the money or the proceeds of the property, deducting his fees, to the receiver; or, if the case so requires, to deliver to the receiver the property in his hands. But if it appears, to the satisfaction of the judge, that an order, appointing a receiver or extending a receivership, is not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money so paid, or the proceeds of the property so delivered, upon an execution in favor of the judgment creditor, issued either before or after the payment or delivery to the sheriff. And a receiver, appointed pursuant to the provisions of this article, may, on leave of a judge having power to appoint such receiver, lease the real property that shall come into his possession for such time as shall be necessary to realize moneys sufficient to satisfy the judgment, with interest thereon and costs of the special proceeding.

Id. Am'd by L. 1892, c. 292.

§ 2450. Balance to be paid or delivered to judgment debtor, etc.

Where money is paid, or property is delivered, as prescribed in the last four sections, and afterwards the special proceeding is discontinued or dismissed; or the judgment is satisfied, without resorting to that money or property; or a balance of the money, or of the proceeds of the property, or a part of the property, remains in the sheriff's or the receiver's hands, after satisfying the judgment, and the costs and expenses of the special proceeding; the judge must make an order, directing the sheriff or receiver to pay the money, or deliver the property, so remaining in his hands, to the judgment debtor, or to such other person as appears to be entitled thereto, upon payment of his fees, and all other sums legally chargeable against the same.

See Co. Proc., §§ 298, 297.

§ 2451. Judge may enjoin transfer, etc., of property.

The judge by whom the order or warrant was granted or to whom it is returnable, may make an injunction order, restraining any person or corporation, whether a party or not a party to the special proceeding, from making or suffering any transfer or other disposition of, or interference with, the property of the judgment debtor, or the property or debt, concerning which any person is required to attend and be examined, until further direction in the premises. Such an injunction order may be made simultaneously with the order or warrant, by which the special proceeding is instituted, and upon the same papers; or afterwards, upon an affidavit, showing sufficient grounds therefor. The judge or the court may, as a condition of granting an application to vacate or modify the injunction order, require the applicant to give security, in such a sum and in such a manner, as justice requires.

From Co. Proc., §§ 298, 299.

§ 2452. Mode of service of certain orders.

An injunction order, or an order requiring a person to attend and be examined, made as prescribed in this article, must be served as follows:

1. The original order, under the hand of the judge making it, must be exhibited to the person to be served.

2. A copy thereof, and of the affidavit upon which it was made, must be delivered to him.

Service upon a corporation is sufficient, if made upon an officer, to whom a copy of a summons must be delivered, where a summons is personally served upon the corporation; unless the officer is specially designated by the judge, as prescribed in section 2444 of this act.

New.

§ 2453. Service of a warrant.

The sheriff, when he arrests a judgment debtor by virtue of a warrant, issued as prescribed in this article, must deliver to him a copy of the warrant, and of the affidavit upon which it was granted.

New.

§ 2454. How proceedings discontinued or dismissed.

A special proceeding, instituted as prescribed in this article, may be discontinued at any time, upon such terms as justice requires, by an order of the judge, made upon the application of the judgment creditor. Where the judgment creditor unreasonably neglects or delays to proceed, or where it appears that his judgment has been satisfied, his proceedings may be dismissed, upon like terms, by a like order, made upon the application of the judgment debtor, or of the plaintiff in a judgment creditor's action against the debtor, or of a judgment creditor who has instituted either of the special proceedings, authorized by this article. Where an order appointing a receiver, or extending a receivership, has been made, in the course of the special proceeding, notice of the application for an order specified in this section, must be given, in such a manner as the judge deems proper, to all persons interested in the receivership, as far as they can conveniently be ascertained.

New.

§ 2455. Costs to judgment creditor.

The judge may make an order, allowing to the judgment creditor a fixed sum, as costs, consisting of his witnesses' fees and other disbursements, and of a sum, in addition thereto, not exceeding thirty dollars; and directing the payment thereof, out of any money which has come, or may come, to the hands of the receiver, or of the sheriff; or, within a time specified in the order, by the judgment debtor, or other person against whom the special proceeding is instituted.

From Co. Proc., § 301.

§ 2456. Id.; to judgment debtor, etc.

Where the judgment debtor, or other person against whom the special proceeding is instituted, has been examined, and property, applicable to the payment of the judgment, has not been discovered in the course of the special proceeding, the judge may make an order, allowing him a like sum as costs; and directing the payment thereof, within a time specified in the order, by the judgment creditor; or, except where it is allowed to the judgment debtor, out of any money which has come, or may come, to the hands of the receiver or of the sheriff.

From Id., § 301.

§ 2457. [Am'd, 1911.] Disobedience to order; how punished.

A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee, made pursuant to the

last two sections, or to any other provision of this article, and duly served upon him, or an oral direction, given directly to him by a judge or referee, in the course of the special proceedings; or to attend before a judge or referee, according to the command of a subpoena, duly served upon him, may be punished by the judge of, or by the court out of which the execution was issued, by the county judge, the special county judge, or the special surrogate of the county to which the execution was issued, or by the city court of the city of New York or a justice thereof, if the proceedings were instituted before such court or any justice thereof, as for a contempt.

From Co. Proc., § 302. Am'd by L. 1911, c. 558 (in effect Sept. 1, 1911).

§ 2458. [Am'd, 1881, 1897.] Upon what judgment and to what county the execution must have issued.

In order to entitle a judgment-creditor to maintain either of the special proceedings authorized by this article, the judgment must have been rendered upon the judgment debtor's appearance or personal service of the summons upon him, for a sum not less than twenty-five dollars or substituted service of the summons upon him in accordance with section 436 of the code of civil procedure; and the execution must have been issued out of a court of record; and either:

1. To the sheriff of the county where the judgment debtor has, at the time of the commencement of the special proceedings, a place for the regular transaction of business in person; or,

2. If the judgment debtor is then a resident of the state, to the sheriff of the county where he resides; or,

3. If he is not then a resident of the state, to the sheriff of the county where the judgment-roll is filed unless the execution was issued out of a court other than that in which the judgment was rendered, and, in that case, to the sheriff of the county where the transcript of the judgment is filed.

From Id., § 292. Am'd by L. 1881, c. 122; L. 1897, c. 189 (in effect Sept. 1, 1897).

§ 2459. In what county judgment debtor, his bailee, etc., must attend.

If the judgment debtor, or other person, required to attend and be examined, as prescribed in this article, or the officer of a corporation, required to attend in its behalf, is, at the time of the service of the order upon him, a resident of the State, or then has an office, within the State, for the regular transaction of business in person, he cannot be compelled to attend, pursuant to the order, or to any adjournment, at a place without the county wherein his residence or place of business is situated.

From Co. Proc., § 292.

§ 2460. [Am'd, 1881.] No person excused from answering on the ground of fraud.

A party or a witness, examined in a special proceeding, authorized by this article, is not excused from answering a question, on the ground that his examination will tend to convict him of the commission of a fraud; or to prove that he has been a party or privy to, or knowing of, a conveyance, assignment, transfer, or other disposition of property for any purpose; or that he or another person claims to be entitled, as against the judgment creditor, or a receiver appointed or to be appointed in the special proceeding, to hold property, derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor, or to a person in his behalf. But an answer cannot be used, as evidence against

the person so answering, in a criminal action or criminal proceeding.

From Co. Proc., § 292. Am'd by L. 1881, c. 122.

§ 2461. [Am'd, 1900.] Proceedings where judgment is against joint debtors.

Where the execution was issued as prescribed in section 1934 or section 1941 of this act, a debt due to, or other personal property owned by, one or more of the defendants not summoned, jointly with the defendants summoned, or with any of them, may be reached by a special proceeding, instituted as prescribed in this article, and founded upon the judgment.

From Co. Proc., § 294. Am'd by L. 1900, c. 217 (in effect Sept. 1, 1900).

§ 2462. Proceedings commenced before one judge may be continued before another.

Sections 26, 52, and 279[1] of this act apply to a special proceeding, instituted as prescribed in this article; and the judge before whom it is continued, as prescribed in either of those sections, is deemed to be the judge to whom an order or warrant is returnable, for the purpose of any provision of this or the next article.

New.

§ 2463. [Am'd, 1886, 1908.] Cases where this chapter is not applicable; what property cannot be reached.

This article does not authorize the seizure of, or other interference with, any property, which is expressly exempt by law from levy and sale by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from a person, other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days, next before the institution of the special proceeding; when it is made to appear, by his oath or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor.

In part from Co. Proc., § 297. Am'd by L. 1886, c. 26; L. 1908, c. 278 (in effect Sept. 1, 1908). See § 1879, ante.

[1] This refers to § 279 of the Code as it read before Jan. 1, 1896. It was repealed by L. 1895, c. 946, § 2. The present § 279 was enacted by L. 1897, c. 36. See § 263, ante, footnote.

ARTICLE SECOND.

The receiver.

Sec. 2464. When and how receiver may be appointed.
2465. Notice to other creditors.
2466. Only one receiver to be appointed. Former receivership may be extended.
2467. Order to be filed and recorded.
2468. When property is vested in receiver.
2469. How receiver's title to personal property extended by relation.
2470. County clerk to record orders, etc.; penalty for neglect.
2471. Receiver and his accounts are subject to the control of the court.

§ 2464. When and how receiver may be appointed.

At any time after making an order, requiring the judgment debtor, or any other person, to attend and be examined, or issuing a warrant, as prescribed in article first of this title, the judge to whom the order or warrant is returnable may make an order, appointing a receiver of the property of the judgment debtor. At least two days' notice of the application for the order appointing a receiver, must be given personally to the judgment debtor, unless the judge is satisfied that he cannot, with reasonable diligence, be found within the State; in which case, the order must recite that fact, and may dispense with notice, or may direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined, or the warrant, has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him.

From Co. Proc., § 298.

§ 2465. Notice to other creditors.

The judge must ascertain, if practicable, by the oath of the judgment debtor, or otherwise, whether an action, specified in article first of title fourth of chapter fifteenth of this act, or a special proceeding instituted as prescribed in article first of this title, is pending against the judgment debtor. If either is pending, and a receiver has not been appointed therein, notice of the application for the appointment of a receiver, and of all the subsequent proceedings respecting the receivership, must be given, in such a manner as the judge directs, to the judgment creditor prosecuting it.

From Id., § 298.

§ 2466. Only one receiver to be appointed. Former receivership may be extended.

Only one receiver of the property of a judgment debtor shall be appointed. Where a receiver thereof has already been appointed, the judge, instead of making the order prescribed in the last section but one, must make an order, extending the receivership to the special proceeding before him. Such an order gives to the judgment creditor the same rights, as if a receiver was then appointed upon his application; including the right to apply to the court to control, direct, or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed, to those taken under his judgment.

From Id., § 298.

§ 2467. Order to be filed and recorded.

An order appointing a receiver, or extending a receivership, must be filed in the office of the clerk of the county, wherein

the judgment-roll in the action is filed; or, if the special proceeding is founded upon an execution issued out of a court, other than that in which the judgment was rendered, in the office of the clerk of the county, wherein the transcript of the judgment is filed.

From Id., § 298.

§ 2468. When property is vested in receiver.

The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him, or extending his receivership, as the case may be; subject to the following exceptions:

1. Real property is vested in the receiver, only from the time when the order, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

2. Where the judgment debtor, at the time when the order is filed, resides in another county of the State, his personal property is vested in the receiver, only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides.

From Id., § 298.

§ 2469. [Am'd, 1892.] How receiver's title to personal property extended by relation.

Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back, by relation, for the benefit of the judgment creditor in whose behalf the special proceeding was instituted, as follows:

1. Where an order, requiring the judgment debtor to attend and be examined, or a warrant, requiring the sheriff to arrest him and bring him before the judge, has been served, before the appointment of the receiver, or the extension of the receivership, the receiver's title extends back, so as to include the personal property of the judgment debtor, at the time of the service of the order or warrant.

2. Where an order or warrant has not been served, as specified in the foregoing subdivision, but an order has been made, requiring a person to attend and be examined, concerning property belonging, or a debt due, to the judgment debtor, the receiver's title extends to the personal property, belonging to the judgment debtor, which was in the hands, or under the control, of the person or corporation thus required to attend, at the time of the service of the order; and to a debt then due to him from that person or corporation.

3. In every other case, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor, at the time when the notice was served, either personally, or by complying with the requirements of an order, prescribing a substitute for personal service.

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted.

5. No person shall be appointed a receiver in this State who is not a resident thereof, nor shall any person continue to act as receiver after he ceases to be a resident thereof. And the judgment creditor may apply to the court or judge that appointed such receiver, within thirty days after said receiver ceases to be a resident of this State, for the appointment of another person in

his place, upon such notice to the persons interested as the court or judge may direct.

But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration; or the payment of a debt in good faith, and without notice.

New. Am'd by L. 1892, c. 85.

§ 2470. County clerk to record orders, etc.; penalty for neglect.

Each county clerk must keep in his office a book, indexed to the names of the judgment debtors, styled "book of orders appointing receivers of judgment debtors". A county clerk, in whose office an order or a certified copy of an order is filed, as prescribed in section 2467 or section 2468 of this act, must immediately note thereupon the time of filing it, and, as soon as practicable, must record it, in the book so kept by him. He must also, upon request, furnish forthwith to any party or person interested, one or more certified copies thereof. For each omission to comply with any provision of this section, a county clerk forfeits, to the party aggrieved, two hundred and fifty dollars, in addition to all damages sustained by reason of the omission.

From Co. Proc., § 298.

§ 2471. [Am'd, 1913, 1915.] Receiver and his accounts are subject to the control of the court.

A receiver, appointed as prescribed in this article, is subject to the direction and control of the court out of which the execution was issued, except where a receiver is appointed by the city court of the city of New York or by a county court, or a justice of said courts, he is subject to the direction and control of the said court or justice. Where an order has been made, extending a receivership to a special proceeding founded upon a subsequent judgment, the control over, and direction of, the receiver, with respect to that judgment, remain in the court or justice to whose control and direction he was originally subject. He shall keep accounts of his receivership and vouchers for all moneys paid out. An interested party may appear by serving upon the receiver and filing in the court a written notice.

The receiver may file his account and thereupon move for either an intermediate or final judicial settlement thereof. Should the receiver fail to file an account and apply for the above relief within a reasonable time, an interested party may apply for an order directed to the receiver. The account must contain a full and true statement as to all property and the disposition thereof. It must be verified to the effect, that it is true to the knowledge of the receiver, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, he believes it to be true, that the sources of his information and grounds of his belief are as therein set forth, and he knows of no error or omission to the prejudice of the judgment debtor, creditor, surety, or other person interested. All vouchers must be numbered and classified and a summary of the totals, together with the total payment made or due to each person, shall be made part of and accompany the account. The court may direct the receiver to attend and be examined under oath as to the account, the discharge of his duties, or any other matter relating to the administration thereof. He may be allowed without a voucher, any proper item of expenditure for postage, affidavits or

acknowledgments, or other item, not exceeding five dollars, for which a voucher is not customarily given or obtainable, upon specifying in his account when, to whom and for what the payment was made; but all the items so allowed shall not exceed one hundred dollars. An interested party may contest the account after appearing by filing written objections thereto and serving a copy thereof upon the receiver or his attorney either before or after service upon him of a written notice of the filing of said account. The time within which to contest the account may be limited by the court. The contest shall be confined to the items or matters thus objected to. A settlement of the account may be ordered subject to said objections. The court may allow or disallow any item of the account and decree either an intermediate or final settlement, conclusive upon all parties, appearing therein or who have been served with notice of filing of said account.

From Id., § 298. Am'd by L. 1913, c. 480; L. 1915, cc. 255, 634 (in effect September 1, 1915).

TITLE XIII.

Proceedings to compel the delivery of books to a public officer.

Sec. 2471a. Delivery of books and papers, how enforced.

§ 2471a. [Omitted; see Table, p. iii.] Delivery of books and papers, how enforced.

A public officer may demand from any person in whose possession they may be, a delivery to such officer of the books and papers belonging or appertaining to such office. If such demand is refused, such officer may make complaint thereof to any justice of the supreme court of the district, or to the county judge of the county in which the person refusing resides. If such justice or judge be satisfied that such books or papers are withheld, he shall grant an order directing the person refusing to show cause before him at a time specified therein, why he should not deliver the same. At such time, or at any time to which the matter may be adjourned, on proof of the due service of the order, such justice or judge shall proceed to inquire into the circumstances. If the person charged with withholding such books or papers makes affidavit before such justice or judge that he has delivered to the officer all books and papers in his custody which, within his knowledge, or to his belief belong or appertain thereto, such proceedings before such justice or judge shall cease, and such person be discharged. If the person complained against shall not make such oath, and it appears that any such books or papers are withheld by him, such justice or judge shall commit him to the county jail until he delivers such books and papers, or is otherwise discharged according to law. On such commitment, such justice or judge, if required by the complainant, shall also issue his warrant directed to any sheriff or constable, commanding him to search, in the daytime, the places designated therein, for such books and papers, and to bring them before such justice or judge. If any such books and papers are brought before him by virtue of such warrant, he shall determine whether they appertain to such office, and if so shall cause them to be delivered to the complainant.

Added by L. 1893, c. 179.

CHAPTER XVIII.

Surrogates' Courts, and Proceedings Therein.[1]

(Revised by Laws of 1914, Chapter 443 [in effect Sept. 1, 1914].)

TITLE I.—The surrogate and acting surrogate, and their powers and duties. The surrogate's court, its officers and their powers and duties; the surrogate's court and its general jurisdiction.

TITLE II.—Special proceedings; pleadings, process and its service; appearance; trial by court or jury; taking and preserving testimony; orders and decrees, their effect and enforcement. Letters, their requisites, effect, issue and revocation. Bonds and undertakings, their requisites, approval, prosecution and discharge. Sureties, their rights and obligations.

TITLE III.—Granting letters of administration. Probating and construing wills. Issuing letters testamentary, and ancillary letters testamentary and of administration. Appointment and qualification of testamentary trustee. Appointment and qualification of general, ancillary and testamentary guardians, and guardian by deed. Annual accounts by such guardians.

TITLE IV.—Ascertaining assets and debts. Payment of debts and legacies. Powers and duties of executors and administrators. Mortgage, lease or sale of real property for payment of debts, funeral expenses, expenses of administration, and to satisfy charges thereon, and for distribution.

TITLE V.—Accounting and judicial settlement. Effect and contents of decree on judicial settlement. Costs, their amount, allowance and payment. Fees of appraisers, referees, jurors and witnesses. Commissions and allowances. Appeals, how and to what court taken; undertakings and stay of execution. Probate of heirship. Definitions and application of other sections.

TITLE I.

The Surrogate and acting surrogate, and their powers and duties; the surrogate's court, its officers and their powers and duties; the surrogate's court and its general jurisdiction.

Article 1. The surrogate and acting surrogate; their powers and duties; when disqualified and how office filled.
2. The officers of the surrogate's court; their appointment, powers, duties, salaries and fees.
3. The surrogate's court and its general jurisdiction.

ARTICLE FIRST.

The surrogate and acting surrogate; their powers and duties; when disqualified and how office filled.

Sec. 2472. Surrogate and acting surrogate; their official designations.
2473. Seal of the surrogate and surrogate's court.
2474. Surrogate, when not to be counsel.
2475. Surrogate liable for clerk's acts.
2476. Surrogate, when disqualified.
2477. Disqualification; when objection must be taken.
2478. Vacancy or disability; who to act as surrogate.

[1] This "Surrogates' Courts Act" and the "Decedent Estate Law" are so closely interrelated that the one is the necessary complement of the other. The "Decedent Estate Law" is therefore incorporated in this edition of the Code as **Appendix II** (beginning on page 1022a).

2479. If surrogate disqualified, who to act.
2480. Id., in New York county.
2481. Proof of authority.
2482. Id., when and how made.
2483. How authority superseded.
2484. Temporary surrogate; when board of supervisors may appoint.
2485. Compensation of person acting as surrogate in case of vacancy, disability or disqualification.
2486. Books to be kept by surrogate.
2487. Books to be indexed; notation on margin as to certain decrees.
2488. Papers and books to be preserved and bonds filed.
2489. What papers to be transmitted to secretary of state or state comptroller; expenses thereof.
2490. Incidental powers of the surrogate.

§ 2472. Surrogate and acting surrogate; their official designations.

Where the county judge is also surrogate, he may be designated, in any paper or proceeding relating to the office of surrogate, as the surrogate of the county, without any addition referring to his office as county judge. A local officer elected, as prescribed in the constitution, to discharge the duties of surrogate, or of county judge and surrogate, is designated in this act, and, when acting as surrogate, may be designated as the "special surrogate" of his county. Where an officer, other than the surrogate, or special surrogate, acts as surrogate in a case prescribed by law, he must be designated by his official title with the addition of the words, "and acting surrogate."

Former § 2483 of this Code. From L. 1853, c. 648.

§ 2473. Seal of the surrogate and surrogate's court.

The seal of the surrogate of each county shall continue to be the seal of the surrogate's court of that county, and must be used as such by an officer who discharges the duties of the surrogate. A description of each of such seals must be deposited and recorded in the office of the secretary of state, unless it has already been done; and must remain of record.

Former § 2507 of this Code. From 2 R. S., §§ 3, 4, 5, as am'd by L. 1909, c. 65.

§ 2474. Surrogate, when not to be counsel.

A surrogate shall not be counsel, solicitor or attorney in a civil action or special proceeding for or against any executor, administrator, temporary administrator, testamentary trustee, guardian or infant, over whom, or whose estate or accounts, he could have any jurisdiction by law.

Former § 2495 of this Code. From 2 R. S. 223 (Part 3, c. 2, tit. 1) § 13, as am'd by L. 1893, c. 686.

§ 2475. Surrogate liable for clerk's acts.

A surrogate hereafter elected or appointed, and the sureties on his official bond, are liable for any act of the clerk or deputy clerk of the surrogate's court in the discharge of his official duties, during the surrogate's term of office, as if the act were performed by the surrogate. The surrogate may take security from the clerk or deputy clerk, or either of them, to indemnify him against the liability created by this section.

Former § 2511 of this Code. See L. 1857, c. 789, § 5; L. 1893, c. 686; L. 1907, c. 209.

§ 2476. Surrogate, when disqualified.

In addition to his general disqualifications as a judicial officer, a surrogate is disqualified from acting upon an application for

probate of a will, where he is a subscribing witness, or is necessarily examined or to be examined as a witness.

A surrogate is also disqualified in any matter in his court where he files a certificate that his relations to the parties or the subject-matter are such that it is improper for him to act.

Former § 2496 of this Code, modified. From 2 R. S. 79 (Part 2, c. 6, tit. 2), § 48; L. 1847, c. 470, § 32; L. 1871, c. 859, § 8.

§ 2477. Disqualification; when objection must be taken.

An objection to the power of a surrogate to act, based upon a disqualification, is waived by an adult party to a special proceeding unless it is taken at or before the joinder of issue by that party, or, where an issue is not framed, at or before the submission of the matter or question to the surrogate.

Former § 2497 of this Code. From 2 R. S. 276 (Part 3, c. 3, tit. 1), § 14; L. 1844, c. 300, § 6.

§ 2478. Vacancy or disability; who to act as surrogate.

Where in any county, except New York, the office of surrogate is vacant; or the surrogate is disabled by reason of sickness, absence or lunacy, or is disqualified in a particular matter, and special provision is not made by law for the discharge of the duties of his office in that contingency; the duties of his office must be discharged, until the vacancy is filled or the disability ceases, as follows:

1. By the special surrogate.
2. If there is no special surrogate, or he is in like manner disabled, or is precluded or disqualified, by the special county judge.
3. If there is no special county judge, or he is in like manner disabled, or is precluded or disqualified, by the county judge.
4. If there is no county judge, or he is in like manner disabled, or is precluded or disqualified, by the district attorney.

But before an officer is entitled to act as prescribed in this section, proof of his authority to act as prescribed in section 2481 of this chapter must be made. In any proceeding in the surrogate's court of the county of Kings, before either of the officers authorized in this section to discharge the duties of the office of surrogate of such county for the time being, if an issue is joined or a contest arises either on the facts or the law, such officer, in his discretion, may, by order, transfer such cases to the supreme court to be heard and decided at a special term thereof, held in such county, which order shall be recorded in the surrogate's office. A certified copy of such order, together with the appropriate certificate or certificates of the authority of the officer to act as surrogate, shall be sufficient and conclusive evidence of the jurisdiction and authority of the supreme court in such matter or cause. After a final order or decree is made in the matter or cause so transferred to the supreme court, the court shall direct the papers to be returned and filed, and transcripts of all orders and decrees made therein to be recorded in the surrogate's office of such county; and when so filed and recorded, they shall have the same effect as if they were filed and recorded in a case pending in the surrogate's court of such county.

Former § 2484 of this Code. From 2 R. S. 79 (Part 2, c. 6, tit. 2), §§ 49-54; L. 1847, c. 470, § 32; L. 1871, c. 839, § 8; L. 1877, c. 285; L. 1879, c. 151; L. 1893, c. 686.

§ 2479. If surrogate disqualified, who to act.

Where the surrogate of any county, except New York, is precluded or disqualified from acting with respect to any particular matter, his powers with respect to that matter, or if he be temporarily absent, his powers with respect to all matters, shall be discharged by the several officers designated in the last section, in the order therein provided. If there is no such officer qualified to act therein, the surrogate may file in his office a certificate, stating that fact; specifying the reason why he is disqualified or precluded; and designating the surrogate of any county, other than New York, to act in his place in the particular matter or during his absence. The surrogate so designated has, with respect to that matter, or generally when the designation is made on account of absence of the surrogate, all the powers of the surrogate making the designation, and may exercise the same in either county.

Former § 2485 of this Code. From L. 1877, c. 285; L. 1879, c. 311; L. 1893, c. 686.

§ 2480. Id., in New York county.

In the county of New York the supreme court, at a special term thereof, on the presentation of proof of its authority, as prescribed in the next section, must exercise all the powers and jurisdiction of the surrogate's court, as follows:

1. Where the surrogate is precluded or disqualified from acting with respect to a particular matter, it must exercise all the powers and jurisdiction of that court with respect to that matter.

2. Where the office of surrogate of the county is vacant, or the surrogate is disabled by reason of sickness, absence or lunacy, it must exercise all the powers and jurisdiction of that court, until the vacancy is filled or the disability ceases, as the case may be.

Former § 2486 of this Code. See L. 1881, c. 535; L. 1893, c. 686; L. 1895, c. 946.

§ 2481. Proof of authority.

The authority of another officer, or, in the county of New York, of the supreme court, to act as prescribed in the last three sections, must be proved in one of the following modes:

1. Where the surrogate is disqualified or precluded from acting in a particular matter, that fact may be proved by the surrogate's certificate thereof. Where the surrogate is temporarily absent, that fact may be proved by the certificate of the surrogate, or of the clerk of the surrogate's court, or of the county clerk.

2. The fact that the surrogate is disabled by reason of sickness, or lunacy, or that the office is vacant, and also the authority of the officer, or of the court, as the case may be, to act in his place, may be proved and are deemed conclusively established by an order of a justice of the supreme court of the judicial district embracing the county.

Former § 2487 of this Code. See L. 1887, c. 684; L. 1893, c. 686; L. 1895, c. 946.

§ 2482. Id., when and how made.

An order may be made as prescribed in subdivision second of the last section upon or without notice, as a justice of the supreme court of the judicial district embracing the county thinks proper. It must recite the cause of the making thereof, and must designate the officer or court empowered to discharge the duties of the office of surrogate.

It may, in the discretion of the justice, require an officer to give security for the due discharge of the duties therein. Where the office of surrogate is vacant, or the surrogate is disabled by reason of lunacy, the attorney-general, if directed by the governor must, or the district attorney upon his own motion may, apply for the order, and a justice of the supreme court of the judicial district embracing the county must grant it upon his application. A justice of the supreme court of the judicial district embracing the county may also grant the order upon the application of a party or a person about to become a party to any special proceeding in the surrogate's court. Where the surrogate is sick, the granting of an order rests in the discretion of the justice, and its effect may be qualified as the justice thinks proper.

Former § 2488 of this Code. From same sources as § 2478, ante. Am'd by L. 1889, c. 495, § 1.

§ 2483. How authority superseded.

Where an order is made by a justice of the supreme court of the judicial district embracing the county, as prescribed in the last two sections, or an appointment is made as prescribed in section 2484 of this chapter for any cause except a vacancy in the office of surrogate, it may be revoked, without prejudice to any proceeding theretofore taken by virtue thereof, by a justice of the supreme court of the judicial district embracing the surrogate's county, upon proof that it was improvidently made, or that the cause of making it has become inoperative. Such an order or appointment, made upon the ground that the surrogate's office is vacant, is superseded without any formal revocation, by the filling of the vacancy. After the order of appointment is revoked, or the vacancy is filled, as the case may be, the unfinished business, in any proceeding taken by virtue of the order or appointment, must be transferred to, and may be completed by, the surrogate, in the same manner and with like effect as where a new surrogate completes the unfinished business of his predecessor.

Former § 2489 of this Code. See L. 1889, c. 495, § 2.

§ 2484. Temporary surrogate; when board of supervisors may appoint.

In any county, except New York, if the surrogate is disabled by reason of sickness, and there is no special surrogate, or special county judge of the county, the board of supervisors, or in the counties embraced within the city of New York, the board of aldermen, may, in its discretion, appoint a suitable person to act as surrogate until the surrogate's disability ceases, or until a special surrogate or a special county judge is elected or appointed. A person so appointed must, before entering on the execution of the duties of his office, take and file an oath of office and give an official bond as prescribed by law with respect to a person elected to the office of surrogate.

Former § 2492 of this Code. From 2 R. S. 79, § 54; L. 1830, c. 320, § 21; L. 1893, c. 686.

§ 2485. Compensation of person acting as surrogate in case of vacancy, disability or disqualification.

An officer, or a person appointed by the board of supervisors, or board of aldermen, who acts as surrogate of any county during a vacancy in the office, or in consequence of disability, as prescribed in this title must be paid, for the time during which he so acts, a

compensation equal pro rata to the salary of the surrogate; or, in a county where the county judge is also surrogate, to the salary of the county judge. The amount of his compensation must be audited and paid in like manner as the salary of the surrogate, or of the county judge, as the case may be. Where an officer of the county performs the duties of the surrogate with respect to a particular matter wherein the surrogate is disqualified or precluded from acting, the supervisors of the county, or board of aldermen, must allow him a compensation equal pro rata to the salary of the surrogate to be audited and collected in the same manner.

Former § 2493 of this Code. From L. 1871, c. 359, § 8.

§ 2486. Books to be kept by surrogate.

Each surrogate must provide and keep the following books:

1. A record-book of wills, in which must be recorded, at length, every will required by law to be recorded in his office and the decree admitting it to probate.

2. A record-book of letters testamentary, letters of administration and letters of guardianship, in which must be recorded all such letters issued out of his court.

3. A record-book in which must be recorded every decree whereby the account of an executor, administrator, testamentary trustee, or guardian is settled.

4. A book containing a minute of every paper filed, or other proceeding taken, relating to the disposition of the real property of a decedent, and a record of every order or decree made thereupon; with a memorandum of every report made, and other proceeding taken, founded upon a decree for such a disposition.

5. A book containing a minute or record of every decree or order, the record of which is not required by this section to be kept elsewhere; together with a memorandum of each execution issued, and of the satisfaction of each decree recorded therein.

6. A book in which must be recorded, upon the application of any person, all instruments acknowledged, or proved, and duly certified, settling estates or accounts or assigning, mortgaging, charging or releasing any interest in any estate or fund.

7. A book known as the Court and Trust Fund Register.

8. A book in which all bonds and undertakings filed in his court must be recorded.

The expense of providing the books required by law to be kept and used by the surrogate is a county charge, and such books must be open at all reasonable times to the inspection of any person.

Former § 2498 of this Code, modified, with parts of §§ 2499, 2502, 2509. From 2 R. S. 222 (Part 3, c. 2, tit. 1), § 7; Id., 110 (Part 2, c. 6, tit. 4), § 60; L. 1837, c. 460, § 3.

§ 2487. Books to be indexed; notation on margin as to certain decrees.

To each of the books kept as prescribed in the last section must be attached an alphabetical index referring to the page of the book where each subject may be found. The surrogate may keep two or more books for a further division of the subjects specified in either subdivision of the last section; in which case he must keep a separate index to each set of books. Each decree or judgment affecting a will, its probate or construction, or revoking or otherwise affecting letters testamentary, letters of administration, or letters of guardianship, or suspending or removing a testamentary trustee, or modify-

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ing or otherwise affecting any other decree, must be plainly noted at the end or in the margin of the record of the will, letters, or original decree, with a reference to the book and page where the subsequent decree is recorded.

Former § 2499 of this Code. From 2 R. S. 222 (Part 3, c. 2, tit. 1), § 7; L. 1837, c. 460, § 2.

§ 2488. Papers and books to be preserved and bonds filed.

The surrogate must carefully file and preserve in his office every deposition, affidavit, petition, report, account, voucher, or other paper relating to any proceeding in his court and deliver to his successor all the papers and books kept by him, except that vouchers may be returned to the accounting party after two years, or destroyed after five years from the date of the decree which allowed the payments represented by them.

Former § 2500 of the Code. From 2 R. S. 223, § 8; Id., 102, § 13; L. 1837, c. 460, § 2; L. 1893, c. 686.

§ 2489. What papers to be transmitted to secretary of state or state comptroller; expenses thereof.

A surrogate who admits to probate the will of a person who was not a resident of the state at the time of his death, or grants original or ancillary letters testamentary upon such a will, or original or ancillary letters of administration upon the estate of such a person, must, within ten days thereafter, transmit to the secretary of state, to be filed in his office, a certified copy of the will or letters.

The surrogate must, within ten days after granting letters of administration to a county treasurer, transmit to the state comptroller a certified copy of such letters.

Former § 2503 of this Code. From 2 R. S. 80 (Part 2, c. 6, tit. 2), § 59.

§ 2490. Incidental powers of the surrogate.

A surrogate, in or out of court, as the case requires, has power:

1. To issue citations and other process authorized by law to parties, in any matter within the jurisdiction of his court; and, in a case prescribed by law, to compel the attendance of a party.

2. To adjourn, from time to time, a hearing or other proceeding in his court; and where all persons who are necessary parties have not been cited or notified, and citation or notice has not been waived by appearance or otherwise, it is his duty, before proceeding further, so to adjourn the same, and to issue a supplemental citation, or require the petitioner to give an additional notice, as may be necessary.

3. To issue, under the seal of the court, a subpœna requiring the attendance of a witness, or of a person, residing or being in any part of the state, for examination as to any matter or subject about which it is necessary or proper for the surrogate to inquire in order that he may properly perform any duty imposed upon him by law; or a subpœna duces tecum requiring such attendance and the production of a book or paper material to an inquiry pending in the court.

4. To enjoin by order, an executor, administrator, testamentary trustee or guardian, to whom a citation or other process has been duly issued from his court, from acting as such until the further order of the court.

5. To require, by order, an executor, administrator, testamentary trustee, or guardian subject to the jurisdiction of his court, to per-

form any duty imposed upon him by statute, or by the surrogate's court, under authority of a statute.

6. To open, vacate, modify, or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case, and in the same manner, as a court of record and of general jurisdiction exercises the same powers.

7. To punish any person for a contempt of his court, civil or criminal, in any case where it is expressly prescribed by law that a court of record may punish a person for a similar contempt, and in like manner.

8. Subject to the provisions of law relating to the disqualification of a judge in certain cases, to complete any unfinished business pending before his predecessor in the office, including proofs, accountings and examinations.

9. To complete and certify and sign in his own name, adding to his signature the date of so doing, all records or papers left uncompleted or unsigned by any of his predecessors.

10. To exemplify and certify transcripts of all records of his court, or other papers remaining therein.

11. With respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court having by the common law jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred.

12. A surrogate has power to administer oaths, to take affidavits and the proof and acknowledgment of deeds and all other instruments in writing, and certify the same with the same force and effect as if taken and certified by a county judge; and in any proceeding of which he has jurisdiction, he may administer oaths, take affidavits, testimony and depositions, and certify the same at any place within the state of New York, with the same force and effect as if taken in his county.

Former § 2481 of this Code. From 2 R. S. 221 (Part 3, c. 2, tit. 1), §§ 6, 11; L. 1837, c. 460, §§ 9, 61; L. 1870, c. 74, § 2; Id., c. 359, § 1; see L. 1871, c. 424, § 2; L. 1874, c. 9; L. 1909, cc. 65 and 510, § 1.

ARTICLE SECOND.

The officers of the surrogate's court; their appointment, powers, duties, salaries and fees.

Sec. 2491. Clerk and deputy clerk of surrogate's court, and clerks in surrogate's office; appointment; salary.
2492. Chief clerk of surrogate's court of Kings county; compensation of clerks and officers.
2493. Appointment of court officers and attendants.
2494. Interpreters in surrogate's court of Kings county.
2495. Stenographer for surrogates' courts in New York, Kings, Erie, Westchester and Queens counties.
2496. Id.; in other counties.
2497. Duty of stenographer.
2498. How minutes of testimony authenticated and bound.
2499. Fees for copying or recording papers.
2500. Fees of stenographer acting or taking testimony in surrogate's court.
2501. Expenses of surrogate or clerk.
2502. Clerk of surrogate's court; deputy clerk of surrogate's court; their powers.
2503. Clerk to keep court and trust fund register.

§ 2491. Clerk and deputy clerk of surrogate's court, and clerks in surrogate's office; appointment; salary.

By a written order filed and recorded in his office, which he may in like manner revoke at pleasure, a surrogate may appoint a clerk of the surrogate's court, and in any county containing a city of the second class, and in the counties of Monroe and Erie the surrogate may also appoint a deputy clerk of said court.

Each surrogate may appoint, and at pleasure remove, as many other clerks for his office, to be paid by the county, as the board of supervisors of his county, or in the city of New York the board of aldermen, authorize him so to appoint.

The board of supervisors or, in the counties embraced within the city of New York, the board of aldermen, as the case requires, must fix the compensation of the clerk or clerks appointed under this section; and may authorize them, or either of them, to receive, for their or his own use, any legal fees permitted to be charged by law. A surrogate may appoint, and at pleasure remove, as many additional clerks to be paid by him as he thinks proper.

Former § 2608 and part of § 2509 of this Code, consolidated and amended.

§ 2492. Chief clerk of surrogate's court of Kings county; compensation of clerks and officers.

The surrogate of the county of Kings may appoint a chief clerk of the court and office of such surrogate, who shall hold office for five years unless sooner removed by the surrogate for cause, after trial, upon charges duly served upon him and an opportunity to be heard and defend. Whenever a vacancy exists for any cause in such office, the surrogate shall appoint a person to fill such office for the full term of five years. Such chief clerk shall, before entering upon the performance of his duties, take the constitutional oath of office and shall file the same with the county clerk of Kings county, together with a bond in the sum of ten thousand dollars, with sureties approved by the surrogate, conditioned for the faithful performance of his duties as such chief clerk. Such chief clerk shall perform such duties as now pertain to the office of chief clerk and clerk of the surrogate's court in such county, and such other duties as the surrogate may from time to time by rule of the court or otherwise impose

upon him. The compensation of such chief clerk and of the other clerks and officers of the court and office of such surrogate shall, notwithstanding any other provision of law, be fixed by the said surrogate, and the same shall be a county charge. The compensation of the chief clerk shall not be decreased during his term of office.

Former § 2509a of this Code. From L. 1911, c. 688.

§ 2493. [Am'd, 1915.] Appointment of court officers and attendants.

The surrogates of Kings county may appoint, and at pleasure remove, all attendants, messengers and court officers in his court, who must attend, from day to day, the terms and sittings of the court to preserve order, and to perform whatever services may be required of him by the surrogate.

The surrogates of Erie, Bronx, Queens and Richmond counties may severally appoint, and at pleasure remove, as many attendants, messengers and court officers in their courts, to be paid by the county, as the board of supervisors of Erie county or the board of estimate and apportionment of the city of New York, respectively, authorize them so to appoint. The court officer or officers so appointed shall possess all the powers of officers designated by sheriffs to attend upon courts, and shall perform whatever services may be required by the surrogate.

The surrogate of any other county may appoint, and at pleasure remove, one or more court officers to attend his court and to perform such duties in respect thereto as the said surrogate may prescribe, who shall be paid by the county treasurer upon the certificate of the surrogate, a sum not to exceed three dollars per day for the days actually spent by him in attendance upon a session of the surrogate's court. Such officers shall also have all the powers of officers designated by sheriffs to attend upon courts of record.

The first part of this section is taken from former § 2512 of this Code; the rest is new. Am'd by L. 1915, c. 546 (in effect Sept. 1, 1915).

§ 2494. Interpreters in surrogate's court of Kings county.

The surrogate of Kings county must from time to time appoint and may at pleasure remove an interpreter to be attached to the surrogate's court of said county. Such interpreter shall receive a salary of eighteen hundred dollars per annum to be paid by the comptroller of the city of New York, in monthly instalments, and shall, before entering upon his duties, file in the office of the clerk of the county of Kings the constitutional oath of office in which there shall also be incorporated language to the effect that he will fully and correctly interpret and translate each question propounded through him to a witness and each answer thereto in said courts. The compensation for the above interpreter to be taken out of the amount appropriated for the support of the said surrogate's court, or from any other contingent city fund.

Former § 2513a of this Code. From L. 1909, c. 65; see Judiciary Law, §§ 198, 382-385.

§ 2495. Stenographer for surrogates' courts in New York, Kings, Erie, Albany, Westchester and Queens counties.

The surrogate of each of the counties of New York, Kings, Queens, Erie, Albany and Westchester must appoint, and may, for cause, remove, a stenographer for his court.

In the counties of New York and Kings such stenographers shall

receive a salary fixed by law, to be paid as the salaries of clerks in the surrogate's office are paid.

In the counties of Erie, Albany, Westchester and Queens the salary of said stenographer shall be fixed by the board of supervisors, or by the board of estimate and apportionment, as the case may be, and the payment of such salary shall be provided for by such board in the same manner as other county salaries are paid.

From former § 2512 of this Code, in part.

§ 2496. [Am'd, 1915.] Id.; in other counties.

The surrogate of each county, except New York, Kings, Bronx, Albany, Westchester, Hamilton, Queens, Richmond, and Erie may, in his discretion, appoint, and at pleasure remove, a stenographer for his court, who, except in Sullivan county, shall receive a salary to be fixed by such surrogate, not exceeding in counties having a population less than thirty thousand, eight hundred dollars per annum; in counties having a population of thirty thousand and not more than fifty thousand, not exceeding one thousand dollars per annum, and in counties having a population exceeding fifty thousand, not exceeding twelve hundred dollars per annum, except that in counties in which are located cities of the second class, or in counties in which are located three cities of the third class, such salary shall not exceed eighteen hundred dollars per annum; and in any county wholly containing a city of the first class, such salaries shall not exceed two thousand dollars per annum. The population of the several counties shall be determined by the last preceding census. If a regular stenographer is appointed in Sullivan county, his salary shall be five hundred dollars per annum. The board of supervisors shall provide for the payment of such salary in the same manner as other county salaries are paid. When not actually engaged in the discharge of his duties as stenographer, he shall perform such clerical duties in connection with the surrogate's court as the surrogate directs. In counties wherein the surrogate is also county judge, the stenographer so appointed shall be the stenographer of the county court, and shall perform the duties pertaining to a stenographer of the county court without additional compensation. In counties where, for any cause, a regular stenographer for his court has not been appointed, as provided by this section, the surrogate may, in individual proceedings requiring the services of a stenographer, appoint a stenographer who shall be paid a reasonable compensation, certified by the surrogate in every case in which he takes notes of testimony, from the estate or matter in which such services are rendered.

When the regular stenographer appointed under this or the last section is sick, absent, on his vacation, or unable to act for other good cause, the surrogate may designate a stenographer to act temporarily in his place, who shall be paid by the county a reasonable compensation certified by the surrogate.

From former § 2513 of this Code, in part. Am'd by L. 1915, c. 221 (in effect April 5, 1915).

§ 2497. Duty of stenographer.

The stenographer of a surrogate's court must, under the direction of the surrogate, take full stenographic notes of all proceedings, in which oral proofs are given, except where the surrogate otherwise directs. The testimony must be legibly written out at length by

him, from his notes when required by the surrogate; and the minutes thereof, as so written out, must, after being authenticated, as prescribed in the next section, be filed in the surrogate's office, and in all cases his stenographic books must be so filed and remain in the surrogate's office five years.

Former § 2541 of this Code. From L. 1871, c. 874, § 1.

§ 2498. How minutes of testimony authenticated and bound.

The minutes of testimony written out as prescribed in the last section, or taken by the surrogate, or under his direction, while the witness is testifying, must, before being filed, be authenticated by the signature of the stenographer, referee, the surrogate or the clerk of the surrogate's court, as the case may be, to the effect that they are correct.

The minutes of testimony written out by the stenographer must be bound, at the expense of the county, in volumes of convenient size and shape, indorsed "Stenographic minutes," and numbered consecutively.

Former §§ 2542, 2543 of this Code. From L. 1877, c. 206; L. 1881, c. 535.

§ 2499. Fees for copying or recording papers.

The clerk of the surrogate's court may charge and receive to the use of the county the following fees, except that where the board of supervisors or board of aldermen have allowed him to receive fees for his own use the same may be received and retained by said clerk:

1. For furnishing a transcript of a decree to be filed in the county clerk's office, fifty cents.

2. For making a copy of the proceedings and evidence in any matter, six cents per folio.

3. For recording agreements settling estates or accounts, releases, assignments, or mortgages of, or liens upon, any interest in an estate or fund; wills probated in another county or state, and the papers required to be recorded therewith, ten cents for each folio.

4. For a certificate, other than a certificate that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

5. For making and certifying a copy of a will, or paper on file or recorded in such office, ten cents for each folio.

6. For comparing and certifying that a paper is a copy of a record or paper on file, twenty-five cents and five cents for each folio; and for comparing and certifying a case on appeal where printed copies thereof are presented by any party to any proceeding, one cent for each folio.

7. For recording the official bond or undertaking of an executor, administrator, guardian or trustee, ten cents a folio, except that where the clerk receives a salary as full compensation for his services no fee shall be charged for such recording.

The board of supervisors, or board of aldermen, may fix a different rate of compensation, and may require the clerk to keep an account of all such fees and make report thereof whenever requested by such board.

On the appointment of a guardian, if it appears that the application is made for the purpose of enabling the minor to receive bounty, arrears of pay or prize money, or pension due, or other dues or gratuity from the federal or state government, for the services of the

parents or brother of such minor in the military or naval service of the United States, no fees shall be charged or received.

From former §§ 2501, 2502, 2566, 2567 of this Code, in part.

§ 2500. Fees of stenographer acting or taking testimony in surrogate's court.

A stenographer, appointed or acting pursuant to sections 2496 and 2497 of this act, may charge and receive a sum not exceeding six cents per folio for furnishing a copy of the minutes, proceedings and testimony taken in surrogate's court to any person who applies for the same.

From former § 2513 of this Code, in part.

§ 2501. Expenses of surrogate or clerk.

Where, upon the application of any party, the surrogate, or the clerk of the surrogate's court, goes to a place other than the surrogate's office, or the court room where surrogate's court is regularly held, in order to take testimony, he shall be paid by such party his actual and necessary expenses.

From former § 2567 of this Code, in part.

§ 2502. [Am'd, 1915.] Clerk of surrogate's court; deputy clerk of surrogate's court; their powers.

The clerk and deputy clerk of the surrogate's court may severally exercise, concurrently with the surrogate, the following powers of the surrogate:

1. He may certify and sign as clerk of the court, or as deputy clerk of the court, as the case may be, any of the records of the court, and the records and papers specified in subdivision nine of section 2490 of this chapter.

2. He may issue any citation, subpœna or other mandate to which a party is entitled as of course, either unconditionally or on the filing of any paper; and may sign, as clerk of the court, or as deputy clerk of the court, as the case may be, and affix the seal of the court to any letters or mandate issued from the court.

3. He may certify in the manner prescribed by chapter ninth of this act, a copy of any paper, required or permitted by law to be filed or recorded in the surrogate's office.

4. He may adjourn to a definite time, not exceeding thirty days, any matter, when the surrogate is absent from his office, or unable, by reason of other engagements, to attend to the same.

5. He may administer oaths, take affidavits and the proof and acknowledgment of deeds and all other instruments in writing and certify the same with the same force and effect as if taken and certified by the county judge; and in any proceeding of which the court has jurisdiction, he may administer oaths, take affidavits, testimony and depositions, and certify the same at any place within the state of New York, with the same force and effect as if taken in his county.

6. The clerk of the surrogate's court of each of the counties of Kings, Bronx, Queens and New York may, with the approval of the surrogate or surrogates of his county, authorize or deputize one or more of the other clerks, employed in the surrogate's office of his county, to sign his name, and exercise such of the other powers conferred upon him by this section, as he shall designate. The surrogate

may prohibit the clerk and deputy clerk, or either of them, from exercising any powers specified in this subdivision, but the prohibition does not affect the validity of any act of the clerk or deputy clerk done in disregard of the prohibition.

7. The clerk or deputy clerk or other person employed in any capacity in a surrogate's office, shall not act as appraiser, as attorney or counsel, or as referee, or special guardian, in any matter before the surrogate.

8. The clerk and deputy clerk of the surrogate's court, and in the county of Kings two other clerks and in the counties of Bronx and of Queens one other clerk, to be designated by the surrogate, in addition to the powers above enumerated may exercise, concurrently with the surrogate of the county, the power to take the proof of a will, unless demand be made for an oral examination or cross-examination of the subscribing witnesses, or objections to such probate are pending.

Former §§ 2509, 2510 of this Code, consolidated. Am'd by L. 1915, c. 61 (in effect March 11, 1915.

§ 2503. Clerk to keep court and trust fund register.

Whenever there shall be filed in the office of the surrogate any decree or order of the surrogate or of the surrogate's court directing the deposit of money, either actually in the hands of some person or persons or thereafter arising from the sale of real estate described in any such decree or order, with the county treasurer of his county, or with the chamberlain of the city of New York, or upon the filing in the said surrogate's office of any treasurer's or chamberlain's receipt stating that a sum of money has been deposited with such treasurer or chamberlain, in accordance with a decree or order of any such surrogate's court, the clerk of the surrogate's court shall enter in the court and trust fund register, the title of the proceeding, or the name of the estate in which such decree or order was made, together with a statement of the amount so deposited, or ordered to be deposited, if said decree or order contains the amount of same, and the name of the person or persons, if any, to whom said money is ordered to be paid, and the date of the filing of the same or of such receipt as herein mentioned.

From § 2509 of this Code, in part, modified.

ARTICLE THIRD.

The surrogate's court and its general jurisdiction.

Sec. 2504. Surrogate's court; when to be open; times and places of holding court.
2505. When and where court held by county judge; proceedings where county judge is also surrogate.
2506. Terms of surrogates' courts in New York county and powers of surrogates.
2507. Proceedings in supreme court regulated.
2508. Id.; transfer of proceedings to surrogate's court.
2509. Proceedings, etc., of acting surrogates, where and how recorded.
2510. General jurisdiction of surrogate's court.
2511. Jurisdiction of persons; when and how obtained.
2512. Jurisdiction of subject-matter; objection to defect in record.
2513. Presumption of jurisdiction.
2514. Effect of exercise of jurisdiction.
2515. Exclusive jurisdiction.
2516. Concurrent jurisdiction of two or more surrogates.
2517. Jurisdiction, how affected by locality of debts.

§ 2504. Surrogate's court; when to be opened; times and places of holding court.

The surrogate's court is always open for the transaction of any business within its powers and jurisdiction.

The surrogate may, from time to time, appoint, and may alter, the times and places of holding said court for the transaction of any business which may come before it. The surrogate may sign orders, decrees, letters testamentary, of administration and of guardianship, and approve bonds wherever he may be at any time.

From former §§ 2504, 2505 of this Code, in part.

§ 2505. When and where court held by county judge. Proceedings where county judge is also surrogate.

The surrogate's court, in a county where the county judge is also surrogate, may be held at the time and place at which the county court is held; and the jury in attendance may constitute the jury for the trial of any issue arising in the surrogate's court.

Former § 2506 of this Code, in part. From L. 1847, c. 280, § 32.

§ 2506. Terms of surrogates' courts in New York county and powers of surrogates.

The surrogates of the county of New York, from time to time must appoint and may alter the times of holding terms of that court for the trial of probate proceedings and for the hearing of motions and other chamber business. They must prescribe the duration of such terms, and assign the surrogate to preside and attend at the terms so appointed. In case of the inability of a surrogate of that county to preside or attend, the other surrogate may preside or attend in his place. Two or more terms of the surrogate's court may be appointed to be held at the same time. The term of that court held at the chambers shall dispose of all business except contested probate proceedings; all contested probate proceedings shall be disposed of at the trial term. An appointment must be published in two newspapers published in the city of New York during or before the first week in January in each year. All the powers conferred by law upon the surrogate of the county of New York may be exercised by either of the surrogates of the said county. There shall be published in the official law paper published in said county,

upon Monday of every week, under the name of the surrogate making the several appointments, a full and true list of the names of all appraisers, transfer tax appraisers, special guardians, referees and temporary administrators, which either surrogate shall have designated or appointed during the preceding week together with the names of the proceedings in which they were appointed and the dates of said appointments.

Former § 2504 of this Code, in part. From 2 R. S. 221 (Part 3, c. 2, tit. 1), § 2; L. 1893, c. 9; L. 1899, c. 605.

§ 2507. Proceedings in supreme court regulated.

In a special proceeding cognizable before a surrogate, taken in the supreme court, as prescribed in section 2480 of this chapter, the seal of the court in which it is taken, must be used, where a seal is necessary. The special proceeding must be entitled in that court; and the papers therein must be filed or recorded, as the case may be, and issues therein must be tried, as in an action brought in that court. The clerk of that court must sign each record, which is required to be signed by the surrogate or the clerk of the surrogate's court. The issuing of a citation may be directed, and any order intermediate the citation and the decree may be made by a judge of the court.

Former § 2490 of this Code. From 2 R. S. 79, § 52; L. 1895, c. 946.

§ 2508. Id.; transfer of proceedings to surrogate's court.

The court may, at any time, in its discretion, upon being satisfied that the reason for the exercise of its powers and jurisdiction has ceased to operate, make an order to transfer to the surrogate's court any matter then pending before it. Such an order operates to transfer the same accordingly. Immediately after such a transfer, or after the revocation of the order of the justice of the supreme court as prescribed in section 2483, the surrogate must cause entries to be made in the proper book in his office referring to all the papers filed, and orders entered, or other proceedings taken in the supreme court; and he may cause copies of any of the orders or papers to be made, and recorded or filed in his office, at the expense of the county.

Former § 2491 of this Code. See L. 1895, c. 946.

§ 2509. Proceedings, etc., of acting surrogates, where and how recorded.

Where an act is done, or a proceeding is taken by, before, or by authority of, an officer, or a person appointed by the board of supervisors, or by the board of aldermen, temporarily acting as surrogate of any county as prescribed in this chapter, the same must be recorded, or the proper minutes thereof must be entered, in the books of the surrogate's court, in like manner as if the same were done or taken by, before, or by authority of the surrogate of the county; and the officer or person so acting, or the clerk of the surrogate's court, must sign the certificate of probate and any letters so issued, and must certify the record thereof in the book.

Former § 2494 of this Code. From 2 R. S. 80, § 53.

§ 2510. General jurisdiction of surrogate's court.

Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

To administer justice in all matters relating to the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any proceeding, or between any party and any other person having any claim or interest therein who voluntarily appears in such proceeding, or is brought in by supplemental citation, as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

And in the cases and in the manner prescribed by statute;

1. To take the proof of wills; to admit wills to probate; and to take and revoke probate of heirship.

2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee.

4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate or fund.

5. To direct the disposition of real property, and interests in real property of decedents, and the disposition of the proceeds thereof.

6. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; to direct and control their conduct, and settle their accounts.

7. To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

8. To determine the validity, construction or effect of any disposition of property contained in any will proved in his court, whenever a special proceeding is brought for that purpose, or whenever it is necessary to make such determination as to any will in a proceeding pending before him, or whenever any party to a proceeding for the probate of any will, who is interested thereunder, demands such determination in such proceeding.

Former §§ 2472, 2472a of this Code, modified. From 2 R. S. 220 (Part 3, c. 2, tit. 1), § 1; L. 1871, c. 482; L. 1874, c. 267; L. 1903, c. 407; L. 1910, c. 576.

§ 2511. Jurisdiction of persons; when and how obtained.

The surrogate's court, in any proceeding before it, shall have jurisdiction of the following described persons:

1. The petitioner.

2. Parties who have been duly cited, including all those described as being persons belonging to a class, or connected with the decedent, or as interested in the property or matter in question, whether designated by their full and correct names or not.

3. Persons of full age who have not been judicially declared to be incompetent to manage their affairs.

a. Who shall, either before or after the filing of the petition, waive

the issue or service, or both, of the citation by an instrument in writing signed, acknowledged, or proved and duly certified.

b. Who, whether named in the petition or citation or not, shall appear personally in court and file written signed notice of appearance acknowledged, or proved, and duly certified.

c. Who, whether named in the petition or citation or not, shall appear by attorney whose authority in writing to appear, so signed, acknowledged, or proved, and duly certified, shall be filed.

From former § 2528 of this Code (in part) and provisions found in various other sections in relation to obtaining jurisdiction of the person.

§ 2512. Jurisdiction of subject-matter; objection to defect in record.

The surrogate's court obtains jurisdiction in every case to make a decree or other determination by the existence of the jurisdictional facts prescribed by statute. When the decree or other determination fails to recite the existence or proof of a jurisdictional fact, and such fact actually existed; or when any party has failed to take any intermediate proceeding required by law to be taken, an objection to such decree or determination based thereon is available only upon appeal; and the surrogate's court may, in its discretion, allow such a defect to be supplied by amendment.

Former § 2474 of this Code, modified. See L. 1869, c. 260, § 1; L. 1870, c. 359, § 1; L. 1872, c. 92.

§ 2513. Presumption of jurisdiction.

Where the jurisdiction of a surrogate's court to make a decree or other determination, is drawn in question collaterally, the jurisdiction is presumptively, and, in the absence of fraud or collusion, conclusively, established, by an allegation of the jurisdictional facts, contained in a written petition or answer, duly verified, used in the surrogate's court. The fact that jurisdiction of the parties was obtained is presumptively proved, by a recital to that effect in the decree.

Former § 2473 of this Code. See L. 1870, c. 359, § 1; L. 1910, c. 576.

§ 2514. Effect of exercise of jurisdiction.

Jurisdiction, once duly exercised over any matter by a surrogate's court, excludes the subsequent exercise of jurisdiction by another surrogate's court, over the same matter, and all its incidents, except as otherwise specially prescribed by law. Where a guardian has been duly appointed by, or letters testamentary or of administration have been duly issued from, or any other special proceeding has been duly commenced in, a surrogate's court having jurisdiction, all further proceedings to be taken in a surrogate's court, with respect to the same estate or matter, must be taken in the same court.

Former § 2475 of this Code. From 2 R. S. 223 (Part 3, c. 2, tit. 1), § 12; Id., 61 (Part 2, c. 6, tit. 1), § 28; Id., 117 (Part 2, c. 6, tit. 5), § 24.

§ 2515. Exclusive jurisdiction.

The surrogate's court of each county has jurisdiction, exclusive of every other surrogate's court, to take the proof of a will, and to grant letters testamentary thereupon, or to grant letters of administration, as the case requires, in either of the following cases:

1. Where the decedent was, at the time of his death, a resident of that county, whether his death happened there or elsewhere.

2. Where the decedent, not being a resident of the state, died within that county, leaving personal property within the state, or leaving personal property which has, since his death, come into the state, and remains unadministered.

3. Where the decedent, not being a resident of the state, died without the state, leaving personal property within that county, and no other; or leaving personal property which has since his death, come into that county, and no other, and remains unadministered.

4. Where the decedent was not, at the time of his death, a resident of the state, and a petition for probate of his will, or for a grant of letters of administration, under subdivision second or third of this section, has not been filed in any surrogate's court; but real property of the decedent, to which the will relates, or which is subject to disposition under title fourth of this chapter, is situated within that county, and no other.

Former § 2476 of this Code. From 2 R. S. 73 (Part 2, c. 6, tit. 2), § 23; L. 1837, c. 260, § 1.

§ 2516. Concurrent jurisdiction of two or more surrogates.

Where personal property of the decedent is within, or comes into, two or more counties, under the circumstances specified in subdivision third of the last section; or real property of the decedent is situated in two or more counties, under the circumstances specified in subdivision fourth of the last section; the surrogates' courts of those counties have concurrent jurisdiction, exclusive of every other surrogate's court, to take the proof of the will and grant letters testamentary thereupon, or to grant letters of administration, as the case requires. But where a petition for probate of a will, or for letters of administration, has been duly filed in either of the courts so possessing concurrent jurisdiction, the jurisdiction of that court excludes that of the other.

Former § 2477 of this Code. From 2 R. S. 73, § 24.

§ 2517. Jurisdiction, how affected by locality of debts.

For the purpose of conferring jurisdiction upon a surrogate's court, a debt owing to a decedent by a resident of the state is regarded as personal property situated within the county where the debtor, or either of two or more joint debtors, resides; and a debt owing to him by a domestic corporation is regarded as personal property situated within the county where the principal office of the corporation is situated. But the foregoing provision does not apply to a debt evidenced by a bond, promissory note, or other instrument for the payment of money only, in terms negotiable, or payable to the bearer or holder. Such a debt, whether the debtor is a resident or a non-resident of the state, or a foreign or a domestic government, state, county, public officer, association, or corporation, is, for the purpose of so conferring jurisdiction, regarded as personal property at the place where the bond, note or other instrument is, either within or without the state.

Former § 2478 of this Code.

TITLE II.

Special proceedings, pleadings, process and its service; appearance; trial by court or jury; taking and preserving testimony; orders and decrees, their effect and enforcement; letters, their requisites, effect, issue and revocation; bonds, their requisites, approval, prosecution and discharge; sureties, their rights and obligations.

Article 1. Special proceedings, how begun; pleadings and process; service of citation and other process, and proof thereof.
2. Appearance, appointment of special guardian; consolidation of proceedings. Reference, trial, decision, exceptions and testimony. Orders and decrees, effect and enforcement; docketing, discharging and staying.
3. Letters, their requisites, priority and authority; how, when and to whom granted; revocation. Removal of trustee.
4. Bonds and undertakings; approval, recording, prosecution and discharge; sureties, their release, rights and obligations.

ARTICLE FIRST.

Special proceedings, how begun; pleadings and process; service of citation and other process, and proof thereof.

Sec. 2518. Proceeding commenced by petition; statute of limitations.
2519. Written pleadings required.
2520. Verification thereof.
2521. General contents of petition.
2522. Process; how executed and returnable.
2523. General contents of citation.
2524. General contents of citation; persons constituting a class; persons unknown or whose names or parts of names are unknown.
2525. Citation; how served within state.
2526. Service personally without the state, or by publication; when ordered.
2527. Application for order permitting service by publication; or personally without the state.
2528. Order, when and how made; contents thereof.
2529. When service of citation shall be made; manner of service without the state or by publication.
2530. Id.; upon infant, etc.; additional requirement in certain cases.
2531. Proof of service of citation, subpœna, etc.
2532. Publication of citation, etc

§ 2518. Proceeding commenced by petition; statute of limitations.

Every proceeding in surrogate's court shall be commenced by the filing of a petition. In any case where the time in which to begin such proceeding is limited, a citation, or an order to show cause, on such petition must, within sixty days thereafter, be issued and be served, as prescribed in this chapter upon the adverse party, or upon one of two or more adverse parties, who are jointly liable, or otherwise united in interest; or, within the same time, the first publication thereof must be made pursuant to an order made as prescribed in this chapter.

From former §§ 2516, 2517 of this Code.

§ 2519. Written pleadings required.

All petitions, answers, and objections shall contain a plain and concise statement of the facts constituting the claim, objection or defence, and a demand for the decree, order, or other relief, to which the party supposes himself to be entitled, and shall be duly verified. The surrogate may require that a copy thereof be served upon any person interested in such manner as he may direct. A party who

fails to comply with such requirement may be treated as a party in default.

Former § 2533 of this Code, modified.

§ 2520. Verification thereof.

The provisions of sections 523, 524, 525 and 526 of this act apply to a verification made pursuant to this chapter, and to the petition or other paper so verified, where they can be so applied in substance, without regard to the form of the proceeding.

Former § 2534 of this Code.

§ 2521. General contents of petition.

A petition must substantially set forth:

1. The title of the proceeding, the name and residence of the person to whose estate or fund the proceeding relates, and the name and residence of the petitioner.

2. The facts upon which the jurisdiction of the court depends to entertain the application and grant the relief asked for.

3. So far as they can be ascertained with due diligence, the names and post-office addresses of all the persons interested in the proceeding who are required to be cited upon the application, or concerning whom the court is required to have information; and if the name or post-office address of any of such persons is unknown, the facts which show what effort has been made to ascertain the same.

4. That there are no other persons than those mentioned interested in the application or proceeding.

5. A request for the relief or action of the court to which the petitioner deems himself entitled.

Before any process shall be issued on a petition the petitioner may be required to show by his petition or otherwise the following matters:

If any person named be an infant there shall be set forth:

a. His age, and whether or not he has a general or testamentary guardian.

b. Whether or not his father, or if he be dead, his mother is living, giving the name and post-office address of such person.

c. The person with whom such infant resides and his post-office address.

If any person named be an adjudged, or an alleged, incompetent there shall be set forth:

a. The name and post-office address of the committee, if any, and the name and post-office address of the person or institution having the care or custody of such incompetent.

b. The facts regarding his incompetency, and the name and post-office address of a relative or friend having an interest in his welfare.

If any of such persons be included in a class, and his name be unknown there shall be set forth:

The names and post-office addresses of those persons of the class who are known, and a general description of all other persons belonging to such class, showing their connection with the decedent or fund and their interest in the property or matter in question.

If any of such persons be unknown or his name be unknown there shall be set forth:

A general description of such person showing his connection with

the decedent or fund, and his interest in the property or matter in question.

New. See former §§ 2513, 2662 of this Code.

§ 2522. Process; how executed and returnable.

The process of the surrogate's court shall be a citation to show cause, an order to show cause, and such other process and mandate as the surrogate is or shall be authorized by law to issue and employ in the performance of the duties imposed on him and in the enforcing of his orders and decrees.

A citation or other mandate of a surrogate's court must, except where it is otherwise specially prescribed by law, be made returnable before the surrogate's court from which it was issued, and may be served or executed in any county. A warrant of attachment must be directed to the sheriff of the surrogate's county, who may execute it in any county, and must convey the person arrested to the place where it is returnable.

Former § 2515 of this Code, in part. From L. 1837, c. 460, §§ 66, 67.

§ 2523. General contents of citation.

A citation must substantially set forth:

1. The name and residence of the petitioner, and of the person to whose estate or fund the proceeding relates.

2. The names of all the persons to be cited who have not waived its issue and service, or have not appeared, so far as the same can be ascertained.

3. The time and place when the citation is returnable, which time must not be more than four months after the date thereof.

4. The object of the proceeding in regard to which the persons cited are required to show cause.

5. The date when the citation issues.

6. It must be attested in the name of the surrogate, and by the seal of his court.

New. See former § 2519 of this Code.

§ 2524. General contents of citation; persons constituting a class; persons unknown or whose names or parts of names are unknown.

In addition to the requirements of the last section, a citation must substantially set forth:

1. Where the names of some persons to be cited comprising a class are unknown, the names of those persons of the class who are known, and a general description of all other persons belonging to such class, showing their connection with the decedent and their interest in the property or matter in question.

2. Where the persons to be cited are unknown, a general description of such persons showing their connection with the decedent and their interest in the property or matter in question.

In either of said cases where the petitioner is ignorant of the name of a person to be cited, he may designate that person in the citation by a fictitious name or by so much of his name as is known, adding a description identifying the person intended.

3. In every case where it appears that there is no heir-at-law or next of kin, as the case may be; or that it is not known whether or not there be such; or when all of the parties interested are non-

resident aliens, the citation shall be issued to the attorney-general of the state.

Former §§ 2518, 2616 of this Code, in part. From 2 R. S. 74 (Part 2, c. 6, tit. 2), § 26; L. 1908, c. 272.

§ 2525. Citation; how served within state.

Personal service of a citation within the state shall be made as follows:

Upon an adult person, or upon an infant of the age of fourteen years or upwards, by delivering a copy thereof to the person to be served.

Upon an infant under the age of fourteen years, by delivering a copy thereof to the infant in person, and to his father, mother or guardian; or if there be none within the state, or if the infant does not reside with a parent, to the person having the care and control of him, or with whom he resides, or in whose service he is employed.

Upon a person judicially declared to be incompetent to manage his affairs by reason of lunacy, idiocy, or habitual drunkenness, or upon a corporation by delivering a copy thereof in the manner prescribed for personal service of a summons upon such a person, or upon a corporation in article first of title first of chapter fifth of this act. Upon a public officer by delivering a copy thereof to such officer, or to one of his duly constituted deputies.

Where it appears, by affidavit, to the satisfaction of the surrogate from whose court a citation is issued, that proper and diligent effort has been made to serve it as hereinbefore prescribed in this section upon a resident of the state whose place of residence or place of business is known, and that the person to be served cannot be found at his residence or place of business, and cannot be elsewhere served within the state within a reasonable time, or, if found, that he evades service, so that it cannot be made; the surrogate may make an order directing that service thereof be made, as prescribed in section 436 of this act; and the provisions of that section and of section 437 of this act, relating to the service of a summons, apply to the service of a citation, pursuant to an order made as prescribed in this section.

Where it is necessary in any special proceeding to cite known creditors, and it appears that the number of creditors or persons claiming to be creditors, residing within the state of New York, upon whom citation is required to be served, exceeds fifty, service thereof may be made upon them by publication thereof in such newspaper or newspapers and for such a length of time as shall be fixed by the surrogate, and by the mailing of a copy of such citation to each of them by deposit of a copy thereof in the post-office, properly enclosed in a postpaid sealed wrapper addressed to each of them at his last known post-office address as stated in the order, at least twenty days prior to the return day thereof.

From §§ 2520, 2521, 2526 of this Code.

§ 2526. Service personally without the state, or by publication; when ordered.

The surrogate from whose court a citation is issued may make an order directing the service thereof personally without the state, or by publication, in either of the following cases:

1. Where it is to be served upon a foreign corporation, or upon a person who is not a resident of the state.

2. Where the person to be served is a resident of the state, and substituted service upon him cannot be authorized as provided in section 2525 of this chapter.

3. Where it is to be served upon a party, or a person required to be made a party, whose name, or residence, cannot be ascertained.

4. Where it is to be served upon one or more unknown creditors, next of kin, heirs, legatees or other persons, either individually or included in a class, to whom a citation has been directed, designating them by a general description, as prescribed in this chapter.

From §§ 2522, 2523, of this Code.

§ 2527. Application for order permitting service by publication or personally without the state.

Application for an order permitting service of a citation by publication or personally without the state of New York must be made upon the petition, or upon an affidavit, which must set forth to the satisfaction of the surrogate the facts which show that the case is one of those specified in section 2526 of this chapter and that the petitioner has used due diligence to ascertain the names and post-office addresses of the parties whose names or post-office addresses are unknown.

From former § 2524 of this Code.

§ 2528. Order, when and how made; contents thereof.

When an order, directing the service of a citation personally without the state, or by publication, is made, if the order authorizes service by publication, it must direct that the citation be served upon the persons named or described in the order, by publication of the citation in two newspapers, therein designated, unless from the petition or affidavit filed it appears that the estate or fund amounts to less than five thousand dollars, in which case only one newspaper shall be designated, for such specified time as the surrogate deems reasonable, not less than once in each of four successive weeks, and by mailing a copy of such citation as provided in section 2529 of this chapter; except that the order may dispense with such mailing to persons whose names or addresses are alleged in the petition or affidavit to be unknown.

If the order authorizes personal service without the state of New York, it must direct that service be made upon the parties named therein in the manner prescribed in section 2529 of this chapter.

The order may authorize both modes of service at the option of the petitioner, or may direct that service be made by either mode without embodying the other. The granting of an order for service by publication, or personally without the state, shall not prevent the personal service of such citation within the state.

Former § 2524 of this Code, in part; See L. 1881, c. 664; L. 1899, c. 606.

§ 2529. When service of citation shall be made; manner of service without the state or by publication.

Any person over eighteen years of age, although a party to the special proceeding, may serve a citation.

Service of a citation upon a resident of the state, or upon a non-resident within the state, must be made, if within the county of the surrogate, or in an adjoining county, at least eight days before

the return day thereof; and if in any other county of the state, at least ten days before the return day thereof.

Service of a citation personally without the state of New York, pursuant to an order therefor, must be made in the same manner as is required by this chapter for the personal service of a citation within the state, by delivering a copy of such citation, if within the United States at least twenty days, and if without the United States at least thirty days before the return day thereof.

Service of citation by publication must be made by publication of the citation as prescribed in such order, and by the deposit, on or before the day of the first publication, in a specified postoffice, of a copy of the citation, contained in a securely closed postpaid wrapper, directed to the person to be served, at a place specified in the order; and if the person to be served is an infant under the age of fourteen years, a further copy, likewise contained in a securely closed postpaid wrapper directed to the father, or the mother, or the guardian, and the person with whom such infant is sojourning; unless by the terms of the order mailing is dispensed with.

From §§ 2520, 2524, 2526 of this Code, combined and modified. See L. 1837, c. 460, § 8; L. 1840, c. 384, § 1; L. 1863, c. 382; L. 1864, c. 71, § 3; L. 1881, c. 664; L. 1882, c. 399; L. 1899, c. 606; L. 1913, c. 535.

§ 2530. Id.; upon infant, etc.; additional requirement in certain cases.

Where a person cited, or to be cited, is an infant, or where the surrogate has, in his opinion, reasonable grounds to believe, that a person cited, or to be cited, is an habitual drunkard, or for any cause mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the surrogate may, in his discretion, with or without an application therefor, and in the interest of that person, make an order requiring that a copy of the citation be delivered, in behalf of that person, to a person designated in the order and that service of the citation shall not be deemed complete until such delivery.

Former § 2527 of this Code, modified. See L. 1872, c. 693.

§ 2531. [Am'd, 1916.] Proof of service of a subpœna, citation or other process.

Proof of service of a subpœna, citation or other process issued from a surrogate's court, must be made by the certificate of the sheriff, when served by him, and in any other case by the affidavit of the person so serving it; or, where the person served is of full age and not incompetent, by a written admission signed by him, accompanied with proof, by acknowledgment, affidavit or otherwise, of the genuineness of his signature. Proof of publication and deposit in a post-office may be made as prescribed in section 444 of this act.

From former §§ 2525, 2532 of this Code. From 2 R. S. 223 (Part 3, c. 2, tit. 1), § 9; L. 1837, c. 460, § 9. Am'd by L. 1916, c. 445 (in effect May 9, 1916).

§ 2532. Publication of citation, et cetera.

Where a provision of this chapter, or an order made pursuant to such a provision, directs the publication of a citation, notice, or other paper, or the service thereof by publication, the publication must be made in a newspaper published in the county. The sur-

rogate may, also, in his discretion, direct the publication thereof in any other newspaper published in the same or another county, as he deems proper, for the purpose of giving notice to the persons intended to be served or notified. If no newspaper is published in the county, the citation, notice or other paper, must be published in the newspaper printed at Albany, in which legal notices are required by law to be published.

Former § 2535 of this Code. From 2 R. S. 107 (Part 2, c. 6, tit. 4), § 40; L. 1874, c. 437.

ARTICLE SECOND.

Appearance; appointment of special guardian; consolidation of proceedings. Reference, trial, decision, exceptions and testimony. Orders and decrees, effect and enforcement; docketing, discharging and staying.

Sec. 2533. Appearance; how made and effect thereof.
2534. Special guardian; when to be appointed.
2535. Consolidation of proceedings.
2536. Surrogate may refer questions of fact.
2537. Right to trial by jury preserved, how waived.
2538. Trial by jury.
2539. Trial by jury; powers of surrogate; motion to set aside verdict and for new trial.
2540. Jury in surrogate's court; how obtained; fees of jurors and officers.
2541. Decision by surrogate after trial without a jury.
2542. Exceptions upon a trial.
2543. Testimony of witness; how taken.
2544. Id.; by the surrogate of another county.
2545. Bequest, etc., does not disqualify, etc., witness.
2546. Uncontroverted allegations constitute due proof.
2547. Filing testimony taken out of court by commission.
2548. Definition of decree and order; how order enforced.
2549. Decree or order; when evidence of assets.
2550. Force and effect of a decree of surrogate's court.
2551. Decree for money; how docketed; effect; assignment and discharge.
2552. Decree; partial satisfaction of.
2553. Enforcement of decree by execution.
2554. Id.; by punishment for contempt.
2555. Effect and contents of decree revoking letters.
2556. The last section qualified.
2557. When execution of decree or order is stayed by appeal.

§ 2533. Appearance; how made and effect thereof.

In a surrogate's court, a party of full age may, unless he has been judicially declared to be incompetent to manage his affairs, appear and prosecute or defend a special proceeding in person, or by attorney regularly admitted to practice in the courts of record, at his election, except in a proceeding to punish him for contempt, or where he is required to appear in person, by special provision of law, or by a special order of the surrogate. An appearance must be evidenced by a notice of appearance signed by the party or by his attorney, and filed in the surrogate's court; and where no citation has been served on the person appearing, such notice must be signed by him and be acknowledged or proved, and duly certified.

Former § 2528 of this Code. See L. 1870, c. 359, § 2; L. 1896, c. 570; L. 1911, c. 330.

§ 2534. [Am'd. 1915.] Special guardian; when to be appointed.

Where a party, who is an infant, does not appear by his general guardian; or where a party, who is a lunatic, idiot, or habitual drunkard, does not appear by his committee; or where any party is an infant, or an habitual drunkard, or for any cause is mentally incapable adequately to protect his rights, although not judicially declared to be incompetent to manage his affairs, the surrogate must appoint a competent and responsible person, to appear as special guardian for that party. Where an infant appears by his general guardian, or where a lunatic, idiot, or habitual drunkard, appears by his committee, the surrogate must inquire into the facts, and

must, in like manner, appoint a special guardian, if there is any ground to suppose that the interest of the general guardian or committee is adverse to that of the infant, or incompetent person; or that for any other reason, the interests of the latter require the appointment of a special guardian. Where there are unknown persons, or persons whose whereabouts are unknown, the surrogate may, in his discretion, appoint a special guardian for such persons. A person cannot be appointed such a special guardian who is nominated by any party; but this prohibition shall not preclude an infant over fourteen years of age from nominating his own special guardian.

Before entering upon his duties such special guardian shall file his consent to so act.

Former § 2530 of this Code, modified, see 2 R. S. 100 (Part 2, c. 6, tit. 4), § 3; L. 1837, c. 460; L. 1863, c. 362, §§ 1, 6; L. 1870, c. 170, § 4; L. 1872, c. 693, § 2; Am'd by L. 1915, c. 315 (in effect September 1, 1915.)

§ 2535. Consolidation of proceedings.

At any time when two or more proceedings are pending involving in whole, or in part, the same matters, the surrogate may, in his discretion, consolidate such proceedings upon such terms as shall appear to him to be equitable and just; but without prejudice to the power of the surrogate to make any subsequent order or decree in either or any of them.

(67)

New. See former §§ 2606, 2727 of this Code.

§ 2536. Surrogate may refer questions of fact.

In a special proceeding other than one instituted for probate of a will, and subject to the right of trial by jury of any question of fact, the surrogate may, in his discretion, appoint a referee to take and report to the surrogate the evidence upon the facts, or upon a specific question of fact; to examine an account rendered; to hear and determine all questions, arising upon the settlement of such an account, which the surrogate has power to determine; and to make a report thereon, subject, however, to confirmation or modification by the surrogate. But no referee to examine an account rendered, whether intermediate or final, or to hear and determine all questions arising upon the settlement of such an account, shall be appointed, where the estate or fund does not exceed one thousand dollars in value, or in any case where the item or items in such account to which objections have been made do not aggregate more than two hundred dollars. Such a referee has the same power, and is entitled to the same compensation as a referee appointed by the supreme court for the trial of an issue of fact in an action; and the provisions of this act, applicable to a reference by the supreme court, apply to a reference made as prescribed in this section, so far as they can be applied in substance without regard to the form of proceeding. The surrogate of the county of New York, may on the written consent of all parties appearing in a probate case, appoint a referee, or may, in his discretion, direct an assistant to take and report the testimony, but without authority to pass upon the issues involved therein. Unless a referee's report is passed upon and confirmed, approved, modified or rejected by a surrogate within ninety days after it has been submitted to him, it shall be deemed to have been confirmed as of course and a decree to that effect may be entered by any party interested in the proceeding upon two days' notice.

Former § 2546 of this Code. From L. 1870, c. 359, § 6; L. 1881, c. 535; L. 1887,

§ 2537. Right to trial by jury preserved, how waived.

Whenever in any proceeding in the surrogate's court, the order or decree of the court will determine any issue or fact as to which any party has a right of trial by jury in any court, such trial shall be deemed to be waived, unless such party, personally, or through his attorney, guardian, committee, or special guardian appears and seasonably demands the same, in which case such trial shall be had according to the practice of such court. And whenever such trial is demanded, the same may be waived in any of the modes prescribed with respect to the trial of an action in section 1009 of this act.

New.

§ 2538. [Am'd, 1915.] Trial by jury.

In any proceeding in which any controverted question of fact arises, of which any party has constitutional right of trial by jury, and in any proceeding for the probate of a will in which any controverted question of fact arises, the surrogate must make an order directing the trial by jury of such controverted question of fact, if any party appearing in such proceeding seasonably demands the same, and in any proceeding in which any controverted question of fact arises, of which any party has, or has not, constitutional right of trial by jury, the surrogate may, in his discretion, make such order without such demand. The surrogate in such order must direct that such trial be had either before himself and a jury, or at a trial term of the supreme court to be held within the county, or in the county court of the county. Either of the surrogates of the county of New York may, in his discretion, make an order transferring to the supreme court any special proceeding for the probate of a will pending in said county. If the trial shall not take place in the surrogate's court the order must state distinctly and plainly each question of fact to be tried, and shall be the only authority necessary for the trial of such question. The verdict, if not set aside by the judge before whom the question is tried, shall be certified to the surrogate's court by the clerk of the court in which the trial took place, and shall be conclusive except upon appeal.

Former § 2547 of this Code modified. From 2 R. S. 102 (Part 2, c. 6, tit. 4), § 11; L. 1847, c. 280, § 45; L. 1886, c. 119; L. 1895, c. 946; L. 1910, c. 576. Am'd by L. 1915, c. 275 (in effect April 13, 1915).

§ 2539. Trial by jury; power of surrogate; motion to set aside verdict and for new trial.

The surrogate has jurisdiction to conduct a trial by jury in any case in which he is permitted or required by this act to order such trial, and in any case where he shall conduct such trial the same shall be had before the surrogate and a jury, and the trial shall proceed in the same manner as if such trial were had in the supreme court at a trial term thereof held in and for the county of such surrogate.

The provisions of this act relating to trial by the court and a jury, or to a motion for new trial, shall apply to surrogates' courts and to the proceedings therein so far as they can be applied to the substance and subject-matter of such proceedings without regard to form, but the surrogate shall have no power to set aside a verdict or to grant a motion for a new trial in any proceeding in which the trial took place in a court other than the surrogate's court.

New.

§ 2540. Jury in surrogate's court; how obtained; fees of jurors and officers.

The surrogate may at any time order the drawing of a jury for service in surrogate's court, upon reasonable notice to the parties

who have appeared, stating the day, hour and place of such drawing.

For the purpose of procuring the drawing and attendance of a jury, the surrogate shall have all the powers of a justice of the supreme court specified in sections 527 and 528 of the Judiciary Law and in sections 1171 and 1172 of the Code of Civil Procedure; and the clerk of the county of the surrogate shall, upon receiving the order of the surrogate, perform such duties in relation thereto as he is required to perform under a like order of a justice of the supreme court as specified in such sections.

Such jury shall be drawn in the presence of the surrogate, either in his office or in the office of the county clerk, and the minutes thereof shall be made in triplicate, and be signed by the surrogate and the county clerk, and one copy thereof filed in the office of the surrogate, one copy filed in the office of the county clerk, and one copy delivered to the sheriff of the county.

The names of the jurors so drawn shall be returned to the jury box by the county clerk, but if any such juror is again drawn for service in any court, the fact that he served as a juror in surrogate's court shall, upon his request, be a sufficient excuse for not being required to again serve.

In counties where by special act an officer other than the county clerk is designated to draw juries and perform corresponding acts, such officer shall cause the necessary jurors to be summoned and drawn as though a justice of the supreme court had made such order.

The provisions of law applicable to the summoning of jurors, the return of the sheriff, the fees of the sheriff and jurors and their payment, in supreme court, shall apply where jurors are drawn and summoned for service in surrogate's court; and where the county clerk is not a salaried officer, he shall be entitled for his services to such compensation as shall be audited by the board or body entitled to fix his compensation.

The number of days' service of each juror in surrogate's court shall be certified to the county clerk by the clerk of the surrogate's court.

New.

§ 2541. Decision by surrogate after trial without a jury.

Upon a trial before the surrogate without a jury, the surrogate must file in his office his decision in writing which shall direct the decree to be entered, which, except for such direction, need not contain either the facts found or the conclusions of law. No party shall have the right, after the close of the trial, to request a finding upon any question of fact or a ruling upon a question of law. For the purposes of appeal or other form of review, the decree made by the surrogate upon the trial by him of an issue of fact shall have the same effect as the general verdict of a jury would have if the same issues were triable before a court and a jury and were so tried and a general verdict rendered thereon.

Former § 2545 of this Code, in part, modified.

§ 2542. Exceptions upon a trial.

An exception may be taken to a ruling by a surrogate upon the trial by him of an issue of fact, in a case where such an exception may be taken to a ruling of the court upon a trial, without a jury,

of an issue of fact, as prescribed in article third of title first of chapter tenth of this act. The provisions of that article, relating to the manner and effect of taking such an exception, and the settlement of a case containing the exceptions, apply to such a trial before a surrogate; for which purpose, the decree is regarded as a judgment, and notice of an exception may be filed in the surrogate's office.

Former § 2545 of this Code, in part, modified.

§ 2543. Testimony of witness; how taken.

Where it appears to the satisfaction of the surrogate, that the testimony of a witness is material and necessary, the surrogate may, in his discretion, proceed to the place where the witness is, and there, as in open court, take his examination. Such notice of the time and place of taking the examination, as the surrogate prescribes, must be given, by the party applying therefor.

Former § 2539 of this Code, modified. From L. 1837, c. 460, § 12; L. 1841, c. 129, §§ 1, 2, 3.

§ 2544. [Am'd, 1916.] Id.; by the surrogate of another county.

Where the surrogate has good reason to believe that a subscribing or a material witness who is in another county of the state cannot conveniently attend before him, and no issue is pending therein, he may make an order, directing that the witness be examined before the surrogate of the county in which he is; specifying by an order the nature and manner of the examination. A copy of the order must be transmitted by him to the surrogate designated in the order, together with the original will, where the testimony relates to the execution of a written will. The examination may be taken by one of the clerks described in section 2502 of this chapter. The examination, after it is reduced to writing and subscribed by the witness or otherwise duly authenticated, together with a statement of the proceedings upon the execution of the order, must be certified by the surrogate or clerk taking the examination, attested by the seal of his court, and returned without delay, with the original will, if any, to the surrogate who directed the examination, who must file the same in his office. A surrogate may appoint a referee to take the testimony, who shall report the same to the surrogate who makes the appointment. An examination so taken has the same effect as if it was taken by commission.

Former § 2540 of this Code, modified. From L. 1837, c. 460, §§ 13, 14, 15; L. 1881, c. 535; L. 1911, c. 105. Am'd by L. 1916, c. 446 (in effect May 9, 1916).

§ 2545. Bequest, etc., does not disqualify, etc., witness.

A person is not disqualified or excused from testifying respecting the execution of a will, by a provision therein, whether it is beneficial to him or otherwise.

Former § 2544 of this Code. See 2 R. S. 57, 65 (Part 2, c. 6, tit. 1), §§ 6, 50.

§ 2546. Uncontroverted allegations constitute due proof.

Except as otherwise provided by law, a petition, affidavit or account filed in a special proceeding shall be due proof of the facts therein stated, unless controverted by answer, objection or other proof.

New.

§ 2547. Filing testimony taken out of court by commission.

Where in any matter before the surrogate or in a surrogate's court the testimony of any witness shall be taken by or on commission, the same, together with the commission on which it is taken, shall be duly filed in the office of the surrogate but need not be recorded.

From former § 2620 of this Code, in part.

§ 2548. Definition of decree and order; how order enforced.

The determination of the rights of the parties to a special proceeding in a surrogate's court, is a decree.

A direction of a surrogate's court, made or entered in writing, and not included in a decree, is an order. It may be enforced in like manner as a similar order, made by the supreme court in an action.

Former §§ 2550, 2556 of this Code, consolidated.

§ 2549. Decree or order; when evidence of assets.

A decree directing payment by an executor, administrator, guardian or testamentary trustee, to a creditor of, or a person interested in, the estate or fund, or an order permitting a judgment creditor to issue an execution against an executor or administrator, is, except upon an appeal therefrom, conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay, or for which the order permits the execution to issue. A decree charging a deceased executor, administrator, guardian or trustee with assets upon an accounting under section 2725 of this chapter, is not evidence of assets in the hands of such accounting executor, administrator, guardian or trustee.

From former §§ 2552, 2606 of this Code. See 2 R. S. 116 (Part 2, c. 6, tit. 5, § 21).

§ 2550. Force and effect of a decree of surrogate's court.

Every decree of a surrogate's court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained.

New.

§ 2551. Decree for money; how docketed; effect; assignment and discharge.

Where a decree directs the payment of a sum of money into court, or to one or more persons therein designated, the surrogate, or the clerk of the surrogate's court, must furnish to any person applying therefor one or more transcripts, duly attested, stating all the particulars with respect to the decree which are required by law to be entered in the clerk's docket-book, where a judgment for a sum of money is rendered in the supreme court, so far as the provisions of law directing such entries are applicable to such a decree. Each county clerk to whom such a transcript is presented must, upon payment of his fees, immediately file it, and docket the decree in the appropriate docket-book kept in his office as prescribed by law for docketing a judgment of the supreme court. The docketing of such a decree has the same force and effect, the lien thereof may be suspended or discharged, and the decree may be assigned or satisfied, as if it were such a judgment.

Former § 2553 of this Code. From L. 1837, c. 460, §§ 53, 64; L. 1844, c. 104, § 2; L. 1867, c. 782, § 9.

§ 2552. Decree; partial satisfaction of.

Upon the application of any person interested, there may be recorded in the surrogate's office any instrument acknowledging payment of moneys pursuant to the provisions of decrees for the judicial settlement of accounts of executors, administrators, testamentary trustees and guardians. Every such instrument to be recorded shall be acknowledged, or proved and duly certified, and the record thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument and its due execution, and shall be presumptively a satisfaction and discharge of such decree as to any payment of money or delivery of property therein acknowledged.

From former § 2502 of this Code, in part.

§ 2553. Enforcement of decree by execution.

A decree directing the payment of a sum of money into court, or to one or more parties, may be enforced by an execution against the property of the party directed to make the payment. The execution must be issued by the surrogate, or the clerk of the surrogate's court, under the seal of the court, and must be made returnable to the court. In all other respects the provisions of this act relating to an execution against the property of a judgment-debtor issued upon a judgment of the supreme court, and the proceedings to collect it, apply to an execution issued from the surrogate's court, and the collection thereof, the decree being, for that purpose, regarded as a judgment; except that the proceedings prescribed in title twelfth of chapter seventeenth of this act, if founded upon such a decree, must be taken as if the decree was a judgment of the county court, or, in the city of New York, of the supreme court.

Former § 2554 of this Code. From L. 1837, c. 460, § 64; L. 1895, c. 946.

§ 2554. Id.; by punishment for contempt.

In either of the following cases, a decree of a surrogate's court directing the payment of money, or requiring the performance of any other act, may be enforced by serving a certified copy thereof upon the party against whom it is rendered, or the officer or person who is required thereby, or by law, to obey it; and if he refuses or wilfully neglects to obey it, by punishing him for a contempt of court:

1. Where it cannot be enforced by execution, as prescribed in the last section.

2. Where part of it cannot be so enforced by execution; in which case, the part or parts which cannot be so enforced may be enforced as prescribed in this section.

3. Where an execution issued as prescribed in the last section to the sheriff of the surrogate's county has been returned by him wholly or partly unsatisfied.

4. Where the delinquent is an executor, administrator, guardian, or testamentary trustee, and the decree relates to the fund or estate, in which case the surrogate may enforce the decree as prescribed in this section, either without issuing an execution, or after the return of an execution, as he thinks proper.

If the delinquent has given an official bond, his imprisonment, by virtue of proceedings to punish him for a contempt, as prescribed in this section, or a levy upon his property by virtue of an execution,

issued as prescribed in the last section, does not bar, suspend, or otherwise affect an action against the sureties on his official bond.

Former § 2555 of this Code.

§ 2555. Effect and contents of decree revoking letters.

Upon the entry of a decree, made as prescribed in this chapter, revoking letters issued by a surrogate's court to an executor, administrator or guardian, his powers cease. The decree may, in the discretion of the surrogate, require him to account for all money and other property received by him; and to pay and deliver over all money and other property in his hands into the surrogate's court, or to his successor in office, or to such other person as is authorized by law to receive the same; or it may be made without prejudice to an action or special proceeding for that purpose, then pending, or thereafter to be brought. The revocation does not affect the validity of any act, within the powers conferred by law upon the executor, administrator, or guardian, done by him before the service of the citation, where the other party acted in good faith; or done after the service of the citation, and before entry of the decree, where his powers with respect thereto were not suspended by service of the citation, or where the surrogate, in a case prescribed by law, permitted him to do the same, notwithstanding the pendency of the special proceeding against him; and he is not liable for such an act done by him in good faith.

Former § 2603 of this Code. From 2 R. S. 62, (Part 2, c. 6, tit. 1), § 38; Id., 77, 79, §§ 40, 46, 47.

§ 2556. The last section qualified.

The last section does not affect the liability of a person to whom money or other property has been paid or delivered, as husband, wife, next of kin, or legatee, to respond to the person lawfully entitled thereto, where letters are revoked, because a supposed decedent is living; or because a will is discovered, after administration has been granted in a case of supposed intestacy, or revoking a prior will upon which letters were granted.

Former § 2604 of this Code.

§ 2557. When execution of decree or order is stayed by appeal.

An appeal from a decree or an order directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court; or an attorney or counsel employed therein, for disobedience to a direction of the surrogate's court, or for neglect of duty; or directing the commitment of a person refusing to obey a subpoena, or to testify when required according to law; does not stay the execution of the decree or order appealed from unless the appellant gives the undertaking required by section 2761 of this chapter.

An appeal from a decree of a surrogate admitting a will to probate, or granting letters testamentary, or letters of administration, or from an order or judgment of the appellate division of the supreme court affirming a decree of the surrogate admitting a will to probate, or granting letters testamentary or letters of administration does not stay the issuing of letters where, in the opinion of the surrogate

manifested by an order, the preservation of the estate requires that the letters should issue.

An appeal from a decree revoking letters testamentary, letters of administration, or letters of guardianship; or from a decree or an order, suspending an executor, administrator, or guardian, or removing or suspending a testamentary trustee, or appointing a temporary administrator, or an appraiser of personal property does not stay the execution of the decree or order appealed from.

Except as otherwise expressly prescribed in this chapter a perfected appeal has the effect, as a stay of the proceedings to enforce the decree or order appealed from, prescribed in section 1310 of this act, with respect to a perfected appeal from a judgment.

Parts of former §§ 2579, 2582, 2583, 2584 of this Code, combined. See 2 R. S. 610, 611 (Part 3, c. 9, tit. 3), §§ 110–116.

ARTICLE THIRD.

Letters, their requisites, priority and authority; how, when and to whom granted; revocation; removal of trustee.

Sec. 2558. Requisites of letters.
2559. Limited and restrictive letters.
2560. Letters evidence of authority; effect of appeal.
2561. Priority among different letters.
2562. Time, how reckoned upon successive letters.
2563. When surviving or remaining representative may act; when successor must be appointed.
2564. Persons incompetent to receive letters, or act as testamentary trustee.
2565. Surrogate may refuse letters under certain conditions.
2566. Objections to grant of letters.
2567. Bond; when required.
2568. Official oaths of executors, etc.
2569. Removal, or revocation of letters for disqualification, misconduct, etc.
2570. Petition; citation thereupon; suspension.
2571. Hearing; decree; testamentary trusts not affected.
2572. Application by executor, etc., for permission to resign.
2573. Proceedings thereupon.
2574. In what cases letters may be revoked or trustee removed without a citation.

§ 2558. Requisites of letters.

Letters testamentary, letters of administration, and letters of guardianship must be in the name of the people of the state. Where they are granted by a surrogate, they must be attested in the name of the officer granting them, signed by him, or by the clerk of the surrogate's court, and sealed with the seal of the surrogate's court. Where they are issued out of another court, they must be attested in the name of the judge holding the court, signed by the clerk thereof, and sealed with its seal.

To all letters of guardianship of the property of an infant the surrogate must cause a copy of sections 2660 and 2661 of this chapter to be annexed or to be printed thereupon.

From former §§ 2590, 2843 of this Code. See 2 R. S. 80 (Part 2, c. 6, tit. 2), § 55; L. 1837, c. 460, §§ 57, 58.

§ 2559. Limited and restrictive letters.

Letters may be granted limiting and restricting the powers and rights of the holders thereof as follows:

To an executor or administrator where a right of action exists.

To a general guardian where his possession and control of certain property of his ward is limited as provided in section 2650 of this chapter.

New; compare former §§ 2664, 2830 of this Code.

§ 2560. Letters evidence of authority; effect of appeal.

Subject to the provisions of the next section, regulating the priority among different letters, letters testamentary, letters of administration, and letters of guardianship, granted by a court or officer having jurisdiction to grant them, are conclusive evidence of the authority of the persons to whom they are granted, until the decree granting them is reversed upon appeal, or the letters are revoked.

When letters testamentary or letters of administration have been issued in accordance with an order of the surrogate as authorized in section 2557 of this act, such letters so issued confer upon the person named therein all the powers and authority, and subject him to all

the duties and liabilities of an executor or administrator in an ordinary case, except that they do not confer power to sell real property by virtue of a provision in the will, or to pay or to satisfy a legacy, or distribute the unbequeathed property of the decedent, until after the final determination of the appeal; and in case letters shall have been issued before such appeal, the executor or administrator, on a like order of the surrogate, may exercise the powers and authority, subject to the duties, liabilities and exceptions above provided.

Former §§ 2591, 2682 of this Code, consolidated. From 2 R. S. 80 (Part 2, c. 6, tit. 2), § 56; L. 1871, c. 603; § 1; L. 1881, c. 535; L. 1900, c. 191.

§ 2561. Priority among different letters.

A person to whom letters are first issued from a surrogate's court having jurisdiction to issue them, has sole and exclusive authority, pursuant to the letters, until the letters are revoked; and he is entitled to demand and recover from any person, to whom letters are afterwards issued, by any other surrogate's court, the property in his hands belonging to the estate or fund. But the acts of a person, to whom letters were afterwards issued, done in good faith, before notice of the letters first issued, are valid; and an action or special proceeding commenced by him, may be continued by and in the name of the person or persons to whom the letters were first issued.

Former § 2592 of this Code, modified. From 2 R. S. 74, § 25.

§ 2562. Time, how reckoned upon successive letters.

Where it is prescribed by law, that an act must or may be done within a specified time after letters are issued, and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters, except in a case where it is otherwise specially prescribed by law; or where the first or any subsequent letters are revoked, as prescribed in section 2624 of this chapter, by reason of the want of power in the surrogate's court to issue the same, for any cause.

Former § 2593 of this Code.

§ 2563. When surviving or remaining representative may act; when successor must be appointed.

Where one of two or more executors or administrators dies, or where letters are revoked with respect to one of them, a successor to the person who dies, or whose letters are revoked, shall not be appointed, except where such an appointment is necessary, in order to comply with the express terms of a will; but the others may proceed and complete the administration of the estate pursuant to the letters, and may continue any action or special proceeding brought by or against all.

Where all the persons to whom letters have been issued die, or where the letters of all have been revoked by a decree of the surrogate's court, that court has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person or persons whose powers have ceased, as if the letters had not been issued. The successor may complete the execution of the trust committed to his predecessor; he may continue in his own name, a civil action, or special proceeding, pending in favor of

his predecessor; and he may enforce a judgment, order, or decree, in favor of the latter.

Former §§ 2692, 2695, combined and modified. From 2 R. S. 77, 78 (Part 2. c. 6, tit. 2), §§ 40, 44; Id. 153, § 17; L. 1837, c. 460, § 33; L. 1865, c. 733, § 1.

§ 2564. Persons incompetent to receive letters, or act as testamentary trustee.

No person is competent to serve as an executor, administrator, testamentary trustee or guardian, who is:

1. Under the age of twenty-one years;
2. An adjudged incompetent;
3. An alien not an inhabitant of this state;
4. A felon;
5. Incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of understanding.

Except as prescribed in section 2567, an executor, testamentary guardian or testamentary trustee, who is not by law required to give a bond, shall not qualify or serve as such where, after objection filed and proof taken, the surrogate finds that:

1. His circumstances are such that they do not afford adequate security to the creditors, or persons interested in the estate or fund for the due administration thereof.
2. He is not a resident of the state of New York.

Former §§ 2612, 2661 of this Code, in part. From 2 R. S. 69, (Part 2, c. 6, tit. 2). §§ 3, 4; Id., 75, § 32; L. 1867, c. 782, § 5; L. 1873, c. 79; L. 1893, c. 696.

§ 2565. Surrogate may refuse letters under certain conditions.

The surrogate may, in his discretion, refuse to grant letters to any person unable to read and write the English language; or to any person who does not file in the surrogate's office an instrument acknowledged or proved, and duly certified designating the clerk of the surrogate's court and his successor in office, on whom service of any process issuing from the surrogate's court may be made in like manner and with like effect as if it were served personally upon himself, whenever the person so receiving letters can not be found and served within the state of New York, after due diligence used.

From former § 2612 of this Code, in part.

§ 2566. Objections to grant of letters.

Any person interested in the estate or fund may, before letters testamentary, of administration or of guardianship are granted or a testamentary guardian or trustee is allowed to qualify and serve, file objections showing his interest in the estate or fund, and setting forth specifically one or more legal objections to granting the letters to one or more of the persons about to receive the same, or to allowing a testamentary guardian or trustee to qualify and serve. Where such objections are filed, the surrogate must stay the granting of letters or refuse to allow the testamentary guardian or trustee to qualify until the matter is disposed of.

From former §§ 2636, 2641, 2852 of this Code, in part.

§ 2567. Bond; when required.

In either of the following cases, a person named as executor in a will, or a testamentary guardian or trustee who is not required by the will to give a bond, may entitle himself to letters or to act there-

under by giving a bond as prescribed by law, although an objection against him has been established to the satisfaction of the surrogate:

1. That his circumstances are such, that they do not afford adequate security to the creditors, or persons interested in the estate or fund, for the due administration of the same.

2. That he is not a resident of the state; and he is a citizen of the United States.

Former § 2638 of this Code, modified. From 2 R. S. 70, § 6; L. 1873, c. 657.

§ 2568. Official oaths of executors, etc.

The official oath or affirmation of an executor, administrator, guardian, or testamentary trustee, to the effect that he will well, faithfully, and honestly discharge the duties of his office, describing it, must be filed in the surrogate's office, before letters are issued to him, or he is permitted to act. The oath may be taken before any officer who is authorised to administer oaths.

Former § 2594 of this Code, modified. From 2 R. S. 71, 77, §§ 13, 41; L. 1837, c. 460, § 59.

§ 2569. Removal, or revocation of letters for disqualification, misconduct, etc.

In either of the following cases, a creditor, or person interested in the estate of a decedent, or a ward or friend of a ward, or a person beneficially interested in the execution of a trust, or any surety on a bond of a person to whom letters have been granted or of a trustee may present to the surrogate's court having jurisdiction a petition, praying for a decree revoking those letters, or removing such trustee, and that the respondent may be cited to show cause why a decree should not be made accordingly:

1. Where the respondent was, when appointed or when letters were issued to him, or has since become incompetent, or disqualified by law to act as such, and the grounds of the objection did not exist, or the objection was not taken by the petitioner, or a person whom he represents, before the letters were granted or the appointment made.

2. Where, by reason of his having wasted or improperly applied the money or other assets in his hands, or invested money in securities unauthorized by law, or otherwise improvidently managed or injured the property committed to his charge; or by reason of other misconduct in the execution of his office, or dishonesty, drunkenness, improvidence, or want of understanding; he is unfit for the due execution of his office.

3. Where he has wilfully refused, or, without good cause, neglected, to obey any lawful direction of the surrogate contained in a decree or order, or any provision of law relating to the discharge of his duty.

4. Where the grant of his letters, or his appointment was obtained by a false suggestion of a material fact.

5. Where by the terms of a will, deed or order his office was to cease upon a contingency which has happened.

6. In the case of an executor, who has not been required to give a bond, where his circumstances are such that they do not afford adequate security to the creditors or persons interested for the due administration of the estate; or where he has removed or is about to remove from the state.

7. In case of a guardian where he has removed or is about to remove from the state, or where the interest of the infant will be promoted by the appointment of another person as guardian.

8. In the case of a temporary administrator, appointed upon the estate of an absentee, where it is shown that the absentee has returned; or that he is living, and capable of returning and resuming the management of his affairs; or that an executor, or administrator-in-chief has been appointed upon his estate; or that a committee of his property has been appointed by a competent court of the state.

Former §§ 2685, 2817, 2832, 2858 of this Code, combined. From 2 R. S. 72, § 18; Id., 152, § 14; L. 1837, c. 460.

§ 2570. Petition; citation thereupon; suspension.

A petition presented as prescribed in the last section, must set forth the facts showing that the case is one of those therein specified, and unless the surrogate declines to entertain the proceeding, a citation must be issued according to the prayer thereof.

If such citation be issued the surrogate may, in his discretion, make an order suspending the respondent wholly or partly, from the exercise of his powers and authority, during the pendency of the special proceeding. A certified copy of an order so made must accompany the citation, and be served therewith; but, from the time when it is made, the order is binding upon the respondent and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in sections 2555 and 2556 of this chapter, with respect to a decree revoking letters.

Former §§ 2686, 2833, 2834 of this Code, consolidated. See L. 1837, c. 460, § 61.

§ 2571. Hearing; decree; testamentary trusts not affected.

Upon the return of a citation, issued as prescribed in the last section, the surrogate may make a decree revoking the letters issued to, or removing, the respondent, or may, in his discretion, dismiss the proceedings upon such terms as justice requires.

Where an executor or an administrator is also a testamentary trustee, a decree revoking his letters does not affect his power or authority as testamentary trustee, except in the case specially prescribed for that purpose, in section 2640 of this chapter.

From former §§ 2687, 2688, 2833 of this Code, in part. From 2 R. S. 72, §§ 20, 21; Id., 152, §§ 14, 16.

§ 2572. Application by executor, etc., for permission to resign.

An executor, administrator, guardian or testamentary trustee may, at any time, present to the surrogate's court a petition, praying that his account may be judicially settled; that a decree may thereupon be made, revoking his letters or permitting him to resign, and discharging him accordingly; and that the same persons may be cited to show cause why such a decree should not be made who must be cited upon a petition for a judicial settlement of his account. The petition must set forth the facts upon which the application is founded; and it must, in all other respects, conform to a petition praying for a judicial settlement of his account. The surrogate may, in his discretion, entertain or decline to entertain the application.

Former §§ 2689, 2814, 2835, 2859 of this Code, consolidated. From L. 1837, c. 460, §§ 51-56; L. 1870, c. 59, § 3; L. 1879, c. 406.

§ 2573. Proceedings thereupon.

If the surrogate entertains an application, made as prescribed in the last section, the proceedings thereupon must be the same as upon a petition for a judicial settlement of the petitioner's account; except that the surrogate must first determine whether sufficient reasons exist for granting the prayer of the petition. Upon his fully accounting, and paying over all money which is found to be due from him, and delivering over all books, papers, and other property in his hands, either into the surrogate's court, or in such a manner as the surrogate directs, a decree may be made, revoking the petitioner's letters, or removing him, and discharging him accordingly.

Former §§ 2690, 2836 of this Code. From L. 1837, c. 460, §§ 51–56; L. 1870, c. 359, § 3; L. 1879, c. 406.

§ 2574. [Am'd, 1916.] In what cases letters may be revoked or trustee removed without a citation.

In either of the following cases, the surrogate may make a decree revoking letters testamentary, of administration or of guardianship, issued from his court, or removing a testamentary trustee, without a petition or the issuing of a citation:

1. Where the executor, administrator, guardian or trustee is not a resident of the state, or is absent therefrom, and upon being duly cited to account, neglects to appear upon the return of the citation, without showing a satisfactory excuse therefor, and the surrogate has not sufficient reason to believe that such an excuse can be made.

2. Where a citation or order issued to such a person, in a case prescribed by law, cannot be personally served upon him, by reason of his having absconded or concealed himself.

3. Where, by reason of his default in returning an inventory, or his neglect or refusal to obey an order, such a person has remained, for thirty days, committed to jail.

4. Where by the judgment of another court of competent jurisdiction the will under which letters have been issued is declared to be invalid.

5. Where an executor or administrator has failed to give the bond required to sell real estate, or to give a new bond, or a new surety when required to do so by an order or decree of the surrogate's court.

6. Where such person has been convicted of a felony.

7. [Added, 1916.] Where such executor, administrator, guardian or trustee mingles the funds of such estate with his own or deposits the same with any person, association or corporation authorized to do business under the banking law, in an account other than as such executor, administrator, guardian or trustee.

Former §§ 2599, 2691 of this Code, modified. From L. 1846, c. 288, § 1; 2 R. S. 85 (Part 2, c. 6, tit. 3), § 19. Am'd by L. 1916, c. 588 (in effect Sept. 1, 1916).

ARTICLE FOURTH.

Bonds and undertakings, approval, recording, prosecution and discharge; sureties, their release, rights and obligations.

Sec. 2575. Approval and recording of bonds and undertakings.
2576. Deposit of securities to reduce penalty of bond.
2577. When new bond or new sureties may be required.
2578. Id.; how principal may be required to give a new bond, etc.
2579. Sureties may apply to be released, as to future breaches.
2580. Release of old sureties on the giving of new.
2581. Principal may substitute new bond or surety after judicial settlement.
2582. Sureties liable for money, etc., received in another capacity.
2583. When bond may be prosecuted.
2584. Successor may prosecute official bond.
2585. Action on official bond, when no successor appointed.
2586. Discharge of bond or undertaking given on appeal, or for the performance of an act.
2587. Application of this article to executors, etc., heretofore appointed.

§ 2575. Approval and recording of bonds and undertakings.

All bonds and undertakings filed in the surrogate's court must be approved as provided in section 812 of this act, except that in counties containing a city of the first or second class or a part of such city, the surrogate or surrogates may, in writing, designate a clerk in the office to approve all or any class of bonds or undertakings, and when approved such bonds and undertakings must be recorded.

New.

§ 2576. Deposit of securities to reduce penalty of bond.

In a case where a bond, or new sureties on a bond, may be required by a surrogate from an executor, administrator, guardian, or testamentary trustee, if the value of the estate or fund is so great that the surrogate deems it inexpedient to require security in the full amount prescribed by law, he may direct that any securities for the payment of money, belonging to the estate or fund, be delivered to the county treasurer, or chamberlain, or be deposited subject to the order of the executor, administrator, guardian or testamentary trustee, countersigned by the surrogate, with a trust company, bank or safe deposit company. After such a deposit has been made, the surrogate may fix the amount of the bond with respect to the value of the remainder only of the estate or fund. A security thus deposited shall not be withdrawn from the custody of the depository, and no person other than the county treasurer, chamberlain or the proper officer of the depository, shall receive or collect any of the principal or interest secured thereby, without the special order of the surrogate. Such an order can be made in favor of such executor, administrator, guardian or testamentary trustee, only where an additional bond has been given by him, or upon proof that the estate or fund has been so reduced, by payments or otherwise, that the penalty of the bond originally given will be sufficient in amount to satisfy the provisions of law relating to the penalty thereof, if the security so withdrawn is also reckoned in the estate or fund.

Former § 2595 of this Code. See L. 1885, c. 516.

§ 2577. [Am'd, 1915.] When new bond or new sureties may be required.

Any person interested in an estate or fund, may present to the surrogate's court a petition, setting forth that a surety on a bond,

taken as prescribed in this chapter, is insufficient, or has removed, or is about to remove, from the State, or is dead, or that the bond is inadequate in amount; and praying that the principal in the bond may be required to give a new bond, in a larger penalty, or new or additional sureties, as the case requires; or in default thereof, that he may be removed from his office, and that letters issued to him may be revoked. Where the bond so taken is that of a guardian, the petition may also be presented by any relative of the infant. When the bond is that of an executor, or administrator, the petition may also be presented by any creditor of the decedent. If it appears to the surrogate that there is reason to believe that the allegations of the petition are true, a citation shall issue to the principal on the bond to show cause why the prayer of the petition should not be granted.

Former § 2597 of this Code. From L. 1837, c. 460, §§ 25, 26, 35; L. 1862, c. 229. Am'd by L. 1915, c. 622 (in effect May 14, 1915).

§ 2578. Id.; how principal may be required to give a new bond, etc.

Upon the return of a citation, issued as prescribed in the last section, the surrogate must hear the allegations and proofs of the parties; and if the allegations, or any of them, are found to be valid, he must make an order, requiring the principal on the bond to give new or additional sureties, or a new bond in a larger penalty, as the case requires, within such reasonable time, not exceeding twenty days, as the surrogate fixes; and directing that, in default thereof, he be removed or his letters be revoked.

Former § 2598 of this Code. From L. 1837, c. 460, § 27; L. 1862, c. 229.

§ 2579. Sureties may apply to be released as to future breaches.

Any or all of the sureties on a bond taken as prescribed in this chapter, may present a petition to the surrogate's court praying to be released from responsibility on account of any future breach of the condition of the bond, and that the principal on the bond be required to give new sureties and to render and settle his account, and that a citation issue to said principal to show cause why the application should not be granted.

Former § 2600 of this Code. From L. 1837, c. 460, §§ 29, 30; L. 1862, c. 229; L. 1876, c. 278; L. 1901, c. 524.

§ 2580. Release of old sureties on the giving of new.

Upon the return of the citation issued as prescribed in the last section, if the principal on the bond does not file a new bond in the usual form with new sureties to the satisfaction of the surrogate, the surrogate must make an order requiring said principal to file such new bond within such reasonable time, not exceeding twenty days, as the surrogate fixes. Should the principal file such new bond upon the return of such citation or within the time fixed by such order, the surrogate must thereupon make a decree releasing the petitioner from liability upon the bond for any subsequent act or default of the principal, and requiring the principal to render and settle his account to and including the date of such decree, and to file such account within a time fixed, not exceeding twenty days from such date; otherwise he must make a decree removing such principal or revoking his letters.

Former § 2601 of this Code. From L. 1887, c. 460, §§ 31, 32; L. 1901, c. 524.

§ 2581. Principal may substitute new bond or surety after judicial settlement.

Whenever there is pending in surrogate's court a proceeding for the intermediate judicial settlement of the account of an executor, administrator, guardian or testamentary trustee who has been required to file an official bond, such principal may ask in such proceeding, upon good cause shown, for leave to file a new bond or a new surety. If the surrogate grants such application he shall thereupon fix the penalty of the new bond, or the amount in which the new surety must justify, and upon the filing and approval of such new bond, or of the undertaking of the new surety, the surrogate may provide in the decree of judicial settlement that the former bond or surety be discharged from and after the date of such decree from all liability, except upon appeal therefrom, as to all matters embraced in said account and decree.

New.

§ 2582. Sureties liable for money, etc., received in another capacity.

A person to whom letters are issued is liable for money or other personal property of the estate which was in his hands, or under his control, when his letters were issued, in whatever capacity it was received by him, or came under his control. Where it was received by him, or came under his control, by virtue of letters previously issued to him in the same or another capacity, an action to recover the money, or damages for failure to deliver the property, may be maintained upon both official bonds; but, as between the sureties upon the official bond given upon the issue of the prior letters, and those upon the official bond given upon the issue of the subsequent letters, the latter are liable over to the former.

Former § 2596 of this Code.

§ 2583. When bond may be prosecuted.

Where an execution, issued upon a surrogate's decree, against the property of an executor, administrator, testamentary trustee, or guardian, has been returned wholly or partly unsatisfied, an action to recover the sum remaining uncollected may be maintained upon his official bond by and in the name of the person in whose favor the decree was made. If the principal debtor is a resident of the state, the execution must have been issued to the county where he resides.

Former § 2607 of this Code. From L. 1837, c. 460, § 65.

§ 2584. Successor may prosecute official bond.

Where a successor of an executor, administrator, guardian or testamentary trustee has been appointed, he may maintain an action upon his predecessor's official bond, in which he may recover any money, or the full value of any other property, received by the principal in the bond, and not duly administered by him; and to the full extent of any injury, sustained by the estate of the decedent, infant or beneficiary as the case may be, by any act or omission of the principal.

The money recovered in such an action shall be part of the estate or fund in the hands of the successor and must be distributed or otherwise disposed of accordingly; except that a recovery for an act or omission, respecting a right of action, or other property, appro-

priated by law for the benefit of the husband, wife, family, or next of kin of a decedent, or disposed of by a will for the benefit of any person is for the benefit of the person or persons so entitled thereto.

A decree against such decedent's executor, or administrator, rendered upon an accounting under section 2725 of this chapter, has the same effect as if an execution issued upon a surrogate's decree against the property of decedent had been returned unsatisfied during decedent's life time.

Former § 2608 of this Code, with part of § 2606. From 2 R. S. 85 (Part 2, c. 6, tit. 3), § 21.

§ 2585. Action on official bond, when no successor appointed.

Where an executor, administrator, guardian or testamentary trustee has been removed, or his letters have been revoked, and no successor is appointed, any person aggrieved may, upon obtaining an order from the surrogate granting him leave so to do, maintain an action upon the official bond of the person so removed or whose letters have been revoked in behalf of himself and all others interested; in which the plaintiff may recover any money, or the full value of any other property, received by the principal on the bond, and not duly administered by him, and to the full extent of any injury sustained by the estate of the decedent, infant or beneficiary by any act or omission of the principal. The money recovered in such an action must be paid, by the sheriff or other officer who collects it, into the surrogate's court to be paid to a successor when appointed and distributed to the persons entitled thereto.

Former § 2609 of this Code, modified.

§ 2586. Discharge of bond or undertaking given on appeal, or for the performance of an act.

Any party to a bond or undertaking given upon appeal, or to insure the performance of an act by himself or another, as to which no accounting is required by law for its discharge, may apply to the surrogate's court, upon notice to all parties interested in the subject-matter, or in the proceeding in which the bond or undertaking was given, for the discharge of the obligation or liability, in whole or in part. The court may thereupon by order certify that the whole obligation or liability on the bond or undertaking is discharged, or may direct that such obligation or liability be discharged in such amount as may be just, and that the bond or undertaking shall thereafter have the same force and effect as if given in terms for the remaining obligation or liability.

New.

§ 2587. Application of this article to executors, etc., heretofore appointed.

The provisions of this article apply to an executor, administrator, or guardian, to whom letters have been issued, and to a testamentary trustee whose trust has been created before this chapter takes effect; except that it does not affect, in any manner, the liability of the sureties on a bond executed before this chapter takes effect.

Former § 2610 of this Code.

TITLE III.

Granting letters of administration, probating and construing wills; issue of letters testamentary, and ancillary letters testamentary and of administration; appointment and qualification of testamentary trustee; appointment and qualification of general, ancillary and testamentary guardian, and guardian by deed; annual accounts by such guardians.

Article 1. Grant of letters of administration, and qualification of administrators; public and temporary administrators; administrator with the will annexed and de bonis non.
2. Production and probate of wills; objections and their trial; construction of wills; qualification of executors; grant of ancillary letters testamentary and of administration; qualification of testamentary trustee; security from testamentary trustees and executors acting as trustees.
3. Appointment and qualification of general, ancillary and testamentary guardians, and guardians by deed; filing and examining guardians' annual accounts.

ARTICLE FIRST.

Grant of letters of administration, and qualification of administrator; public and temporary administrator; administrator with the will annexed, and de bonis non.

Sec. 2588. Who entitled to letters of administration.
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§ 2588. Who entitled to letters of administration.

Administration in case of intestacy must be granted to the persons entitled to take or share in the personal property, who are competent and will accept the same, in the following order:

1. To the surviving husband or wife.
2. To the children.
3. To the grandchildren.
4. To the father.
5. To the mother.
6. To the brothers.
7. To the sisters.
8. To any other next of kin entitled to share in the distribution of the estate, preference being given to the person entitled to take the largest share in the estate, except as hereinafter provided.

If a person entitled to take all the personal estate is an infant, or an incompetent, or has died, his guardian, committee or legal repre-

sentative, as the case may be, shall have a prior right to letters in his place and stead.

If all the persons entitled to take the personal estate are infants, or adjudged incompetents, or, if no adult or competent person entitled to take or share in the estate will accept the same, letters may be granted to the general guardian of an infant or to the committee of an incompetent, in the place of such infant or incompetent.

If no person entitled to take or share in the estate will accept the same or an appointment is not made by consent as hereinafter provided, then administration shall be granted as follows:

a. To the public administrator.

b. To the county treasurer of the county, or to the petitioner, in the discretion of the surrogate.

c. To any other person or persons.

If several persons have an equal right to administration, they must be preferred in the following order: First, men to women; second, relatives of the whole blood to those of the half blood; third, unmarried women to married. If there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons. Administration may be granted to one or more competent persons, jointly with, and upon the application of, a person entitled; or to a competent person or persons not entitled, upon the consent of all of the persons entitled to take or share in the estate who are within this state and competent, which consent must be in writing, and filed in the office of the surrogate. For the purposes of this section a trust company or other corporation authorized to act as administrator shall be included in the word "person."

Former § 2660 of this Code. From 2 R. S. 74, 75 (Part 2, c. 6, tit. 2), §§ 27, 28, 33, 34; L. 1867, c. 782, § 6; L. 1893, c. 686; L. 1894, c. 503; L. 1897, c. 177; L. 1909, c. 65; L. 1913, c. 403.

§ 2589. Application for letters.

A creditor, or person interested in the estate of an intestate, or interested in an action brought or about to be brought in which the intestate, if living, would be a proper party, may present to the surrogate's court having jurisdiction, a petition, praying for a decree awarding letters of administration, either to him, or to another person. A citation shall not be issued, and a decree shall not be made where a citation is not necessary, until the petitioner shows to the satisfaction of the surrogate, the existence of all the jurisdictional facts, and particularly that the decedent left no will.

Former § 2662 of this Code. From 2 R. S. 74, § 26; L. 1909, c. 184.

§ 2590. Citation; proceedings upon return thereof.

Every person, being a resident of the state and competent, who has a right to administration prior or equal to that of the petitioner and who has not renounced, must be cited upon a petition for letters of administration; and where the petitioner is not entitled to share in the distribution of the estate there must also be cited all resident infants and adjudged incompetents who are so entitled. The surrogate may, in his discretion, issue a citation to non-residents, or those who have renounced, or to any or all other persons interested in the estate. Where it is not necessary to cite any person, a decree, granting letters may be made on presentation of the petition. Any person

who has a right to administration, prior or equal to that of the petitioner, may renounce his right by a written instrument, acknowledged, or proved, and duly certified which must be filed in the surrogate's office; except that a public administrator or county treasurer may not renounce his right and may only be excused from acting as such upon his motion duly made and upon an order made and entered thereupon by the surrogate.

Former § 2663 of this Code. From 2 R. S. 76, §§ 35, 37; L. 1878, c. 298, § 2; L. 1911, c. 431.

§ 2591. Administrator's bond.

Before letters are issued to an administrator he must file his official oath, and execute to the people of the state, and file with the surrogate, the joint and several bond of himself and two or more sureties, in a penalty fixed by the surrogate, not less than the value of the personal property of which the decedent died possessed and of the probable amount to be recovered by reason of any right of action, granted to an executor or administrator, by special provision of law, or by reason of a cause of action which existed in behalf of decedent; except that where the person or persons about to be appointed is or are entitled to the whole estate, the surrogate may dispense with a bond or fix the penalty at such sum as will adequately protect the rights of all creditors. The sum to be fixed as the amount of the penalty must be ascertained by the surrogate, by the examination on oath of the applicant or any other person, or otherwise, as the surrogate thinks proper. The bond must be conditioned that the administrator will faithfully discharge the trust reposed in him as such and obey all lawful decrees and orders of the surrogate's court touching the administration of the estate committed to him.

In cases where the husband or wife and all the next of kin of the decedent or all the persons entitled to share in the estate consent, the penalty of the bond need not exceed double the amount of the claims of the creditors, against the estate, presented to the surrogate, pursuant to a notice to be published once a week for four weeks in such newspaper or newspapers as the surrogate shall direct, reciting an intention to apply for letters under this provision, and notifying creditors to present their claims to the surrogate's court on or before a day to be fixed in such notice, which shall be at least thirty days after the first publication thereof; but no bond so given shall be for less than five thousand dollars; and such bond may be increased by order of the surrogate for cause shown. Pending such application, no temporary administrator shall be appointed, except on petition of such next of kin.

Former § 2664 of this Code. From 2 R. S. 77, § 42; L. 1881, c. 535, L. 1882, c. 398.

§ 2592. Limited letters may be issued; bond.

Where a right of action is granted to an executor or administrator by special provision of law, or it is alleged that a cause of action existed in behalf of decedent, and it appears to be impracticable to give a bond sufficient to cover the probable amount to be recovered in the case of an executor, or such probable recovery and the existing personal estate in the case of an administrator, the surrogate may dispense with a bond, or fix the penalty at such sum as he shall deem

sufficient, and issue letters which as to such cause of action shall be limited to the prosecution thereof, and restraining the executor or administrator from compromise of the action or the enforcement of any judgment recovered therein until the further order of the surrogate made upon filing satisfactory security.

From former § 2664 of this Code, in part.

§ 2593. County treasurer appointed administrator to qualify and have fees.

A county treasurer appointed administrator of an estate shall qualify in the manner prescribed in section 2501; shall be vested with all the powers and rights of other administrators and be subject to the same duties and obligations; and shall be allowed the same fees for his services as are now allowed by law to administrators, which fees shall be in addition to the salary and fees now allowed by law to such county treasurer. Such treasurer may employ an attorney to act for him as such administrator other than the one, if any, appointed to act as the county attorney or the official attorney of such treasurer.

New.

§ 2594. Public administrator of Kings county.

The surrogate of the county of Kings shall, on or before the nineteenth day of October, nineteen hundred and eleven, and every five years thereafter, except as hereinafter provided, appoint a suitable person as public administrator of said county to hold office for the term of five years unless sooner removed for cause, the said term beginning on the nineteenth day of October, 1911. In case of a vacancy in said office by reason of death, resignation or otherwise said surrogate shall fill the same by appointing a suitable person as public administrator for the full term of five years from the date of such appointment and qualification. Before entering upon the performance of the duties of his office the person so appointed must take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond with sureties to be approved by a justice of the supreme court, to the county of Kings, in a penal sum of fifty thousand dollars, conditioned for the faithful discharge of all the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond must be filed with the clerk of the county. He shall be entitled to retain from all moneys or property of any intestate that come into his hands after deducting all actual and necessary expenses the same commissions as are now allowed by law to executors or administrators, and he shall receive a salary for his services to be fixed by the board of estimate and apportionment of the city of New York upon the recommendation of the surrogate of the county of Kings, the same to be raised and paid each year in the same manner as are other county charges. The public administrator shall not receive to his own use any fees or emoluments in addition to his salary, and he shall pay into the treasury of the city of New York all commissions and costs received by him from any source whatever; such payments shall be made monthly and shall be accompanied by a sworn statement in

such form as the comptroller of the city of New York shall prescribe, showing in detail the costs and commissions received and allowed to him. A suitable office for said public administrator shall be provided for him in one of the county buildings in the county of Kings. The surrogate shall also appoint a counsel and a clerk to said public administrator, their salaries to be fixed by the board of estimate and apportionment of the city of New York upon the recommendation of said surrogate and to be raised and paid each year in the same manner as are other county charges. He shall have the prior right and authority to collect, take charge of and administer upon the goods, chattels, personal property and debts of persons dying intestate, and for that purpose to maintain suits as such public administrator as any executor or administrator might by law in the following cases:

1. Whenever such person dies leaving any assets or effects in the county of Kings, and there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, entitled, competent or willing to take out letters of administration on such estate.

2. Whenever assets or effects of any person dying intestate, after his death, come into the county of Kings and there is no such person entitled, competent or willing to take administration of the estate. In such cases intestacy is presumed until a will is proved and letters testamentary issued thereon. All provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York and to the office of public administrator in the several counties of the state, so far as applicable apply to and are conferred on the office hereby created. The surrogate of the county of Kings, in cases where now authorized by law to issue letters of temporary administration, may in his discretion issue letters of temporary administration to such administrator without further security than required by this section.

Former § 2669 of this Code. From L. 1871, c. 335; L. 1887, c. 154; L. 1892, c. 124; L. 1893, c. 686; L. 1904, c. 357; L. 1911, c. 774.

§ 2595. Public administrator of Erie county.

The surrogate of the county of Erie shall, within ten days after the passage of this act, and every five years thereafter, except as hereinafter provided, appoint a suitable person as public administrator of and for said county, to take office immediately, and to hold office for the term of five years from the first day of January succeeding his appointment, unless sooner removed for cause.

In case of a vacancy in said office by reason of death, resignation or otherwise, said surrogate shall fill the same by appointing a suitable person as public administrator, to take office immediately upon his appointment and qualification, and hold for the term of five years from the first day of January succeeding his appointment, unless sooner removed for cause.

Before entering upon the performance of the duties of his office, the person so appointed shall take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond, with sufficient sureties to be approved by a justice of the supreme court, to the county of Erie, in the penal sum of ten thousand dollars, conditioned for the faithful discharge

of the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond shall be filed with the clerk of said county.

Said public administrator shall be entitled to retain from all moneys or property that come into his hands, after deducting all actual and necessary expenses, the same commissions as are now allowed by law to executors or administrators, and all provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York, and to the office of public administrator of the county of Kings, and in the several counties of the state apply to and are conferred on the office hereby created.

The surrogate of the county of Erie, where now authorized by law to issue letters of temporary administration, may, in his discretion, issue letters of temporary administration to such public administrator, without further security than required by this section.

New.

§ 2596. When and how temporary administrators may be appointed.

On the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one or more persons letters of temporary administration, in either of the following cases:

1. When for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will.

An appointment of a temporary administrator, in a case specified in this subdivision must be made by an order, if a proceeding for grant of letters of administration or probate of a will is then pending. At least ten days' notice of the application for such an order must be given to each party to the proceeding who has appeared, unless the surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days. If no proceeding is pending, application shall be by petition and a citation shall issue in the usual manner directed to the persons entitled to letters of administration in a case where no will is known to exist; or to the executor or executors, trustee or trustees if any, and such legatees and devisees as the surrogate may direct to be cited, in cases where a will has been filed.

2. Where a person of whose estate the surrogate would have jurisdiction, if he were shown to be dead, disappears or is missing, so that, after diligent search, his abode cannot be ascertained, and under circumstances which afford reasonable ground to believe either that he is dead, or that he has become a lunatic, or that he has been secreted, confined, or otherwise unlawfully made away with; and the appointment of a temporary administrator is necessary for the protection of his property, and the rights of creditors or of those who will be interested in the estate, if it is found that he is dead.

Application for such an appointment, in a case specified in this subdivision must be made by petition, in like manner as where an application is made for administration in case of intestacy; and the proceedings are the same as prescribed in this title, relating to such last-mentioned application.

Such an application for the appointment of a temporary administrator in either case may also be made, with like effect, and in like manner, as if made by a creditor, by the county treasurer of the county where the person whose estate is in question last resided; or, if he was not a resident of the state, of the county where any of his property, real or personal, is situated. A temporary administrator must qualify as prescribed in section 2591 of this chapter with respect to an administrator-in-chief.

Former § 2670 of this Code. From L. 1837, c. 460, § 23; L. 1864, c. 71, §§ 5, 11; L. 1867, c. 782, § 7; L. 1875, c. 519; L. 1893, c. 686; L. 1901, c. 20.

§ 2597. [Am'd, 1915.] General powers, etc., of temporary administrator.

A temporary administrator, appointed as prescribed in this article, has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of these purposes, or for the purpose of determining the title to personal property in his possession, he may maintain any action or special proceeding. An action may be maintained against him, by leave of the surrogate, upon a debt of the decedent, or of the absentee whom he represents, or upon any cause of action to which the decedent or absentee would have been a party in like manner and with like effect as if he were an administrator-in-chief. The surrogate may, by an order made upon at least ten days' notice to all the parties who have appeared in the special proceeding, authorize the temporary administrator to sell, after appraisal, such personal property, specifying it, of the decedent, or of the absentee whom he represents, as it appears to be necessary to sell, for the benefit of the estate; or, if it appears that the safety of the estate requires the notice to be shortened, the surrogate may shorten the notice to not less than two days. The surrogate may, also, by order, authorize him to pay funeral expenses, or any expenses of the administration of his trust, or stenographer's or referee's fees on contest of a will or administration; and he may also direct the payment of a legacy or other pecuniary provision under a will or a distributive share or just proportionate part thereof, according to sections 2687 and 2688 of this chapter as though he were an executor or administrator.

Former § 2672 of this Code. From L. 1837, c. 460, § 24; L. 1864, c. 71, § 9; L. 1881, c. 535; L. 1915, c. 621 (in effect Sept. 1, 1915).

§ 2598. Id.; as to requiring creditors to present claims.

A temporary administrator, appointed upon the estate of either a decedent or an absentee, has the same power as an administrator-in-chief to publish a notice requiring creditors of the decedent or absentee to exhibit their demands to him. The publication thereof has the same effect, with respect to the temporary administrator, and also an executor or administrator, subsequently appointed upon the same estate, as if the temporary administrator were the executor or an administrator-in-chief, and the person to whom the subsequent letters are issued were his successor.

Former § 2673 of this Code. From L. 1870, c. 359, § 10.

§ 2599. Id.; as to paying debts.

At any time after the completion of the publication of the notice to creditors by a temporary administrator, the surrogate may, upon proof, to his satisfaction, that the assets exceed the debts, make an

order, permitting the temporary administrator to pay the whole or any part of a debt, due to a creditor of the decedent or absentee; or, upon the petition of a creditor, a citation may issue to the temporary administrator, requiring him to show cause why he should not pay the petitioner's debt. When such a petition is presented, the proceedings are, in all respects, the same as where a creditor presents a petition, praying for a decree directing an executor or administrator to pay his debt, as prescribed in this chapter.

Former § 2674 of this Code. From L. 1870, c. 359, § 10.

§ 2600. Id.; as to real property.

When a temporary administrator is appointed and a proceeding is pending for the probate of a will of real property, or there is a delay in the granting of letters testamentary or administration on such a will or in the qualification of a trustee named therein, the order appointing him may confer upon him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year; or to do any other act with respect thereto, except to sell it, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or defend any action or special proceeding.

Former § 2675 of this Code. From L. 1870, c. 359, § 13; L. 1901, c. 21.

§ 2601. Special powers of temporary administrator of absentee; may provide for family.

A temporary administrator, appointed upon the estate of an absentee, has all the powers and authority enumerated in the last section, with respect to the real property of the absentee. His acts, done in pursuance of that authority, bind the absentee, if living, or his heir or devisee, if he be dead, in the same manner as the acts of an executor or administrator bind his successor.

Upon proof, satisfactory to the surrogate, that the wife or any infant child of an absentee upon whose estate a temporary administrator has been appointed, is in such circumstances as to require provision to be made out of the estate for his or her maintenance, clothing, or education, the surrogate may make an order, directing the temporary administrator to make such provision therefor as the surrogate deems proper, out of any personal property in his hands, not needed for the payment of debts.

Former §§ 2676, 2677 of this Code. From L. 1875, c. 519, § 4.

§ 2602. Notices required by this article; how given.

A notice required to be given, as prescribed in this article, to a party other than the temporary administrator, must be served upon the attorney of the party to whom notice is to be given; or, if he has not appeared by an attorney, upon the party, in like manner as a notice may be served upon an attorney in a civil action, brought in the supreme court. But where the attorney or party to be served does not reside in the surrogate's county; or where the attorney for

a party has died, and no other appearance for that party has been filed in the surrogate's office; the surrogate may, by order, dispense with notice to that party; or may require notice to be given to him in any manner which he thinks proper.

Former § 2681 of this Code.

§ 2603. Letters of administration with will annexed; when and to whom granted.

If no person is named as executor in the will, or selected by virtue of a power contained therein; or if, at any time there is no executor, or administrator with the will annexed, qualified to act; the surrogate must, upon the application of a creditor of the decedent, or a person interested in the estate of the decedent, or having a lien upon any real property upon which the decedent's estate has a lien, and upon such notice to the other creditors and persons interested in the estate as the surrogate deems proper, issue letters of administration with the will annexed, as follows:

1. To an executor or administrator of a sole legatee and devisee named in a will.

2. To one or more of the residuary legatees, who are qualified to act as administrators. A corporation which is a residuary legatee shall be qualified to act as such administrator, although not specially authorized by its charter or any provision of law.

3. If there is no such residuary legatee or none who will accept, then to one or more of the principal or specified legatees so qualified.

4. If there is no such legatee or none who will accept, then to the husband, or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees, so qualified.

If any of the above persons who would otherwise be entitled to letters is an infant or an adjudged incompetent, administration may be granted to his guardian or committee as the case may be, unless there is an adult or competent person equally entitled who will accept the same.

5. If there is no qualified person, entitled under the foregoing subdivisions, who will accept, then to the public administrator, and if there be none for the county, to the treasurer of the county or to the petitioner in the discretion of the surrogate, and if neither will accept, to any creditor or competent person designated by the surrogate.

Except as to the right of priority as provided in this section, the provisions of section 2588 of this chapter apply to an application for letters of administration with the will annexed.

Former § 2643 of this Code, modified. From 2 R. S. 71, §§ 14, 17; L. 1881, c. 535; L. 1895, c. 734; L. 1901, c. 141; L. 1910, c. 585.

§ 2604. Id.; renunciation or exclusion of persons having prior right.

Where a person applies for letters of administration with the will annexed, as prescribed in the last section, and another person has a right to the administration, prior to that of the petitioner, a citation must issue accordingly unless a renunciation acknowledged or proved and duly certified of every person having such a prior right is filed. The surrogate may in his discretion issue a citation to a person equally entitled. The proceedings thereupon are the same as upon an application for administration upon the estate of an intestate.

Former § 2644 of this Code, modified. From 2 R. S. 76, § 35.

§ 2605. How executor or administrator with the will annexed qualifies.

An executor from whom a bond is required as prescribed in this chapter, or an administrator with the will annexed, must, before letters are issued to him, qualify as prescribed by law with respect to an administrator upon the estate of an intestate; and the provisions of section 2591 of this chapter, with respect to the bond to be given by the administrator of an intestate, apply to a bond given pursuant to this section; except that, in fixing the penalty thereof, the surrogate must take into consideration the value of the real property, or of the proceeds thereof, which may come to the hands of the executor or administrator, by virtue of any provision contained in the will, and also how much of the estate, if any, has already been administered.

Former § 2645 of this Code. From 2 R. S. 76, § 42.

§ 2606. Appointment of administrator de bonis non.

When all the administrators, to whom letters have been issued, die or become incapable, or the letters are revoked as to all of them, the surrogate must grant letters of administration de bonis non to one or more persons as their successors, in like manner as if the former letters had not been issued; and the proceedings to procure the grant of such letters are the same, and the same security shall be required, as upon an original application; except that the surrogate may, in his discretion, in case where the estate has been partially administered upon by the former representative or representatives, fix as the penalty of the bond to be given by such successor or successors, a sum not less than the value of the assets of the estate remaining unadministered.

Former § 2693 of this Code. From 2 R. S. 72, 78, §§ 19, 45; L. 1837, c. 460, § 33; L. 1846, c. 288; L. 1889, c. 503.

ARTICLE SECOND.

Production and probate of wills; objections and their trial; construction of wills; qualification of executor; grant of ancillary letters testamentary and of administration; qualification of testamentary trustees; security from testamentary trustees and executors acting as trustees.

Sec. 2607. Petition to compel production of will.
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2636. Id.; general powers and duties.
2637. How testamentary trustee shall qualify.
2638. Appointment of successor.
2639. Security to be required from a trustee or executor acting as trustee.
2640. Proceedings where testamentary trustee is also executor or administrator
2641. Application of this chapter.

§ 2607. Petition to compel production of will.

Whenever it shall appear by petition of any person claiming to be interested in the estate of a decedent, that there is reasonable ground to believe that any person has destroyed, retained, concealed, or is conspiring with others to destroy, retain or conceal a will or testamentary instrument of a decedent, or has any knowledge as to such facts, the court must make an order requiring the respondent to attend and be examined in the premises, and may in such order or otherwise in the proceeding require the production of any will or testamentary instrument. Service thereof must be made by delivery of a certified copy thereof to the person or persons named therein and the payment or tender to each of the sum required by law to be paid or tendered to a witness who is subpœnaed to attend a trial in surrogate's court.

Former § 2621a of this Code, rewritten. From L. 1910, c. 358.

sufficient, and issue letters which as to such cause of action shall be limited to the prosecution thereof, and restraining the executor or administrator from compromise of the action or the enforcement of any judgment recovered therein until the further order of the surrogate made upon filing satisfactory security.

From former § 2664 of this Code, in part.

§ 2593. County treasurer appointed administrator to qualify and have fees.

A county treasurer appointed administrator of an estate shall qualify in the manner prescribed in section 2501; shall be vested with all the powers and rights of other administrators and be subject to the same duties and obligations; and shall be allowed the same fees for his services as are now allowed by law to administrators, which fees shall be in addition to the salary and fees now allowed by law to such county treasurer. Such treasurer may employ an attorney to act for him as such administrator other than the one, if any, appointed to act as the county attorney or the official attorney of such treasurer.

New.

§ 2594. Public administrator of Kings county.

The surrogate of the county of Kings shall, on or before the nineteenth day of October, nineteen hundred and eleven, and every five years thereafter, except as hereinafter provided, appoint a suitable person as public administrator of said county to hold office for the term of five years unless sooner removed for cause, the said term beginning on the nineteenth day of October, 1911. In case of a vacancy in said office by reason of death, resignation or otherwise said surrogate shall fill the same by appointing a suitable person as public administrator for the full term of five years from the date of such appointment and qualification. Before entering upon the performance of the duties of his office the person so appointed must take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond with sureties to be approved by a justice of the supreme court, to the county of Kings, in a penal sum of fifty thousand dollars, conditioned for the faithful discharge of all the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond must be filed with the clerk of the county. He shall be entitled to retain from all moneys or property of any intestate that come into his hands after deducting all actual and necessary expenses the same commissions as are now allowed by law to executors or administrators, and he shall receive a salary for his services to be fixed by the board of estimate and apportionment of the city of New York upon the recommendation of the surrogate of the county of Kings, the same to be raised and paid each year in the same manner as are other county charges. The public administrator shall not receive to his own use any fees or emoluments in addition to his salary, and he shall pay into the treasury of the city of New York all commissions and costs received by him from any source whatever; such payments shall be made monthly and shall be accompanied by a sworn statement in

such form as the comptroller of the city of New York shall prescribe, showing in detail the costs and commissions received and allowed to him. A suitable office for said public administrator shall be provided for him in one of the county buildings in the county of Kings. The surrogate shall also appoint a counsel and a clerk to said public administrator, their salaries to be fixed by the board of estimate and apportionment of the city of New York upon the recommendation of said surrogate and to be raised and paid each year in the same manner as are other county charges. He shall have the prior right and authority to collect, take charge of and administer upon the goods, chattels, personal property and debts of persons dying intestate, and for that purpose to maintain suits as such public administrator as any executor or administrator might by law in the following cases:

1. Whenever such person dies leaving any assets or effects in the county of Kings, and there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, entitled, competent or willing to take out letters of administration on such estate.

2. Whenever assets or effects of any person dying intestate, after his death, come into the county of Kings and there is no such person entitled, competent or willing to take administration of the estate. In such cases intestacy is presumed until a will is proved and letters testamentary issued thereon. All provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York and to the office of public administrator in the several counties of the state, so far as applicable apply to and are conferred on the office hereby created. The surrogate of the county of Kings, in cases where now authorized by law to issue letters of temporary administration, may in his discretion issue letters of temporary administration to such administrator without further security than required by this section.

Former § 2669 of this Code. From L. 1871, c. 335; L. 1887, c. 154; L. 1882, c. 124; L. 1893, c. 686; L. 1904, c. 357; L. 1911, c. 774.

§ 2595. Public administrator of Erie county.

The surrogate of the county of Erie shall, within ten days after the passage of this act, and every five years thereafter, except as hereinafter provided, appoint a suitable person as public administrator of and for said county, to take office immediately, and to hold office for the term of five years from the first day of January succeeding his appointment, unless sooner removed for cause.

In case of a vacancy in said office by reason of death, resignation or otherwise, said surrogate shall fill the same by appointing a suitable person as public administrator, to take office immediately upon his appointment and qualification, and hold for the term of five years from the first day of January succeeding his appointment, unless sooner removed for cause.

Before entering upon the performance of the duties of his office, the person so appointed shall take and subscribe before the county clerk, or a justice of the supreme court, the constitutional oath of office, and execute a bond, with sufficient sureties to be approved by a justice of the supreme court, to the county of Erie, in the penal sum of ten thousand dollars, conditioned for the faithful discharge

of the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond shall be filed with the clerk of said county.

Said public administrator shall be entitled to retain from all moneys or property that come into his hands, after deducting all actual and necessary expenses, the same commissions as are now allowed by law to executors or administrators, and all provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York, and to the office of public administrator of the county of Kings, and in the several counties of the state apply to and are conferred on the office hereby created.

The surrogate of the county of Erie, where now authorized by law to issue letters of temporary administration, may, in his discretion, issue letters of temporary administration to such public administrator, without further security than required by this section.

New.

§ 2596. When and how temporary administrators may be appointed.

On the application of a creditor, or a person interested in the estate, the surrogate may, in his discretion, issue to one or more persons letters of temporary administration, in either of the following cases:

1. When for any cause, delay necessarily occurs in the granting of letters testamentary or letters of administration, or in probating a will.

An appointment of a temporary administrator, in a case specified in this subdivision must be made by an order, if a proceeding for grant of letters of administration or probate of a will is then pending. At least ten days' notice of the application for such an order must be given to each party to the proceeding who has appeared, unless the surrogate is satisfied by proof that the safety of the estate requires the notice to be shortened, in which case he may shorten the time of service to not less than two days. If no proceeding is pending, application shall be by petition and a citation shall issue in the usual manner directed to the persons entitled to letters of administration in a case where no will is known to exist; or to the executor or executors, trustee or trustees if any, and such legatees and devisees as the surrogate may direct to be cited, in cases where a will has been filed.

2. Where a person of whose estate the surrogate would have jurisdiction, if he were shown to be dead, disappears or is missing, so that, after diligent search, his abode cannot be ascertained, and under circumstances which afford reasonable ground to believe either that he is dead, or that he has become a lunatic, or that he has been secreted, confined, or otherwise unlawfully made away with; and the appointment of a temporary administrator is necessary for the protection of his property, and the rights of creditors or of those who will be interested in the estate, if it is found that he is dead.

Application for such an appointment, in a case specified in this subdivision must be made by petition, in like manner as where an application is made for administration in case of intestacy; and the proceedings are the same as prescribed in this title, relating to such last-mentioned application.

Such an application for the appointment of a temporary administrator in either case may also be made, with like effect, and in like manner, as if made by a creditor, by the county treasurer of the county where the person whose estate is in question last resided; or, if he was not a resident of the state, of the county where any of his property, real or personal, is situated. A temporary administrator must qualify as prescribed in section 2591 of this chapter with respect to an administrator-in-chief.

Former § 2670 of this Code. From L. 1837, c. 460, § 23; L. 1864, c. 71, §§ 5, 11; L. 1867, c. 782, § 7; L. 1875, c. 519; L. 1893, c. 686; L. 1901, c. 20.

§ 2597. [Am'd, 1915.] General powers, etc., of temporary administrator.

A temporary administrator, appointed as prescribed in this article, has authority to take into his possession personal property; to secure and preserve it; and to collect choses in action; and, for either of these purposes, or for the purpose of determining the title to personal property in his possession, he may maintain any action or special proceeding. An action may be maintained against him, by leave of the surrogate, upon a debt of the decedent, or of the absentee whom he represents, or upon any cause of action to which the decedent or absentee would have been a party in like manner and with like effect as if he were an administrator-in-chief. The surrogate may, by an order made upon at least ten days' notice to all the parties who have appeared in the special proceeding, authorize the temporary administrator to sell, after appraisal, such personal property, specifying it, of the decedent, or of the absentee whom he represents, as it appears to be necessary to sell, for the benefit of the estate; or, if it appears that the safety of the estate requires the notice to be shortened, the surrogate may shorten the notice to not less than two days. The surrogate may, also, by order, authorize him to pay funeral expenses, or any expenses of the administration of his trust, or stenographer's or referee's fees on contest of a will or administration; and he may also direct the payment of a legacy or other pecuniary provision under a will or a distributive share or just proportionate part thereof, according to sections 2687 and 2688 of this chapter as though he were an executor or administrator.

Former § 2672 of this Code. From L. 1837, c. 460, § 24; L. 1864, c. 71, § 9; L. 1881, c. 535; L. 1915, c. 621 (in effect Sept. 1, 1915).

§ 2598. Id.; as to requiring creditors to present claims.

A temporary administrator, appointed upon the estate of either a decedent or an absentee, has the same power as an administrator-in-chief to publish a notice requiring creditors of the decedent or absentee to exhibit their demands to him. The publication thereof has the same effect, with respect to the temporary administrator, and also an executor or administrator, subsequently appointed upon the same estate, as if the temporary administrator were the executor or an administrator-in-chief, and the person to whom the subsequent letters are issued were his successor.

Former § 2673 of this Code. From L. 1870, c. 359, § 10.

§ 2599. Id.; as to paying debts.

At any time after the completion of the publication of the notice to creditors by a temporary administrator, the surrogate may, upon proof, to his satisfaction, that the assets exceed the debts, make an

order, permitting the temporary administrator to pay the whole or any part of a debt, due to a creditor of the decedent or absentee; or, upon the petition of a creditor, a citation may issue to the temporary administrator, requiring him to show cause why he should not pay the petitioner's debt. When such a petition is presented, the proceedings are, in all respects, the same as where a creditor presents a petition, praying for a decree directing an executor or administrator to pay his debt, as prescribed in this chapter.

Former § 2674 of this Code. From L. 1870, c. 359, § 10.

§ 2600. Id.; as to real property.

When a temporary administrator is appointed and a proceeding is pending for the probate of a will of real property, or there is a delay in the granting of letters testamentary or administration on such a will or in the qualification of a trustee named therein, the order appointing him may confer upon him authority to take possession of real property, in the same or another county, which is affected by the will, and to receive the rents and profits thereof. The surrogate may, by an order, confer upon him authority to lease any or all of the real property, for a term not exceeding one year; or to do any other act with respect thereto, except to sell it, which is, in the surrogate's opinion, necessary for the execution of the will, or the preservation or benefit of the real property. For either of these purposes, he may maintain or defend any action or special proceeding.

Former § 2675 of this Code. From L. 1870, c. 359, § 13; L. 1901, c. 21.

§ 2601. Special powers of temporary administrator of absentee; may provide for family.

A temporary administrator, appointed upon the estate of an absentee, has all the powers and authority enumerated in the last section, with respect to the real property of the absentee. His acts, done in pursuance of that authority, bind the absentee, if living, or his heir or devisee, if he be dead, in the same manner as the acts of an executor or administrator bind his successor.

Upon proof, satisfactory to the surrogate, that the wife or any infant child of an absentee upon whose estate a temporary administrator has been appointed, is in such circumstances as to require provision to be made out of the estate for his or her maintenance, clothing, or education, the surrogate may make an order, directing the temporary administrator to make such provision therefor as the surrogate deems proper, out of any personal property in his hands, not needed for the payment of debts.

Former §§ 2676, 2677 of this Code. From L. 1875, c. 519, § 4.

§ 2602. Notices required by this article; how given.

A notice required to be given, as prescribed in this article, to a party other than the temporary administrator, must be served upon the attorney of the party to whom notice is to be given; or, if he has not appeared by an attorney, upon the party, in like manner as a notice may be served upon an attorney in a civil action, brought in the supreme court. But where the attorney or party to be served does not reside in the surrogate's county; or where the attorney for

a party has died, and no other appearance for that party has been filed in the surrogate's office; the surrogate may, by order, dispense with notice to that party; or may require notice to be given to him in any manner which he thinks proper.

Former § 2681 of this Code.

§ 2603. Letters of administration with will annexed; when and to whom granted.

If no person is named as executor in the will, or selected by virtue of a power contained therein; or if, at any time there is no executor, or administrator with the will annexed, qualified to act; the surrogate must, upon the application of a creditor of the decedent, or a person interested in the estate of the decedent, or having a lien upon any real property upon which the decedent's estate has a lien, and upon such notice to the other creditors and persons interested in the estate as the surrogate deems proper, issue letters of administration with the will annexed, as follows:

1. To an executor or administrator of a sole legatee and devisee named in a will.

2. To one or more of the residuary legatees, who are qualified to act as administrators. A corporation which is a residuary legatee shall be qualified to act as such administrator, although not specially authorized by its charter or any provision of law.

3. If there is no such residuary legatee or none who will accept, then to one or more of the principal or specified legatees so qualified.

4. If there is no such legatee or none who will accept, then to the husband, or wife, or to one or more of the next of kin, or to one or more of the heirs or devisees, so qualified.

If any of the above persons who would otherwise be entitled to letters is an infant or an adjudged incompetent, administration may be granted to his guardian or committee as the case may be, unless there is an adult or competent person equally entitled who will accept the same.

5. If there is no qualified person, entitled under the foregoing subdivisions, who will accept, then to the public administrator, and if there be none for the county, to the treasurer of the county or to the petitioner in the discretion of the surrogate, and if neither will accept, to any creditor or competent person designated by the surrogate.

Except as to the right of priority as provided in this section, the provisions of section 2588 of this chapter apply to an application for letters of administration with the will annexed.

Former § 2643 of this Code, modified. From 2 R. S. 71, §§ 14, 17; L. 1881, c. 535; L. 1895, c. 734; L. 1901, c. 141; L. 1910, c. 585.

§ 2604. Id.; renunciation or exclusion of persons having prior right.

Where a person applies for letters of administration with the will annexed, as prescribed in the last section, and another person has a right to the administration, prior to that of the petitioner, a citation must issue accordingly unless a renunciation acknowledged or proved and duly certified of every person having such a prior right is filed. The surrogate may in his discretion issue a citation to a person equally entitled. The proceedings thereupon are the same as upon an application for administration upon the estate of an intestate.

Former § 2644 of this Code, modified. From 2 R. S. 76, § 35.

§ 2605. How executor or administrator with the will annexed qualifies.

An executor from whom a bond is required as prescribed in this chapter, or an administrator with the will annexed, must, before letters are issued to him, qualify as prescribed by law with respect to an administrator upon the estate of an intestate; and the provisions of section 2591 of this chapter, with respect to the bond to be given by the administrator of an intestate, apply to a bond given pursuant to this section; except that, in fixing the penalty thereof, the surrogate must take into consideration the value of the real property, or of the proceeds thereof, which may come to the hands of the executor or administrator, by virtue of any provision contained in the will, and also how much of the estate, if any, has already been administered.

Former § 2645 of this Code. From 2 R. S. 76, § 42.

§ 2606. Appointment of administrator de bonis non.

When all the administrators, to whom letters have been issued, die or become incapable, or the letters are revoked as to all of them, the surrogate must grant letters of administration de bonis non to one or more persons as their successors, in like manner as if the former letters had not been issued; and the proceedings to procure the grant of such letters are the same, and the same security shall be required, as upon an original application; except that the surrogate may, in his discretion, in case where the estate has been partially administered upon by the former representative or representatives, fix as the penalty of the bond to be given by such successor or successors, a sum not less than the value of the assets of the estate remaining unadministered.

Former § 2693 of this Code. From 2 R. S. 72, 78, §§ 19, 45; L. 1837, c. 460, § 33; L. 1846, c. 288; L. 1889, c. 503.

ARTICLE SECOND.

Production and probate of wills; objections and their trial; construction of wills; qualification of executor; grant of ancillary letters testamentary and of administration; qualification of testamentary trustees; security from testamentary trustees and executors acting as trustees.

Sec. 2607. Petition to compel production of will.
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2638. Appointment of successor.
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2640. Proceedings where testamentary trustee is also executor or administrator
2641. Application of this chapter.

§ 2607. Petition to compel production of will.

Whenever it shall appear by petition of any person claiming to be interested in the estate of a decedent, that there is reasonable ground to believe that any person has destroyed, retained, concealed, or is conspiring with others to destroy, retain or conceal a will or testamentary instrument of a decedent, or has any knowledge as to such facts, the court must make an order requiring the respondent to attend and be examined in the premises, and may in such order or otherwise in the proceeding require the production of any will or testamentary instrument. Service thereof must be made by delivery of a certified copy thereof to the person or persons named therein and the payment or tender to each of the sum required by law to be paid or tendered to a witness who is subpœnaed to attend a trial in surrogate's court.

Former § 2621a of this Code, rewritten. From L. 1910, c. 358.

§ 2608. Probate of wills of citizens of the United States domiciled in the United Kingdom of Great Britain and Ireland.

The last will and testament of any person being a citizen of the United States, or, if female, whose father or husband previously shall have declared his intention to become such citizen, who shall have died, or hereafter shall die, while domiciled or resident within the United Kingdom of Great Britain and Ireland, or any of its dependencies, which shall affect property within this state and which shall have been duly proven within such foreign jurisdiction, and there admitted to probate, shall be admitted to probate in any county of this state wherein shall be any property affected thereby, upon filing in the office of the surrogate of such county, and there recording, a copy of such last will and testament, certified under the hand and seal of a consul-general of the United States resident within such foreign jurisdiction, together with the proofs of the said last will and testament, made and accepted within such foreign jurisdiction, certified in like manner. Letters testamentary on such last will and testament shall be issued to the persons named therein to be the executors and trustees, or either thereof, or to those of them who, prior to the issuance of such letters, by formal renunciation, duly acknowledged or proven, and duly certified, shall not have renounced the trust therein devolved upon them; provided, that before any such will shall be admitted to probate in any county of this state, the same proceedings shall be had in the surrogate's court of the proper county as are required by law upon the proof of the last will and testament of a resident of this state who shall have died therein; except that there need be cited upon such probate proceedings only the beneficiaries named in such will.

Former § 2705 of this Code. From L. 1894, c. 731, § 1; L. 1909, c. 65.

§ 2609. Who may propound will; contents of petition.

A petition for the probate of a will may be presented by:

Any person designated in the will as executor, devisee, legatee, testamentary trustee or guardian;

A creditor of the decedent, or any other person interested in the estate;

Any party to an action brought, or about to be brought, in which action the decedent, if living, would be a proper party.

Such petition in addition to the general allegations contained in section 2521 of this chapter shall describe such will, and any other will of the same testator on file in the surrogate's office, and set forth the names and post office addresses, so far as they can be obtained with due diligence, of all the devisees, legatees and beneficiaries named in said will, or in any other will so filed.

Former § 2614 of this Code, modified. From L. 1837, c. 406, § 4; L. 1897, c. 177.

§ 2610. Who to be cited thereupon; contents of citation.

The following persons must be cited upon a petition, presented as prescribed in the last section:

If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator.

If the will relates exclusively to personal property, the husband or wife, if any, and all the next of kin of the testator.

If the will relates to both real and personal property, the husband or wife, if any, and all the heirs, and all the next of kin of the testator.

In every case, each person designated in the will as executor, testamentary trustee or guardian, and each person named as executor, testamentary trustee or guardian, or beneficiary in any other will of the same testator filed in the surrogate's office.

In addition to the general contents contained in sections 2523 and 2524 of this chapter, the citation must also set forth the name of the person by whom the will is propounded; whether the will relates exclusively to real property, or to personal property, or to both; and if the will is nuncupative, that fact.

Former §§ 2615, 2616 of this Code, consolidated and modified. From 2 R. S. (Part 2, c. 6, tit. 2), § 37; L. 1837, c. 460, §§ 5, 7; L. 1891, c. 174; L. 1892, c. 627; L. 1894, c. 118; L. 1905, c. 438; L. 1911, c. 433.

§ 2611. Witnesses to be examined; proof required.

Before a written will is admitted to probate, two, at least, of the subscribing witnesses must be produced and examined, if so many are within the state, and competent and able to testify. Before a nuncupative will is admitted to probate, its execution and the tenor thereof must be proved by at least two witnesses. The proofs must be reduced to writing. Any party to the proceeding may request the oral examination of the subscribing witnesses to the will and may examine such witnesses and any other witness produced by the proponent before the surrogate, without first filing objections to the probate of such will.

Former § 2618 of this Code, modified. From L. 1837, c. 460, §§ 10, 11; L. 1841, c. 129, §§ 1, 2, 3; L. 1913, c. 412.

§ 2612. Absent, etc., witnesses to be accounted for; dispensing with testimony; commission; proof of handwriting.

The death, absence from the state, or incompetency by reason of lunacy, or otherwise of a subscribing witness required to be examined as prescribed in this or the last section, or the fact that such witness cannot, with due diligence, be found within the state, or cannot be examined by reason of his physical or mental condition may be shown by affidavit or other competent evidence, and when so shown to the satisfaction of the surrogate, the surrogate may by an order entered in the minutes or recited in the decree dispense with his testimony; or in a case where such witness is absent from the state and it is shown that his testimony can be obtained with reasonable diligence, the surrogate may, in his discretion, and shall upon the demand of any party, require his testimony to be taken by commission. Where the testimony of a subscribing witness has been dispensed with as provided in this section, and one subscribing witness has been examined, the will may be admitted to probate upon the testimony of such subscribing witness alone.

If all the subscribing witnesses to a written will be dead, or incompetent by reason of lunacy or otherwise, to testify, or unable to testify, or are absent from the state and their testimony has been dispensed with as provided in this section, or if a subscribing witness has forgotten the occurrence, or testifies against the execution of the will, or was not present with the other witness at the execution of the will; the will may nevertheless be established, upon proof of

the handwriting of the testator, and of the subscribing witnesses, and also of such other circumstances as would be sufficient to prove the will upon the trial of an action.

Former §§ 2619, 2620 of this Code, modified. From L. 1837, c. 460, §§ 10, 11, 20; L. 1882, c. 399; L. 1888, c. 508; L. 1902, c. 114.

§ 2613. Proof of lost or destroyed will.

A lost or destroyed will can be admitted to probate in a surrogate's court, but only in a case where a judgment establishing the will could be rendered by the supreme court, as prescribed in section 1865 of this act.

Former § 2621 of this Code. From L. 1870, c. 359, § 8; see 2 R. S. 68, § 67b.

§ 2614. Probate not allowed, unless surrogate satisfied, etc.

Before admitting a will to probate, the surrogate must inquire particularly into all the facts and circumstances, and must be satisfied with the genuineness of the will, and the validity of its execution.

If it appears to the surrogate that the will was duly executed; and that the testator, at the time of executing it, was in all respects competent to make a will and not under restraint; it must be admitted to probate as a will valid to pass real property, or personal property, or both, as the surrogate determines, and the petition and citation require, and must be recorded accordingly. The decree admitting it to probate must state whether the probate was or was not contested.

Former §§ 2622, 2623 of this Code, consolidated and modified. From L. 1837, c. 460, §§ 17, 10; 2 R. S. 58 (Part 2, c. 6, tit. 1), § 14; L. 1877, c. 206, § 2.

§ 2615. Construction of will, how obtained.

An executor, administrator with the will annexed, or any person interested in obtaining a determination as to the validity, construction or effect of any disposition of property contained in a will, may present to the surrogate's court in which such will was probated, a petition setting forth the facts which show his interest, the names and post-office addresses of the other parties interested, and the particular portion of such will concerning which he requests the determination of the court.

If the surrogate entertains the application, a citation shall issue to all persons interested in the question to be presented, to show cause why such determination should not be made. On the return of the citation the surrogate shall make such decree as justice requires.

If a party expressly puts in issue in a proceeding for the probate of a will the validity, construction, or effect of any disposition of property, contained in such will, the surrogate may determine the question, upon rendering a decree, after notice given in such manner as the surrogate directs to all persons interested who do not appear on such application in person or by attorney; or, unless the decree refuses to admit the will to probate, by reason of a failure to prove any of the matters specified in section 2614, may admit the will to probate and reserve the questions so raised for future consideration and decree.

In part from former § 2624 of this Code. From L. 1870, c. 359, § 11; L. 1910, c. 584.

§ 2616. Notice of probate to legatees and devisees.

Before letters are issued, there shall be filed in the surrogate's court a written notice, entitled in the proceeding, stating the name of the testator, that his last will and testament has been offered for probate, or probated, as the case may be, and the name and post-office address of the proponent, and of each and every legatee, devisee or other beneficiary, as set forth in the petition, who has not been cited or has not appeared or waived citation, with proof by affidavit of the mailing of a copy of such notice to each of said beneficiaries.

New.

§ 2617. Who may file objections to the probate of an alleged will; jury trial.

Any person interested in the event as devisee, legatee or otherwise, in a will or codicil offered for probate; or interested as heir-at-law, next of kin, or otherwise, in any property, any portion of which is disposed of or affected, or any portion of which is attempted to be disposed of or affected, by a will or codicil offered for probate; or is interested as devisee, legatee, executor, testamentary trustee or guardian in any other will or codicil alleged to have been made by the same testator and not duly revoked by him; may file objections to any will or codicil so offered for probate.

Such objections must be filed at or before the close of the testimony taken before the surrogate on behalf of the proponent, or at such subsequent time as the surrogate may direct, and if a jury trial of any issue is desired the same shall be demanded in the objections.

New.

§ 2618. Notice to legatees and devisees of objections filed.

Whenever objections are filed to the probate of a will, the proponent shall file the notice specified in section 2616 and serve the same on each of the parties therein named, and upon any other persons directed by the surrogate to be notified, in such manner and within such time as the surrogate shall direct, which notice shall have the additional statement included in or endorsed thereon that objections have been filed to the probate of such will and that the same will be heard on a day or at a term of court therein stated. Proof of due service of such notice shall be made and filed in the surrogate's office, and any decree in the proceeding shall not affect the right or interest of any such person unless he shall have been so notified.

New; see former § 2617 of this Code.

§ 2619. Proceedings upon jury trial of contested probate.

Upon the trial before the court and a jury of the objections filed to the probate of a will, or codicil, or either, the verdict of the jury or any order or decision of the judge holding the court shall be entered in the minutes of the court; and if the trial was not held in the surrogate's court, such verdict, order or decision shall be certified by the clerk of the court to the surrogate's court, whereupon the surrogate shall enter a final decree accordingly.

New.

§ 2620. Wills to be recorded and retained; exception.

Every will admitted to probate, together with the decree, order or judgment admitting it to probate shall be recorded in the proper surrogate's court. Where a written will is proved, it must be filed and remain in the surrogate's office. But when it shall be shown, by affidavit or otherwise, to the satisfaction of the surrogate, that the decedent left real or personal property in another state or territory of the United States or in a foreign country, and that the laws of such state, territory or country require the production of the original will before the provisions thereof become effective, the surrogate may, at any time after probate, and upon such notice to the parties interested in the estate as he may think proper, cause any original will remaining on file in his office to be sent by post or otherwise to any court which, or to any officer of such state, territory or country who, under the laws thereof, is empowered to receive the same for probate, or may deliver such will to any person interested in the probate thereof in such state, territory or country, or to his representative, upon such terms as he shall think proper for the preservation of the will and the protection of other parties interested in the estate.

From former § 2620 of this Code.

§ 2621. Will certified, or record thereof, may be read in evidence.

The surrogate must cause to be indorsed upon, or annexed to, the original will admitted to probate, or the exemplified copy, or statement of the tenor of the will, which was admitted without production of an original written will, a certificate, under his hand, or the hand of the clerk of his court, and his seal of office, stating that it has, upon due proof, been admitted to probate, as a will valid to pass real or personal property, or both, as the case may be. The will, or the copy or statement, so authenticated, the record thereof, or an exemplified copy of the record, may be read in evidence, as proof of the original will, or of the contents or tenor thereof, without further evidence, and with the effect specified in this chapter.

Former § 2629 of this Code. From 2 R. S. 58, § 15; Id., 80, § 58; L. 1882, c. 399; L. 1910, c. 578.

§ 2622. Recording wills proved elsewhere within the state.

A certified copy of a will of real property, proved and recorded in any court of the state of competent jurisdiction, must be recorded upon the request of any person interested therein, in the office of the county clerk or register as the case requires of any county in which real property of the testator is situated.

Former § 2630 of this Code. From L. 1837, c. 460, § 68.

§ 2623. Records of certain wills heretofore proved; how far evidence.

The exemplification of the record of a will, proved before the judge of the former court of probate, and recorded in his office before the first day of January, in the year 1785, certified under the seal of the officer having custody of the record, must be admitted in evidence in any case, after it has been made to appear that diligent and fruitless search has been made for the original will.

A certified copy of the last will and testament of any deceased

person, which has been admitted to probate, whether as a will of real or personal property, or both, and recorded in the office of the surrogate in any county of this state, shall be admitted in evidence in any of the courts of this state, without the proofs and examination taken on the probate thereof, and whether such proofs shall have been recorded or not, with like effect as if the original of such will had been produced and proven in such court, when thirty years have elapsed since the will was admitted to probate and recorded. And the recording of such will shall be evidence that the same was duly admitted to probate. The exemplification of the record of a will which has been proved before the surrogate or judge of probate, or other officer exercising the like jurisdiction of another state must, when certified by the officer having by law, when the certificate was made, custody of the record, be admitted in evidence as if the original will was produced and proved, when thirty years have elapsed since the will was proved.

Former §§ 2631, 2632 of this Code, combined. From 2 R. S. 59, § 20; L. 1871, c. 361, § 1; L. 1881, c. 705; L. 1894, c. 89; L. 1901, c. 540.

2624. Revocation of letters upon proof of will.

Where, after letters of administration, on the ground of intestacy, have been granted, a will is admitted to probate, and letters are issued thereupon; or where a subsequent will is admitted to probate and letters are issued thereupon; the decree, granting probate, must revoke the former letters.

Former § 2684 of this Code. From 2 R. S. 78 (Part 2, c. 6, tit. 2), § 46.

§ 2625. When letters testamentary may be issued.

After a will has been admitted to probate any person entitled to letters thereunder who is competent by law to serve, and who appears and qualifies, is entitled to letters testamentary thereupon.

A person entitled to letters upon a contingency may appear and show that the contingency has happened by which he is entitled to such letters.

A person named as an executor by a person other than the testator under a valid power contained in a will, must appear and file an acknowledged or proved, and duly certified selection of himself as an executor within fifteen days after the date of the decree admitting the will to probate, in default whereof the power of selection is deemed to have been renounced, unless for good cause shown the surrogate extends such time or relieves the default.

New. From §§ 2636, 2640 of this Code.

§ 2626. Supplementary letters; executors not named in letters not to act.

If the disability of a person under age, or an alien named as executor in a will, be removed before the execution of the provisions of such will is completed, he shall be entitled, on petition being filed setting forth the facts to supplementary letters testamentary, to be issued in the same manner as the original letters, and authorized to join in the execution of the will with the persons previously appointed. A person named in a will as executor, shall be deemed to be superseded by the issue to another person of letters testamentary,

and shall have no power or authority whatever as such executor until he appears and qualifies.

Former § 2613 of this Code, modified. From 2 R. S. 70, 71, 72, §§ 5, 15, 16, 22; L. 1893, c. 686.

§ 2627. Executor failing to qualify or renounce, how excluded.

If a person named as executor in a will, does not qualify or renounce, within fifteen days after probate thereof; or if a person chosen by virtue of a power in the will, does not qualify or renounce within fifteen days after the filing of the instrument designating him; or, in either case, if objections are filed, and the executor does not qualify or renounce, within five days after they are determined, in his favor, or, in a case specified in section 2567 of this chapter, within five days after an objection has been established; the surrogate must, upon the application of any other executor, or any creditor or person interested in the estate, make an order requiring him to qualify within a time therein specified; and directing that, in default of so doing, he be deemed to have renounced his appointment. Where it appears, by affidavit, or other written proof, to the satisfaction of the surrogate, that such an order cannot, with due diligence, be served personally within the state, upon the person therein named, the surrogate may prescribe the manner in which it must be served, which may be by publication. If the person, so appointed executor, does not qualify within the time fixed, or within such further time as the surrogate allows for that purpose, an order must be made reciting the facts, and declaring that he has renounced his appointment as executor. Such an order may be revoked by the surrogate in his discretion, and letters testamentary may be issued to the person so failing to renounce or qualify, upon his application, in a case where he might have retracted an express renunciation, as prescribed in the next section.

Former § 2642 of this Code. From 2 R. S. 70, 71 (Part 2, c. 6, tit. 2), §§ 9, 10, 11, 12; L. 1883, c. 401.

§ 2628. Renunciation by nominated executor; retraction thereof.

A person, named as executor in a will, may renounce the appointment by an instrument in writing, signed by him, and acknowledged, or proved, and duly certified, or attested by one or more witnesses, and proved to the satisfaction of the surrogate. Such a renunciation may be retracted by a like instrument, at any time before letters testamentary, or letters of administration with the will annexed, have been issued to any other person in his place; or, after they have been so issued, if they have been revoked, or the person to whom they were issued, has died, or become a lunatic, and there is no other acting executor or administrator. Where a retraction is so made, letters testamentary may, in the discretion of the surrogate, be issued to the person making it upon such notice as the surrogate may require. An instrument specified in this section must be filed in the surrogate's office.

Former § 2639 of this Code. From 2 R. S. 70, § 8.

§ 2629. Ancillary letters upon foreign probate.

Where a will of personal property made by a person who resided without the state at the time of the execution thereof, or at the time

of his death, has been admitted to probate or established within the foreign country, or admitted to probate within the state or the territory of the United States, where it was executed, or where the testator resided at the time of his death; the surrogate's court having jurisdiction of the estate, must, upon an application made as prescribed in this article, accompanied by a copy of the will, and of the foreign letters, if any have been issued, authenticated as prescribed in section 45 of the decedent estate law, record the will and the foreign letters, and issue thereupon ancillary letters testamentary, or ancillary letters of administration with the will annexed, as the case requires.

Former § 2695 of this Code. From 2 R. S. 67 (Part 2, c. 6, tit. 1), § 68a; L. 1840, c. 384, § 2; L. 1888, c. 495; L. 1909, c. 65.

§ 2630. Id.; upon foreign grant of administration.

Upon application by the party entitled as hereinafter provided, or by his duly authorized attorney-in-fact made as prescribed in this article, to a surrogate's court having jurisdiction of the estate, and upon the presentation of a copy, authenticated as prescribed in section 45 of the decedent estate law, of letters of administration upon the estate of a decedent who resided at the time of his death without this state, but within the United States, granted within the state or territory where the decedent so resided, or, in cases where the decedent, at the time of his death, resided without the United States, upon the presentation to such surrogate's court of satisfactory proof that the party so applying either personally or by such attorney-in-fact, is entitled to the possession in the foreign country of the personal estate of such decedent, the surrogate's court to which such copy of such foreign letters so authenticated, or such proof, is so presented, must issue ancillary letters of administration in accordance with such application, except in the following cases:

1. Where original letters testamentary or ancillary letters upon foreign probate have been previously issued, or the application therefor has not been finally disposed of.

2. Where original letters of administration, upon the estate, have been previously issued to a person entitled to the same, who is legally competent to act, or the application therefor has not been finally disposed of.

Former § 2696 of this Code, modified. From 2 R. S. 75 (Part 2, c. 6, tit. 2), § 31; L. 1881, c. 535; L. 1888, c. 495; L. 1909, c. 65.

§ 2631. To whom ancillary letters granted.

Where the will specially appoints one or more persons as the executor or executors thereof, with respect to personal property situated within the state, the ancillary letters testamentary must be directed to the person or persons so appointed, or to those who are competent to act and who qualify. If all are incompetent or fail to qualify, or in a case where such an appointment is not made, ancillary letters testamentary, or ancillary letters of administration, issued as prescribed in this article, must be directed to the person named in the foreign letters or to the person otherwise entitled to the possession of the personal property of the decedent, unless another person applies therefor, and files with his petition, an instrument, executed

by the foreign executor or administrator, or person otherwise entitled as aforesaid; or, if there are two or more, by all who have qualified and are acting; and also acknowledged, or proved, and duly certified, authorizing the petitioner to receive such ancillary letters, in which case, the surrogate must, if the petitioner is a fit and competent person, issue such letters directed to him. Where two or more persons are named in the foreign letters, or in an instrument executed as prescribed in this section, the ancillary letters may be directed to either or any of them, without naming the others, if the others fail to qualify, or if, for good cause shown to the surrogate's satisfaction, the decree so directs.

Former § 2697 of this Code. From L. 1863, c. 403, § 1; L. 1881, c. 535.

§ 2632. Petition; citation.

An application for ancillary letters testamentary, or ancillary letters of administration, as prescribed in this article, must be made by petition which must set forth the amount of security given on the original appointment, the name and residence of each creditor, or person claiming to be a creditor residing within the state, and the amount of his claim so far as the same may be ascertained. Citation shall thereupon issue to the state comptroller, and to such creditors, and may issue generally to all creditors or persons claiming to be creditors.

Former § 2698 of this Code, modified. From L. 1863, c. 403, §§ 2, 3; L. 1899, 717; L. 1910, c. 234.

§ 2633. Hearing; security.

Upon the return of the citation, the surrogate must ascertain, as nearly as he can do so, the amount of debts due or claimed to be due, from the decedent to residents of the state. Before ancillary letters are issued, the person to whom they are awarded, must qualify, as prescribed for the qualification of an administrator upon the estate of an intestate; except that the penalty of the bond may, in the discretion of the surrogate, be in such a sum, not exceeding twice the amount which appears to be due from the decedent to residents of the state, as will, in the surrogate's opinion, effectually secure the payment of those debts; or the sums which the resident creditors will be entitled to receive, from the persons to whom the letters are issued, upon an accounting and distribution, either within the state, or within the jurisdiction where the principal letters were issued. If however there appear to be no such creditors, or transfer tax assessable, and a citation to show cause why such letters should not issue without a bond, has been directed generally to all creditors within the state and has been duly served by publication, such letters may issue without a bond.

Former § 2699 of this Code. From L. 1863, c. 403, § 1.

§ 2634. Persons acting under ancillary letters must transmit assets.

The person to whom ancillary letters are issued, as prescribed in this article, must unless otherwise directed in the decree awarding the letters; or in a decree made upon an accounting; or by an order of the surrogate, made during the administration of the estate; or by the judgment or order of a court of record, in an action to which

that person is a party; transmit the money and other personal property of the decedent, received by him after the letters are issued, or then in his hands in another capacity, to the state, territory, or country, where the principal letters were granted, to be disposed of pursuant to the laws thereof.

Former § 2700 of this Code.

§ 2635. Id.; when they may be directed to pay, etc., without transmission.

The surrogate's court, or any court of the state, which has jurisdiction of an action to procure an accounting, or a judgment construing the will, may in a proper case, by its judgment or decree, direct a person, to whom ancillary letters are issued as prescribed in this article, to pay, out of the money or the avails of the property, received by him under the ancillary letters, and with which he is chargeable upon his accounting, the debts of the decedent, due to creditors residing within the state; or, if the amount of all the decedent's debts here and elsewhere exceeds the amount of all the decedent's personal property applicable thereto, to pay such a sum to each creditor, residing within the state as equals that creditor's share of all the distributable assets, or to distribute the same among the legatees or next of kin, or otherwise dispose of the same, as justice requires.

Former § 2701 of this Code.

§ 2636. Id.; general powers and duties.

The provisions of this chapter, relating to the rights, powers, duties and liabilities of an executor or administrator, apply to a person to whom ancillary letters are granted, as prescribed in this article; except those contained in title fourth thereof relating to the mortgage, lease or sale of real property, or where special provision is otherwise made in this article; or where a contrary intent is expressed in, or plainly to be inferred from, the context.

Former § 2702 of this Code.

§ 2637. How testamentary trustee shall qualify.

A testamentary trustee named in a will or appointed by the surrogate shall, before exercising the duties of his office, qualify by taking and filing with the surrogate an oath of office and such bond as may be required by the surrogate.

A trust company or other trustee exempted by law from taking an oath of office, and filing a bond, shall file a consent to accept such appointment duly executed and acknowledged.

New.

§ 2638. Appointment of successor.

When all the persons named in a will as testamentary trustees die prior to the probate of the will, or by an instrument in writing renounce the appointment, or when all the testamentary trustees die or become incompetent, or are by a decree of the surrogate's court, removed, or allowed to resign, or where one of two or more persons named in a will as testamentary trustees dies prior to the probate of the will, or by an instrument in writing, renounces his or

their appointment, or where one of two or more testamentary trustees dies or becomes a lunatic, or is by decree of the surrogate's court removed or allowed to resign, and the trust has not been fully executed, the surrogate's court may appoint a successor or successors, unless such appointment would contravene the express terms of the will, or in a case where there is a trustee in office, unless all the beneficiaries waive such appointment in writing. Until a successor is appointed the remaining trustee or trustees may proceed and execute the trust. The successor may be appointed upon the application of any person interested and upon notice to such persons as the surrogate may designate.

Former § 2818 of this Code, modified, see L. 1870, c. 359, § 3; L. 1884, c. 408; L. 1903, c. 370.

§ 2639. Security to be required from a trustee or executor acting as trustee.

Whenever by any last will and testament, or by an order of the surrogate's court, a trustee is appointed, or an executor is appointed who is required to hold, manage, or invest any money, securities or property real or personal for the benefit of another, such trustee, or executor, before receiving any such property into his possession or control shall, unless contrary to the express terms of the will, execute to the people of the state of New York, in the usual form, a bond with sufficient surety or sureties in an amount to be fixed by the surrogate. Upon any judicial settlement and partial distribution of such estate or fund the decree may provide for the discharge of the existing bond, and the filing of a new bond covering the amount still remaining in the hands of such executor or trustee.

This section shall not affect any executor or trustee named in a will executed before this section takes effect.

New.

§ 2640. Proceedings where testamentary trustee is also executor or administrator.

Where the same person is a testamentary trustee, and also the executor of the will, or an administrator upon the same estate, proceedings taken by or against him, as prescribed in this chapter, do not affect him as executor or administrator, or the creditors of, or persons interested in, the general estate, except in one of the following cases:

1. Where he presents a petition, praying for the revocation of his letters, he may, also, in the same petition, set forth the facts upon showing which he would be allowed to resign as testamentary trustee; and may thereupon pray for a decree allowing him so to resign, and for a citation accordingly.

2. Where a person presents a petition, praying for the revocation of letters issued to an executor or administrator; and any of the facts set forth in the petition are made, by the provisions of this chapter, sufficient to entitle the same person to present a petition praying for the removal of a testamentary trustee; the petitioner may pray for a decree removing the person complained of in both capacities, and for a citation accordingly.

In either case, proceedings upon the petition for the resignation or removal, as the case requires, of the testamentary trustee, and for

the judicial settlement of his account, may be taken, as prescribed in this chapter, in connection with, or separately from, the like proceedings upon the petition for the revocation of the letters, as the surrogate directs.

Former § 2819 of this Code.

§ 2641. Application of this chapter.

The provisions of this chapter apply to a trust created by the will of a resident of the state, or relating to real property, situated within the state, without regard to the residence of the trustee, or the time of the execution of the will.

Former § 2820 of this Code.

ARTICLE THIRD.

Appointment and qualification of general, ancillary and testamentary guardians, and guardians by deed; filing and examining guardians' annual accounts.

Sec. 2642. Guardian by judicial appointment and approval.
2643. Power of court to appoint guardians.
2644. Jurisdiction to appoint general guardian.
2645. Petition for appointment of general guardian of infant; by whom made
2646. Petition for appointment of general guardian for infant; contents.
2647. Who shall be cited; discretion of surrogate.
2648. Hearing.
2649. Decree appointing general guardian; term of office
2650. Qualification of general guardian of property.
2651. Limited and restrictive letters of guardianship.
2652. Id.; of general guardian of person.
2653. Appointment of general guardian by supreme court.
2654. Application for ancillary letters to foreign guardians.
2655. Proceedings thereupon.
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2657. Will or deed containing appointment to be proved, etc., and recorded.
2658. Guardian by will or deed; qualification, letters, etc.
2659. Appointment of successor.
2660. Guardian to file annual inventory and account.
2661. Affidavit to be annexed thereto.
2662. Annual examination of guardian's accounts.
2663. Proceedings, when account defective, etc.
2664. Surrogate may direct as to infant's maintenance.

§ 2642. Guardian by judicial appointment and approval.

A general guardian is one appointed by the supreme, or surrogate's court, for an infant, either over or under fourteen years of age.

A guardian by will is one appointed by the will of a father or mother in accordance with the provision of the domestic relations law and of section 1745 of the code of civil procedure, who has duly qualified pursuant to the provisions of this article.

A guardian by deed is one appointed by the deed of a father or mother in accordance with the provisions of the domestic relations law, who has duly qualified pursuant to the provisions of this article.

The term "guardian" as used in this chapter applies to all such guardians, except ancillary guardians.

New.

§ 2643. Power of court to appoint guardians.

The surrogate's court has the like power and authority to appoint a general guardian of the person or of the property, or both, of an infant, which the chancellor had, on the thirty-first day of December, 1846. It has also power and authority to appoint a general guardian, of the person or of the property, or both, of an infant whose father or mother is living, and to appoint a general guardian of the property only, of an infant married woman. Such power and authority must be exercised in like manner as they were exercised by the court of chancery, subject to the provisions of this act.

Former § 2821 of this Code. From 2 R. S. 151 (Part 2, c. 8, tit. 3), § 6; L. 1870, c. 341; L. 1871, c. 708.

§ 2644. Jurisdiction to appoint general guardian.

Where an infant has no guardian, a surrogate's court has jurisdiction to appoint a general guardian of an infant's person, or property, or of both, in the following cases:

1. Where the infant is a resident of that county, or has sojourned in that county for at least one year immediately preceding the application.

2. Where the infant is not a resident of the state, but has property, real or personal, situated in that county.

From § 2822 of this Code, in part.

§ 2645. Petition for appointment of general guardian of infant; by whom made.

A petition for the appointment of a general guardian of the person, or property, or both, of an infant over the age of fourteen years must be made by the infant, except that such a petition may be made by any person where such infant is of unsound mind or refuses to make such petition, and in the judgment of the surrogate it is necessary or proper that such a guardian should be appointed.

A petition for the appointment of a general guardian of the person, or property, or both, of an infant under the age of fourteen years may be made by any person in behalf of such infant.

From §§ 2822, 2826, 2827 of this Code, in part.

§ 2646. Petition for appointment of general guardian for infant; contents.

A petition for the appointment of a general guardian of an infant shall set forth:

1. The full name, residence and date of birth.

2. The names of the father and mother and whether or not they are living, and if living, their place of residence; the name and address of the person with whom such infant resides; and the names and addresses of the nearest next-of-kin of full age residing in the county, if both father and mother are dead.

3. Whether the infant has had, at any time, a guardian appointed by will or deed, or an acting guardian in socage, or a guardian of the person appointed pursuant to section 86 of the domestic relations law.

4. The estimated value of the personal property, and of the annual income from any other personal property or real estate, to which the infant is or will be entitled.

5. The facts upon which the jurisdiction of the court depends.

6. If either parent is living and there are reasons why the parent should not be appointed such guardian, the reasons therefor.

7. If the petitioner be a non-resident married woman, and the petition relates to personal property only, it must affirmatively show that the property is not subject to the control or disposition of her husband, by the law of the petitioner's residence, and must set forth the name and residence of such husband.

8. The petition may set forth the reasons why a person named therein would be a proper and suitable person to be appointed such general guardian.

From §§ 2822, 2823, 2827 of this Code, in part.

§ 2647. Who shall be cited; discretion of surrogate.

Upon presentation of the petition, a citation to show cause why the application should not be granted shall be issued as follows:

1. To the parent or parents, who are within the state and whose residences therein are known, or if there be none, to the grandparents who are within the county.

2. To the person having the care and custody of the infant, or with whom he resides.

3. If the application is made on behalf of an infant over fourteen years of age by any person on the infant's refusal to make such application, to the infant.

4. If the application is made by a married woman, to her husband only.

But no citation shall be necessary to a parent who has abandoned the infant, or is deprived of civil rights, or divorced from the petitioner because of his or her adultery, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child; or in case the petitioner is a married woman to a husband who has abandoned her, or is deprived of civil rights, or divorced because of his adultery, or adjudged to be insane or an habitual drunkard.

The surrogate must inquire and ascertain as far as practicable, what relatives of the infant reside in his county or elsewhere, and with whom the infant resides; and he may in his discretion cite any relative or class of relatives to show cause why the appointment should not be made.

From §§ 2823, 2824 of this Code, in part.

§ 2648. Hearing.

Where a citation is not issued, or upon the return of a citation, the surrogate must inquire into all the facts and circumstances regarding the infant, his condition in life and surroundings, and also must ascertain as nearly as practicable the value of his personal property or income from personal property and of the rents and profits of his real property.

From §§ 2825, 2829 of this Code, in part.

§ 2649. Decree appointing general guardian; term of office.

If the surrogate is satisfied that the allegations of the petition are true in fact, and that the interests of the infant will be promoted by the appointment of a general guardian, either of his person, or of his property, or of both, he must make a decree accordingly. The same person may be appointed general guardian of both the person and the property of the infant, or the guardianship of the person and of the property may be committed to different persons. The surrogate may, in his discretion, appoint a person other than the father or mother of the infant, or other than the person nominated by the petitioner.

The term of office of a general guardian so appointed expires when the infant attains the age of twenty-one years.

From §§ 2821, 2828 of this Code, in part.

§ 2650. [Am'd, 1915.] Qualification of guardian of property.

Before letters of guardianship of an infant's property are issued

by the surrogate's court, the person appointed must take an official oath as prescribed by law and execute to the infant, and file in the surrogate's office his bond, with at least two sureties in a penalty, fixed by the surrogate, not less than twice the value of the personal property, and of the rents and profits of the real property, and of the annual income receivable by him from any funds of which the general guardian will not have possession, conditioned that the guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate touching the trust, and that he will, in all things, render a just and true account of all moneys and other properties received by him, and the application thereof, and of his guardianship, whenever required so to do, by a court of competent jurisdiction; but the surrogate may, in his discretion, limit the amount of the bond to not less than twice the value of the personal property, and of the rents and profits of the real property or such annual income receivable by him for the term of three years.

Where the property of the infant does not exceed the sum or value of $2,000, as shown by the petition, the surrogate may, in his discretion, make an order dispensing with such bond wholly or partly, and directing that the guardian collect and receive the moneys and property of his ward jointly with a person designated in the order, and that all such moneys and other property, so far as the same are conveniently capable of deposit, shall be deposited in the name of such guardian, subject to the order of the surrogate, with such bank, savings bank, trust company, or safe deposit company as shall be designated in such order, and shall be withdrawn or removed only on the order of the surrogate.

The letters issued thereupon shall contain the substance of the order.

The cost of the safe deposit box shall be a county charge.

Former § 2830 of this Code. From 2 R. S. 150, § 8; L. 1881, c. 585; L. 1892, c. 559. Am'd by L. 1914, c. 520; L. 1915, c. 642 (in effect May 14, 1915).

§ 2651. Limited and restrictive letters of guardianship.

In a case where a guardian of an infant is named or appointed, and it appears to be impracticable to give a bond sufficient to cover the whole amount of the infant's personal property, the surrogate may, in his discretion, accept security, approved by him, not less than twice the amount of the particular portion of the infant's property which the guardian will be authorized under the letters to receive; and issue letters thereon limited to the receiving and administering only such personal property for which double the security has been given, and restraining the guardian from receiving any other personal property of the infant, until the further order of the surrogate, on additional further satisfactory security.

From former § 2830 of this Code, in part, rewritten.

§ 2652. Id.; of general guardian of person.

Before letters of guardianship of an infant's person are issued by the surrogate's court, the person appointed must take the official oath, as prescribed by law. The surrogate may also require him to execute to the infant a bond, in a penalty fixed by the surrogate,

and with or without sureties, as to the surrogate seems proper; conditioned that the general guardian will in all things faithfully discharge the trust reposed in him, and duly account for all money or other property which may come to his hands, as directed by the surrogate's court.

Former § 2831 of this Code.

§ 2653. Appointment of general guardian by supreme court.

Where the supreme court, or any court other than the surrogate's court, appoints a general guardian of an infant's person, or property, or both, a certified copy of the order or decree appointing such guardian and of the bond or undertaking given by such guardian shall be filed by him in the surrogate's court of the county in which the infant resides, or if such infant be a nonresident, of the county in which such infant has property real or personal, and a minute thereof made and indexed in the book kept by the surrogate in which orders or decrees appointing guardians are entered. A guardian so appointed shall be subject to all the duties and liabilities of a general guardian specified in this title.

New.

§ 2654. Application for ancillary letters to foreign guardians.

1. Where an infant, who resides without the state, and within the United States, is entitled to property within the state, or to maintain an action in any court thereof, a guardian of his property, who has been appointed by a court of competent jurisdiction, within the state or territory where the ward resides, and has there given security, in at least twice the value of the personal property, and of the rents and profits of the real property, of the ward, may present, to the surrogate's court having jurisdiction, a petition, setting forth the facts, and particularly whether or not there are any debts due or to become due from the infant to a resident of this state, and that the security given is sufficient in amount to cover the property sought to be obtained through such letters, and that the court had jurisdiction of the infant, and praying for ancillary letters of guardianship accordingly. The petition must be accompanied with exemplified copies of the records and other papers, showing that he has been so appointed and has given the security required in this section, which must be authenticated in the mode prescribed in section 45 of the decedent estate law, for the authentication of records and papers, upon an application for ancillary letters testamentary, or ancillary letters of administration. Such petition and authenticated records and papers shall be conclusive evidence of the facts therein set forth in any court of this state.

2. Where an infant, who resides without the state, and within a foreign country is entitled to personal property within the state, or to maintain an action, or special proceeding in any court thereof respecting such personal property, a guardian of his property, authorized to act as such within the foreign country where the ward resides, may apply to the surrogate's court of the county where such personal property or any part thereof is situated, for ancillary letters of guardianship on the personal estate of such infant and the person so authorized must present to the surrogate's court having jurisdiction a petition setting forth the facts and such additional

allegations regarding debts and security as required in subdivision one of this section, and praying for ancillary letters of guardianship on the personal estate of such infant. The petition must be accompanied with the exemplified copies of the records and other papers showing the appointment of such foreign guardian, or where such foreign guardian has not been appointed by any court, with other proof of his authority to act as such guardian within such foreign country, and also with proof that pursuant to the laws of such foreign country, such foreign guardian is entitled to the possession of the ward's personal estate. Exemplified copies of the records, where used pursuant to this subdivision, must be authenticated by the seal of the court, or officer, by which or by whom such foreign guardian was appointed, or the officer having the custody of the seal or of the record thereof, and the signature of a judge of such court, or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by the certificate, under the principal seal of the department of foreign affairs, or the department of justice of such country, attested by the signature or seal of a United States consul. Such petition and authenticated records and papers shall be conclusive evidence of the facts therein set forth in any court of this state.

Former § 2838 of this Code. From L. 1870, c. 59, § 1; L. 1875, c. 442; L. 1889, c. 263; L. 1892, c. 576; L. 1897, c. 492; L. 1909, c. 65.

§ 2655. Proceedings thereupon.

Where the surrogate is satisfied upon the papers presented, as prescribed in the last section, that the case is within that section, and that it will be for the ward's interest that ancillary letters of guardianship should be issued to the petitioner, he may make a decree granting ancillary letters accordingly. Such a decree may be made without a citation, or a citation may issue to such persons as the surrogate thinks proper, to show cause why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must direct that any debts appearing to be due or owing from the infant to residents of this state be paid or security given therefor.

Former § 2839 of this Code. From L. 1870, c. 59, § 1; L. 1875, c. 442; L. 1892, c. 576.

§ 2656. Effect of such letters.

Ancillary letters of guardianship are issued as prescribed in the last section, without security except as provided in that section and without an oath of office. If issued in a case provided for in subdivision one of section 2654, they authorize the person to whom they are issued to demand and receive the personal property, and the rents and profits of the real property of the ward; to dispose of them in like manner as a general guardian of the property appointed as prescribed in this article; to remove them from the state, and to maintain or defend any action or special proceeding in the ward's behalf. If issued in a case provided for in subdivision two of section 2654, such ancillary letters of guardianship authorize the person to whom they are issued to demand and receive the personal property of the ward, and to dispose of it in like manner as a guardian of property appointed as prescribed in this article, and to maintain or

defend any action or special proceeding respecting such personal property in the ward's behalf. But in neither case do such letters authorize such ancillary guardian to receive from a resident guardian, executor, or administrator, or from a testamentary trustee, subject to the jurisdiction of a surrogate's court, money or other property belonging to the ward, in a case where letters have been issued to a guardian of the infant's property, from a surrogate's court of a county within the state, upon an allegation that the infant was a resident of that county, except by the special direction made upon good cause shown, of the surrogate's court from which the principal letters were issued, or unless the principal letters have been duly revoked.

Former § 2840 of this Code. From L. 1870, c. 59, § 1; L. 1889, c. 263.

§ 2657. Will or deed containing appointment to be proved, etc., and recorded.

A person shall not exercise, within the state, any power or authority, as guardian of the person or property of an infant, by virtue of an appointment contained in the will of the infant's father or mother, being a resident of the state, and dying after this chapter takes effect, unless the will has been duly admitted to probate, and recorded in the proper surrogate's court, and letters of guardianship have been issued to him thereupon; or by virtue of an appointment contained in a deed of the infant's father or mother, being a resident of the state, executed after this chapter takes effect, unless the deed has been acknowledged or proved, and certified, so as to entitle it to be recorded, and has been recorded in the office for recording deeds in the county, in which the person making the appointment resided, at the time of the execution thereof. Where a deed containing such an appointment is not recorded within three months after the death of the grantor, the person appointed is presumed to have renounced the appointment; and if a guardian is afterward duly appointed by a surrogate's court, the presumption is conclusive.

Former § 2851 of this Code. From L. 1877, c. 206, §§ 4-7.

§ 2658. Guardian by will or deed; qualification, letters, etc.

Where a will, containing the appointment of a guardian, is admitted to probate, or a deed is recorded as provided in the foregoing section, the person appointed guardian must, within thirty days thereafter, qualify by taking and filing his oath of office, and a bond as fixed by the surrogate, unless contrary to the express provision of the will or deed, and by filing a petition or affidavit setting forth the facts which entitle him to so qualify and receive letters; except that a trust company so named, instead of filing such oath and bond, shall file a consent to accept such appointment duly executed and acknowledged; otherwise he is deemed to have renounced the appointment. But the surrogate, either before or after the expiration of thirty days, may extend the time so to qualify, upon good cause shown, for not more than three months. A person appointed guardian by will or deed may, at any time before he qualifies, renounce the appointment by a written instrument, acknowledged, or proved, and duly certified, and filed in the surrogate's office.

Former § 2852 of this Code. From L. 1877, c. 206, §§ 4-7.

§ 2659. Appointment of successor.

Where no guardian appointed by will or deed remains in office on account of resignation, removal, or death, a general guardian may be appointed by the surrogate's court, with all the powers conferred by the will or deed and with the effect prescribed in section 2563 of this chapter; unless such an appointment would contravene the express terms of the will or deed.

Former § 2860 of this Code.

§ 2660. Guardian to file annual inventory and account.

A guardian of an infant's property must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remains under his control, file in the surrogate's court the following papers:

1. An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him, since his appointment, or since the filing of the last annual inventory, as the case requires; the value of each article or item so received; a list of the articles or items, remaining in his hands; a statement of the manner in which he has disposed of each article or item, not remaining in his hands; and a full description of the amount and nature of each investment of money, made by him.

2. A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money, during the preceding year; in which he must charge himself with any balance remaining in his hands, when the last account was rendered, and must distinctly state the amount of the balance remaining in his hands, at the conclusion of the year, to be charged to him in the next year's account.

3. The names and residences of the sureties on his bond; if natural persons whether they are living; and whether the security of the bond has become impaired.

Former §§ 2842, 2855 of this Code. From L. 1837, c. 460, § 57; L. 1913, c. 533.

§ 2661. Affidavit to be annexed thereto.

With the inventory and account, filed as prescribed in the last section, must be filed an affidavit, which must be made by the guardian, unless, for good cause shown in the affidavit, the surrogate permits the same to be made by an agent or attorney, who is cognizant of the facts. The affidavit must state, in substance, that the inventory and account contain, to the best of the affiant's knowledge and belief, a full and true statement of all the guardian's receipts and disbursements, on account of the ward; and of all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires; and of the value of all such property; together with a full and true statement and account of the manner, in which he has disposed of the same, and of all the property remaining in his hands, at the time of filing the inventory and account; and a full and true description of the amount, and nature of each investment made by him, since his appointment, or since the filing of the last annual inventory, and account, as the case requires; and that he does not know of any error or omission in the inventory or account, to the prejudice of the ward.

Former § 2843 of this Code. From L. 1837, c. 460, §§ 57, 58.

§ 2662. Annual examination of guardian's accounts.

In the month of February of each year and thereafter until completed, the surrogate must, for the purposes specified in the next section, examine or cause to be examined, under his direction, all inventories and accounts of guardians filed since the first day of February of the preceding year. The examination may be made by the clerk of the surrogate's court, or by a person specially appointed by the surrogate to make it, who must, before he enters upon the examination, subscribe and take before the surrogate, and file with the clerk of the surrogate's court, an oath faithfully to execute his duties and to make a true report to the surrogate.

Former § 2844 of this Code. From L. 1837, c. 460, § 58; L. 1881, c. 535.

§ 2663. Proceedings, when account defective, etc.

If it appears to the surrogate, upon an examination made as prescribed in the last section, or by the report of such special examiner, that a guardian of an infant's property, has omitted to file his annual inventory or account, or the affidavit relating thereto as prescribed in the last section but one; or if the surrogate is of the opinion, that the interest of the ward requires that the guardian should render a more full or satisfactory inventory or account; or where the surrogate has reason to believe that sufficient cause exists for the guardian's removal, the surrogate may, in his discretion, appoint a fit and proper person special guardian of the ward, for the purpose of filing a petition in his behalf, for the removal of the guardian, and prosecuting the necessary proceedings for that purpose. And in a like case where said special examiner has been appointed, the surrogate shall make an order appointing said examiner special guardian of such infant with authority to procure the filing of an amended account or a proper account, and to prosecute a proceeding for the removal of such guardian when necessary. The surrogate in all cases of examination or prosecution as aforesaid shall fix the fees and compensation of such special examiner and special guardian, and may in his discretion make an order charging them in whole or in part upon the guardian personally, the fund in his hands, or upon the county, in which latter case he shall certify the items thereof to the board of supervisors of the county or in the city of New York to the proper officers, and the same shall be audited and paid as other county or city charges.

Former §§ 2844, 2845 of this Code. From L. 1837, c. 460, § 60.

§ 2664. Surrogate may direct as to infant's maintenance.

Upon the petition of the guardian of an infant's person or property; or of the infant; or of any relative or other person in his behalf; the surrogate, upon notice to such persons, if any, as he thinks proper to notify, may make an order, directing the application, by the guardian of the infant's property, to the support and education of the infant, of such a sum as to the surrogate seems proper, out of the income of the infant's property; or, where the income is inadequate for that purpose, out of the principal.

Former § 2846 of this Code.

TITLE III-A.

Funds of Estates to be Kept Separate.

ARTICLE FIRST.

Funds of estates to be kept separate.

§ 2664-a. [Added, 1916.] Funds of estates to be kept separate.

Every executor, administrator, guardian or testamentary trustee shall keep the funds and property received from the estate of any deceased persons separate and distinct from his own personal fund and property. He shall not invest the same or deposit the same with any person, association or corporation doing business under the banking law or other person or institution, in his own name, but all transactions had and done by him shall be in his name as such executor, administrator, guardian or testamentary trustee.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

Added by L. 1916, c. 588 (in effect Sept. 1, 1916).

TITLE IV.

Ascertaining assets and debts; payment of debts and legacies; powers and duties of executors and administrators; mortgage, lease or sale of real property for payment of debts, funeral expenses, expenses of administration, and to satisfy charges thereon, and for distribution.

Article 1. Appointment of appraisers and making and returning inventory. Proceedings to discover property.
2. Presenting claims, their allowance, rejection and trial. Payment of debts, legacies and expenses. Sales of real estate by executors, administrators with the will annexed, and testamentary trustees under power contained in the will. Deposit of money or securities.
3. Applying rents, and proceeds of mortgage, lease or sale of real estate to the payment of debts, funeral and administration expenses, and charges upon real estate. Sale for distribution, and conveyance in confirmation of title.

ARTICLE FIRST.

Appointment of appraisers, and making and returning inventory; proceedings to discover property.

Sec. 2665. Appointment of appraisers and making inventory.
2666. Appraisal in different places; appraisal of newly discovered property.
2667. Contents of inventory.
2668. Return of inventory.
2669. Return of inventory; how compelled.
2670. Exemption for benefit of family.
2671. Proceedings to compel set-off of exempt property.
2672. What shall be deemed assets.
2673. Assets; debts due from executor to testator; effect of discharge by will.
2674. Apportionment of rents, annuities and dividends.
2675. Proceedings to discover property withheld.
2676. Trial and decree.

§ 2665. [Am'd, 1916.] Appointment of appraisers and making inventory.

On the application of an executor or administrator, an order must be entered in the surrogate's court appointing two disinterested appraisers, as often as may be necessary, to appraise the personal property of a deceased person. The executor or administrator, within three months after qualifying and after giving at least five days' notice personally or by mail to the legatees or next of kin, residing in the county of the decedent, and posting a notice in three public places of the town, or city where he resided, specifying the time and place at which the appraisement will be made, must make a true and perfect inventory of all the personal property of the decedent. Before making the appraisement, the appraisers must take and subscribe an oath, to be inserted in the inventory, that they will truly, honestly and impartially appraise the personal property exhibited to them, according to the best of their knowledge and ability. They must in the presence of such of the parties interested as attend, estimate and appraise the property exhibited to them, and set down each article separately with the value thereof in dollars and cents, distinctly, in figures opposite to the articles respectively.

Former § 2711 of this Code. From 2 R. S. 82 (Part 2, c. 6, tit. 3), §§ 1–5; L. 1873, c. 225; L. 1893, c. 686; L. 1901, c. 195. Am'd by L. 1916, c. 624 (in effect May 20, 1916).

§ 2666. Appraisal in different places; appraisal of newly discovered property.

Should any of the personal property to be inventoried be in different or distant places, the same appraisers may complete such inventory in any place where such property may be, and may adjourn the appraisal to such place; or, upon application duly made, the surrogate may appoint other appraisers to make the inventory of such unappraised property, and the same notice of such appraisal shall be given as for the local appraisal except the posting of notices.

If personal property not mentioned in any inventory come to the possession or knowledge of an executor or administrator, he must cause the same to be duly appraised, and an inventory thereof to be returned within one month after the discovery thereof; and the making of such inventory and return may be enforced in the same manner as in the case of a first inventory.

Parts of former §§ 2711, 2714 of this Code, combined and modified.

§ 2667. Contents of inventory.

The inventory must contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money belonging to the deceased, known to the executor or administrator and of all debts owing by such executor or administrator to the deceased whether discharged by the will or not, with the name of the debtor in each security, the date, the sum originally payable, the amount due at decedent's death and the sum which, in the judgment of the appraisers, is collectible on each security; and of all moneys belonging to the deceased, which have come to the hands of the executor or administrator.

Former § 2714 of this Code, in part. From 2 R. S. 84, §§ 11–14; Id., 56, § 24; L. 1893, c. 686.

§ 2668. Return of inventory.

Duplicates of the inventory must be made and signed by the appraisers, one of which must be retained by the executor or administrator, and the other filed in the surrogate's office within three months from the date of the letters. On returning such inventory, the executor or administrator must take and subscribe an oath, indorsed upon or annexed to the inventory, stating that the inventory is in all respects just and true, that it contains a true statement of all the personal property of the deceased which has come to his knowledge, and particularly of all money belonging to the deceased, and of all just claims of the deceased against him, according to the best of his knowledge. Any one executor or administrator, on the neglect of the others, may return an inventory; and the executors or administrators so neglecting shall not thereafter interfere with the administration or have any power over the personal property of the deceased; but the executor or administrator so returning the inventory shall have the whole administration, until the delinquent return, and verify an inventory in accordance with the provisions of this article.

Former § 2715 of this Code. From 2 R. S. 84, §§ 15, 16; Id., 86, § 23; L. 1888, c. 302.

§ 2669. Return of inventory; how compelled.

A creditor, coexecutor or coadministrator, or person interested

in the estate may present to the surrogate's court a petition showing that an executor or administrator has failed to return an inventory, or a sufficient inventory, within the time prescribed by law therefor. If the surrogate is satisfied that the executor or administrator is in default, he must make an order requiring the delinquent to return the inventory, or a further inventory, or in default thereof, to show cause at a time and place therein specified, why he should not be removed or punished. On the return of the order, if the delinquent has not filed a sufficient inventory, the surrogate may revoke his letters, or issue a warrant of arrest against him, on which the proceedings are the same as on a warrant issued for disobedience to an order, as prescribed in article one of title twelfth of chapter seventeenth of this act. A person committed to jail on the return of a warrant of arrest issued as prescribed in this section, may be discharged by the surrogate or a justice of the supreme court, on his paying and delivering, under oath, all the money and other property of the decedent, and all papers relating to the estate under his control, to the surrogate, or to a person authorized by the surrogate to receive the same.

Former § 2716 of this Code. From 2 R. S. 85, §§ 17, 18, 22, 24.

§ 2670. Exemption for benefit of family.

If a person having a family die, leaving a widow or husband, or minor child or children, the following articles shall not be deemed assets, but must be included and stated in the inventory of the estate as property set off to such widow, husband or minor child or children:

1. All house-keeping utensils, musical instruments, sewing machine and household furniture used in and about the house and premises, fuel and provisions, and the clothing of the deceased, in all not exceeding in value five hundred dollars.

2. The family bible, family pictures and school-books, used by or in such family, and books not exceeding in value fifty dollars, which were kept and used as part of the family library.

3. Domestic animals with their necessary food for sixty days, not exceeding in value one hundred and fifty dollars.

4. Money or other personal property not exceeding in value one hundred and fifty dollars.

Such property so set apart shall be the property of the surviving husband or wife, or of the minor child or children if there be no surviving husband or wife. No allowance shall be made in money or other property under subdivisions one, two and three if the articles mentioned therein do not exist.

Former § 2713 of this Code, modified. From 2 R. S. 83, 84, §§ 9, 10; L. 1842, c. 157; L. 1874, c. 470; L. 1889, c. 406; L. 1867, c. 782, § 13; L. 1887, c. 680; L. 1890, c. 173; L. 1893, c. 686.

§ 2671. Proceedings to compel set-off of exempt property.

Where an executor or administrator has failed to set apart property for a surviving husband, wife or child, as prescribed by law, the person aggrieved may present a petition to the surrogate's court, setting forth the failure and praying for a decree, requiring such executor or administrator to set apart the property accordingly; or, if it has been lost, injured or disposed of, to pay the value thereof, or

the amount of the injury thereto, and that he be cited to show cause why such a decree should not be made. If the surrogate is of the opinion that sufficient cause is shown, a citation shall issue accordingly. In a proper case, the decree may require the executor personally to pay the value of the property, or the amount of the injury thereto.

Former § 2724 of this Code, modified. See L. 1881, c. 535; L. 1893, c. 686.

§ 2672. What shall be deemed assets.

The following shall be deemed assets and go to the executors or administrators, to be applied and distributed as part of the personal property of the testator or intestate, and be included in the inventory:

1. Leases for years; lands held by the deceased from year to year; and estates held by him for the life of another person.

2. The interest remaining in him, at the time of his death, in a term of years after the expiration of any estate for years therein, granted by him or any other person.

3. The interest in lands devised to an executor for a term of years for the payment of debts.

4. Things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support.

5. The crops growing on the land of the deceased at the time of his death.

6. Every kind of produce raised annually by labor and cultivation, except growing grass and fruit ungathered.

7. Rent reserved to the deceased which had accrued at the time of his death.

8. Debts secured by mortgages, bonds, notes or bills; accounts, money, and bank bills, or other circulating medium, things in action, and stock in any corporation or joint-stock association.

9. Goods, wares, merchandise, utensils, furniture, cattle, provisions, moneys unpaid on contracts for the sale of lands, and every other species of personal property not hereinafter excepted. Things annexed to the freehold, or to a building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of this section. The right of an heir to any property, not enumerated in this section, which by the common law would descend to him, is not impaired by the general terms of this section.

Former § 2712 of this Code. From 2 R. S. 82, 83, §§ 6–8. See L. 1893, c. 686.

§ 2673. Assets; debt due from executor to testator; effect of discharge by will.

The naming of a person executor in a will does not operate as a discharge or bequest of any just claim due or to become due which the testator had against him; but it must be included among the credits and effects of the deceased in the inventory, and the executor shall be liable for the same as for so much money in his hands at the time the debt or demand becomes due, and he must apply and distribute the same in the payment of debts and legacies, and among the next of kin as part of the personal property of the deceased. The discharge or bequest in a will of a debt or demand of the testator against an executor named therein, or against any other person, is not

valid as against the creditors of the deceased; but must be construed only as a specific bequest of such debt or demand; and the amount thereof must be included in the inventory and, if necessary, be applied in the payment of his debts; and if not necessary for that purpose, must be paid in the same manner and proportion as other specific legacies.

Former § 2714 of this Code, in part. From 2 R. S. 84, §§ 11–14; Id., 56, § 24; see L. 1893, c. 686.

§ 2674. Apportionment of rents, annuities and dividends.

All rents reserved on any lease made after June 7, 1875, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issues or is derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. Every such person or his executors, administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, becomes due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts form parts, must be collected and recovered by the person or persons who, but for this section, or chapter 542 of the laws of 1875, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description.

Former § 2720 of this Code. From L. 1875, c. 542; L. 1893, c. 686.

§ 2675. Proceeding to discover property withheld.

An executor or administrator may present to the surrogate's court from which letters were issued to him, a petition setting forth on knowledge, or information and belief, any facts tending to show that money or other personal property which should be delivered to the petitioner, or included in an inventory or appraisal, is in the possession, under the control or within the knowledge or information of a person who withholds the same from him; or who refuses to im-

part knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, and praying an inquiry respecting it, and that the respondent may be ordered to attend the inquiry and be examined accordingly, and to deliver the property if in his control. The petition may be accompanied by an affidavit or other written evidence, tending to support the allegations thereof. If the surrogate is satisfied, on the papers so presented, that there are reasonable grounds for the inquiry, he must make an order accordingly, which may be made returnable forthwith, or at a future time fixed by the surrogate, and may be served at any time before the hearing. Service thereof must be made by delivery of a certified copy thereof to the person or persons named therein and the payment, or tender, to each of the sum required by law to be paid or tendered to a witness who is subpoenaed to attend a trial in surrogate's court.

Former § 2707 of this Code, modified. From L. 1870, c. 394, § 1; Id., c. 359, § 7; L. 1886, c. 308; see L. 1893, c. 686; L. 1903, c. 526.

§ 2676. Trial and decree.

If the person directed to appear submits an answer denying any knowledge concerning, or possession of, any property which belonged to the decedent in his lifetime, or shall make default in answer, he shall be sworn to answer truly all questions put to him touching the inquiry prayed for in the petition. If it appears that the petitioner is entitled to the possession of the property, the decree shall direct delivery thereof to him. If such answer alleges title to or the right to possession of any property involved in the inquiry, the issue raised by such answer shall be heard and determined and a decree made accordingly.

Former §§ 2709, 2710 of this Code, combined, in substance, with new procedure. From L. 1870, c. 394, §§ 3-5; L. 1881, c. 535; see L. 1893, c. 686; L. 1903, c. 526.

ARTICLE SECOND.

Presenting claims, their allowance, rejection and trial; payment of debts, legacies and expenses; sales of real estate by executors, administrators with the will annexed and testamentary trustees under power contained in the will; deposit of money and securities.

Sec. 2677. Notice to creditors; affidavit of claimant.
2678. Effect of failure to present claim pursuant to notice.
2679. Determination of issues arising between representative and the estate; suspension of statute of limitations in certain cases.
2680. Effect of admission and allowance of claim or debt by representative.
2681. Rejected claim to be tried on judicial settlement; limitation of action by creditor.
2682. Payment of debts.
2683. Surrogate may authorize representative to compromise, or compound, or sell debt or claim.
2684. Sale of personal property for payment of debts or legacies.
2685. Surrogate's court may make direction as to the value, manner and time of sale of property.
2686. Proceeding to compel payment of funeral expenses.
2687. Proceeding to compel payment of debt, legacy or distributive share, or delivery of property.
2688. Payment of legacies.
2689. Petition to compel payment of legacy or delivery of property, etc., by a testamentary trustee.
2690. Id.; proceedings upon return of citation.
2691. Decree for payment of legacy, etc., on giving security.
2692. Payment of expenses incurred by representative.
2693. Power and duty of executor before probate.
2694. Power to sell, mortgage or lease real estate may be executed by qualifying executors.
2695. Administrators with the will annexed; rights, powers and duties.
2696. Power to sell, mortgage or lease real estate may be executed by qualifying trustees or successors.
2697. Conveyance of real estate by executor or administrator to holder of contract of sale made by a decedent.
2698. Surrogate may direct as to custody, where coexecutors, etc., disagree.
2699. Money paid into court and securities taken; how disposed of.
2700. Deposit of securities may be ordered on revocation of letters.

§ 2677. Notice to creditors; affidavit of claimant.

The executor or administrator at any time after the granting of his letters, may insert a notice once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. The executor or administrator may require satisfactory vouchers in support of any claim presented and the affidavit of the claimant that the claim is justly due, that no payments have been made thereon, and that there are no offsets against the same to the knowledge of the claimant.

Former § 2718 of this Code, in part. From 2 R. S. 88, 89, §§ 34–39; L. 1859, c. 261; L. 1880, c. 245; L. 1890, c. 456; L. 1893, c. 686.

§ 2678. Effect of failure to present claim pursuant to notice.

If a claim against a deceased person be not presented to the executor or administrator within six months from the first publication of the notice to creditors, or, if no notice be published, within one year

from the date of issue of letters, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such claim was presented.

From former § 2718 of this Code, in part, modified.

§ 2679. Determination of issues arising between representative and the estate; suspension of statute of limitations in certain cases.

On the judicial settlement of the account of an executor or administrator, he may prove any debt owing to him by the decedent. Where a contest arises between the accounting party and any of the other parties, respecting property alleged to belong to the estate, but to which the accounting party lays claim individually; or respecting a debt alleged to be due by the accounting party to the decedent, or by the decedent to the accounting party, the contest must be tried and determined in the same manner as any other issue arising in the surrogate's court. From the death of the decedent until the first judicial settlement of the account of the executor or administrator, the running of the statute of limitations against a debt due from the decedent to the accounting party, or any other cause of action in favor of the latter against the decedent, is suspended, unless the accounting party was appointed on the revocation of former letters issued to another person, in which case the running of the statute is so suspended from the grant of letters to him until the first judicial settlement of his account. After the first judicial settlement of the account of an executor or administrator, the statute of limitations begins again to run against a debt due to him from the decedent, or any other cause of action in his favor against the decedent.

Former § 2731 of this Code. From 2 R. S. 88, § 33; L. 1837, c. 460, § 37; L. 1868, c. 594. See L. 1893, c. 686; L. 1895, c. 595.

§ 2680. Effect of admission and allowance of claim or debt by representative.

Whenever upon any accounting or judicial settlement of an account, the executor or administrator admits and allows a claim or debt against the deceased, other than his own claim, or has theretofore in writing admitted or allowed such a claim or debt, the validity of such claim or debt shall be thereby established.

When such a claim or debt has been so admitted or allowed, or a judgment against the executor or administrator has been obtained, whether either has been paid or not, any party adversely affected thereby may file objections thereto and may show that the claim or debt was fraudulently or negligently allowed, or paid, or that the judgment was obtained by fraud, negligence or collusion. If the surrogate shall sustain the objections in a case where the claim or judgment has not been paid, the claim shall be deemed to be rejected by the accountant at the time of such determination, and the time between the presentation of the claim, or the commencement of the action where the claim was not presented, and the time of such determination shall not be a part of the time limited in this act for commencing an action thereon.

New.

§ 2681. [Am'd, 1915.] Rejected claim to be tried on judicial settlement. Limitation of action by creditor.

If the executor or administrator doubts the justice or validity of any claim presented to him, he shall serve a notice in writing upon the claimant that he rejects said claim, or some part of it, which he specifies. Unless the claimant shall commence an action for the recovery thereof against the executor or administrator within three months after the rejection, or, if no part of the debt is then due, within two months after a part thereof becomes due, said claimant, and all the persons claiming under him, are forever barred from maintaining such action, and in such case said claim shall be tried and determined upon the judicial settlement.

Former § 1822 of this Code, modified; see also former §§ 2718, 2718a. From 2 R. S. 89 (Part 2, c. 6, tit. 3), § 38; L. 1882, c. 399; L. 1895, c. 595. Am'd by L. 1915, c. 644 (in effect Sept. 1, 1915).

§ 2682. Payment of debts.

Every executor and administrator must proceed with diligence to pay the debts of the deceased according to the following order:

1. Debts entitled to a preference under the laws of the United States and the state of New York.
2. Taxes assessed on property of the deceased previous to his death.
3. Judgments docketed, and decrees entered against the deceased according to the priority thereof respectively.
4. All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.

Preference shall not be given in the payment of a debt over other debts of the same class, except those specified in the third class. A debt due and payable shall not be entitled to a preference over debts not due. The commencement of a suit for the recovery of a debt or the obtaining a judgment thereon against the executor or administrator shall not entitle such debt to preference over others of the same class. Debts not due may be paid according to the class to which they belong, after deducting a rebate of legal interest on the sum paid for the unexpired term of credit without interest. An executor or administrator shall not satisfy his own debt or claim out of the property of the deceased until proved to and allowed by the surrogate; and it shall not have preference over others of the same class. Preference may be given by the surrogate to rents due or accruing on leases held by the testator or intestate at the time of his death, over debts of the fourth class, if it appear to his satisfaction that such preference will benefit the estate of the testator or intestate.

Former § 2719 of this Code, in part. From 2 R. S. 87, §§ 27–30, 33; L. 1847, c. 80; L. 1888, c. 571; see L. 1893, c. 686.

§ 2683. Disputed or unsettled debt or claim may be compromised, compounded or sold.

Upon the application of an executor, administrator, guardian or testamentary trustee, the surrogate may, for good cause shown, authorize the compromising or compounding of any debt, claim or demand, due or to become due, which it is necessary to settle, adjust or liquidate in connection with the settlement of an estate or fund; and the selling at public auction, on such notice as the surrogate prescribes, of any uncollectible, stale or doubtful debt or claim belonging to the estate or fund; but any party interested in the final settlement may show on such settlement that such debt or claim was fraudulently compromised or compounded.

From former § 2719 of this Code, in part.

§ 2684. Sale of personal property for payment of debts or legacies.

An executor or administrator may sell the personal property of the deceased at any time for the payment of debts, or legacies, or for making distribution. The sale may be public or private, and may be on credit not exceeding one year, with approved security. Articles not necessary for the support and subsistence of the family of the deceased, or not specifically bequeathed, must be first sold; and articles so bequeathed must not be sold until the residue of the personal estate has been applied to the payment of debts.

Former § 2717 of this Code, in part. From 2 R. S. 87, §§ 25, 26. See L. 1893, c. 686.

§ 2685. Surrogate's court may make direction as to the value, manner and time of sale of property.

Whenever the assets of an estate consist of real property which an executor is authorized to sell, or of personal property which it is necessary or proper to sell, and the value of the same is uncertain or is dependent upon the time and manner of sale thereof, the executor or administrator may apply by petition to the surrogate having jurisdiction of the settlement of the estate, for advice and direction as to the propriety, price, manner and time of sale thereof. If the surrogate, in his discretion, entertains the application, notice of such application shall be given to all persons interested or to such persons as the surrogate by order directs to have notice, in such manner as the surrogate shall prescribe. The surrogate shall inquire into the facts and circumstances and may hear the opinions of witnesses as to the value of such property and as to the best manner and time of sale thereof, and may give such advice and direction as shall seem to him for the best interest of the parties. A substantial compliance with the authorization so given shall relieve the said executor or administrator from any charge or objection that the said estate or persons interested suffered a loss on account of the time or manner of sale or the price realized.

New.

§ 2686. Proceeding to compel payment of funeral expenses.

Every executor or administrator shall pay, out of the first moneys received, the reasonable funeral expenses of decedent, and the same shall be preferred to all debts and claims against the deceased. If the same be not paid within sixty days after the grant of letters testamentary or of administration, the person having a claim for such funeral expenses may present to the surrogate's court a petition

praying that the executor or administrator may be cited to show cause why he should not be required to make such payment. If upon the return of the citation it shall appear that the executor or administrator has received moneys belonging to the estate which are applicable to the payment of the claims for funeral expenses, and that the executor or administrator admits the validity of the claim or claims and the reasonableness of the amount thereof, the surrogate shall make an order directing the payment of the same, or of such part thereof as he may specify, within ten days thereafter. If the executor or administrator files an answer setting forth the facts, and therein disputes the validity of the claim or claims, or the reasonableness of the amounts thereof, the surrogate shall direct that the claim or claims so disputed be heard upon the judicial settlement of the accounts of such executor or administrator. If it shall appear that no money has come into the hands of the executor or administrator the proceeding shall be dismissed without costs and without prejudice to a further application or applications showing that since such dismissal the executor or administrator has received money belonging to the estate. At any time after three months from the date of the former order, if no answer was filed disputing such claim, a further application may be made by petition stating the facts upon which the belief of the petitioner that there are moneys in the hands of such executor or administrator applicable to the payment of his claim, is based. Upon such further application the issuance of the citation shall be in the discretion of the surrogate. If upon any accounting it shall appear that an executor or administrator has failed to pay a claim for funeral expenses, the amount of which has been fixed and determined by the surrogate, as above set forth, or upon such accounting, he shall not be allowed for the payment of any debt or claim against the decedent until said claim has been discharged in full; but such claim shall not be paid before expenses of administration are paid.

Former § 2729 (subd. 3) of this Code, modified. From L. 1901, c. 293.

§ 2687. Proceeding to compel payment of debt, legacy or distributive share, or delivery of property.

Where the executor or administrator has not begun the publication of the notice to creditors to present their claims, and three months have elapsed since the probate of the will or grant of letters of administration, any creditor of the deceased having a claim which has not been rejected, or any person entitled to a specific bequest, or to a legacy or other pecuniary provision under a will, or to a distributive share of an estate, may present to the surrogate's court a petition setting forth the facts and praying that the executor or administrator be cited to show cause why he should not pay said claim or pay or satisfy such bequest, legacy or distributive share.

Upon the return of such citation the executor or administrator may reject such claim, or show good and sufficient cause why he should not pay such claim, or pay or satisfy such bequest, legacy or distributive share in whole or in part.

The surrogate may dismiss such petition, or direct immediate payment or satisfaction thereof in whole or in part, or upon receiving a bond as provided in section 2688 of this chapter.

New. Compare former § 2722 of this Code.

§ 2688. Payment of legacies.

No legacy shall be paid by an executor, or administrator with the will annexed, before the completion of the publication of notice to creditors if such notice be published, or if none be published before the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will or by a decree on an accounting to be sooner paid. Bequests of specific articles of property, other than securities representing money, may be delivered at any time in the discretion of the executor. Whenever a legacy is directed by the will to be sooner paid, or specific property is bequeathed, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or the value of the articles so delivered, with interest thereon or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the will, under which such legacy is paid, be denied probate on appeal or otherwise that such legatee will refund the whole of such legacy, with interest, to the executor or administrator entitled thereto.

Former § 2721 of this Code, modified. From 2 R. S. 90, §§ 43–45; see L. 1893, c. 686.

§ 2689. Petition to compel payment of legacy or delivery of property, etc., by a testamentary trustee.

Where a person is entitled, by the terms of the will, to the payment of money, or the delivery of personal property, by a testamentary trustee, he may present to the surrogate's court a petition, setting forth the facts which entitle him to the payment or delivery, and praying for a decree, directing payment or delivery accordingly; and that the testamentary trustee and all other persons whose rights or interests would be affected by the decree may be cited to show cause, why such a decree should not be made. If the petitioner is so entitled, only upon the happening of a contingency, or after the expiration of a certain time, he must show in his petition, that his right to the money or other property has become absolute.

Former §§ 2804, 2806 of this Code, modified.

§ 2690. Id.; proceedings upon return of citation.

Upon the return of a citation, issued as prescribed in the last section, the surrogate must hear the allegations and proofs of the parties, and must make such a decree in the premises, as justice requires. In a proper case, the decree may require the testamentary trustee, who is unable to deliver personal property to which the petitioner is entitled, to pay the value thereof.

Former § 2805 of this Code, modified.

§ 2691. Decree for advance payment of legacy, etc., on giving security.

Whenever a person who will be entitled to the payment or satisfaction of any testamentary provision, or distributive share, is in

actual need of the same or of some part thereof for his support or education, he may present to the surrogate's court his petition setting forth the facts, and thereupon, in the discretion of the surrogate, a citation may issue to the executor, administrator or testamentary trustee to show cause why the prayer of the petition should not be granted. If it appears on the return of the citation, that the amount of money and the value of the other property in the hands of the respondent applicable to the payment of debts, legacies and expenses, exceeds, by at least one-third the amount of all known debts and claims against the estate, of all legacies which are entitled to priority over the petitioner's claim, and of all legacies or distributive shares of the same class; and that the payment or satisfaction of any testamentary provision or distributive share, or some part thereof, is necessary for the support or education of the petitioner, whether adult or infant, or of his family, the surrogate may, in his discretion, make a decree directing payment or satisfaction accordingly, on the filing of a bond, as provided in section 2688 of this title.

Former § 2723 of this Code, modified. From 2 R. S. 98 (Part 2, c. 6, tit. 3), §§ 82, 83; Id., 90, § 44; see L. 1893, c. 686.

§ 2692. Payment of expenses incurred by representative.

An executor, administrator, guardian or testamentary trustee may pay from the funds or estate in his hands, from time to time, as shall be necessary, his legal and proper expenses of administration necessarily incurred by him, including the reasonable expense of obtaining and continuing his bond and the reasonable counsel fees necessarily incurred in the administration of the estate. Such expenses and disbursements shall be set forth in his account when filed, and settled by the surrogate.

New.

§ 2693. Power and duty of executor before probate.

An executor named in a will has no power to dispose of any part of the estate of the testator before letters testamentary are granted, except to pay funeral charges, nor to interfere with such estate in any manner further than is necessary for its preservation.

From former § 2013 of this Code, in part.

§ 2694. Power to sell, mortgage or lease real estate may be executed by qualifying executors.

Where any power to sell, mortgage or lease real estate or any interest therein, is given to executors as such, or as trustees, or as executors and trustees, and any of such persons named as executors shall neglect to qualify, then all sales, mortgages and leases under said power made by the executors who shall qualify shall be equally valid as if the other executors or trustees had joined in such sale.

From former § 2642 of this Code, in part.

§ 2695. Administrators with the will annexed; rights, powers and duties.

Where letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed; and the administrators with such will have the rights and powers, and are subject to the same duties, as if they had been named as executors in the will.

Where power to mortgage, lease or sell real estate is given by a will to an executor or trustee, an administrator with the will annexed or a successor trustee may execute such power in any case where the original executor or trustee could execute the same, unless contrary to the express provisions of the will.

New. First sentence taken from former § 2613 of this Code.

§ 2696. Power to sell, mortgage or lease real estate may be executed by qualifying trustees or successors.

Where any power to sell, mortgage or lease real estate or any interest therein, are given to trustees, and any of such persons named as trustees shall neglect to qualify, then all sales, mortgages and leases under said power made by the trustee or trustees who shall qualify shall be equally valid as if the other trustees had joined in such sale. Where a successor trustee has been appointed by the court, or is named in a will, he shall have the same power as to such real estate as the trustee or trustees had who were named in the will, unless the exercise of such power would be contrary to the express provision of the will.

New. See § 2694, supra; also former § 2642 of this Code.

§ 2697. Conveyance of real property by executor or administrator to holder of contract of sale made by a decedent.

Where a decedent dies seized of lands after he has made a contract for the conveyance thereof, his executor or administrator may make a deed reciting said contract and conveying the said lands. The executor or administrator, or the vendee, his heirs or assigns, may file a petition praying for the confirmation of the act of the executor or administrator in delivering the deed, or for a decree that the same be made and delivered or the executor or administrator may pray for the like relief in a petition for the judicial settlement of his account. In either case, a citation shall issue to all persons interested, and the court shall make such decree as justice requires. A deed delivered pursuant to this section, upon its confirmation by such decree, shall be effectual to convey all the right, title and interest in the said lands which the decedent had at his death.

From former § 2801a, in part, much modified. From L. 1908, c. 502.

§ 2698. Surrogate may direct as to custody, where co-executors, etc., disagree.

Where two or more co-executors or co-administrators disagree, respecting the custody of money or other property of the estate; or two or more testamentary trustees, or guardians of the property disagree, respecting the custody of money or other property, belonging to a fund or an estate which is committed to their joint charge; the surrogate may, upon the petition of either of them, or of a creditor or person interested in the estate, and proof, by affidavit, of the facts, make an order, requiring them to show cause, why the surrogate should not give directions in the premises. Upon the return of the order, the surrogate may, in his discretion make an order, directing that any property of the estate or fund be deposited in a safe place, in the joint custody of the executors, administrators,

guardians, or testamentary trustees, as the case requires, or subject to their joint order; or that the money of the estate be deposited in a specified safe bank or trust company, to their joint credit, and to be drawn out upon their joint order.

Former § 2602 of this Code.

§ 2699. Money paid into court and securities taken; how disposed of.

Where a statute requires the payment of money into, or the deposit of a security with the surrogate's court, or the deposit of a security for the payment of money with the surrogate, the same must be paid to or deposited with the county treasurer of the county or to the chamberlain of a city, to the credit of the beneficiary, or of the estate, or of the special proceeding; unless the statute contains special directions for another disposition thereof. Each security so deposited with the county treasurer or chamberlain must be held and disposed of by him, subject to the direction of the surrogate's court; except that he must, unless otherwise so directed, collect the principal and interest secured thereby. All money collected by or paid to the county treasurer, or chamberlain as prescribed by this section, must be held, managed, invested and disposed of by him, in like manner as money paid into the supreme court in an action pending therein. The regulations contained in the general rules of practice as specified in subdivision 8 of section 4 of the State Finance Law, and the provisions of title third, of chapter eighth of this act, apply to money paid to and securities deposited with the county treasurer, or chamberlain as prescribed in this section; except that the surrogate's court exercises, with respect thereto, or with respect to a security, in which any of the money has been invested, or upon which it has been loaned, the power and authority conferred upon the supreme court by section 747 of this act.

Former § 2537 of this Code; see L. 1882, c. 309; L. 1908, c. 183; L. 1909, cc. 65, 240.

§ 2700. Deposit of securities may be ordered on revocation of letters.

When, upon the revocation of the letters of an executor, administrator or guardian, or the removal of a testamentary trustee, a decree shall be made in which such executor, administrator, guardian or testamentary trustee is personally charged with or directed to pay a sum of money upon a finding that he has made an unlawful investment or disposition of the estate or fund in his hands, and the security or other instrument by which such investment or disposition is evidenced, or the property in the purchase of which such investment or disposition has been made, shall not be a part of the assets which his successor may be legally required to receive, the decree shall direct that such security or other instrument, or such property, if practicably capable of delivery under such direction, be forthwith deposited with a safe deposit company, authorized by law to do business as such, in such manner as to prevent the withdrawal of the same except upon the order of the surrogate.

New.

ARTICLE THIRD.

Applying rents and the proceeds of mortgage, lease or sale of real estate to the payment of debts, funeral and administration expenses, and charges upon real estate; sale for distribution and conveyance in confirmation of title.

Sec. 2701. When rents of real estate may be applied in the same manner as proceeds of mortgage, lease or sale.
2702. What property subject to disposition for the payment of debts, funeral and administration expenses.
2703. For what purposes real property is subject to disposition.
2704. Sale to be refused if bond be given.
2705. When and how real property may be mortgaged, leased or sold.
2706. Trial and determination of claims and expenses; statute of limitations.
2707. Order to mortgage, lease or sell.
2708. Duty of executor or administrator to execute order after filing bond.
2709. Order to be executed and report made.
2710. Execution of order not affected by death, etc.
2711. Execution of the order; decree of judicial settlement; conveyance to heirs.
2712. Allowance on bid to creditor purchasing.
2713. Provision for payment of undetermined claims and debts not yet due.
2714. When conveyance not to affect purchaser or mortgagee from heir, etc.
2715. Effect of conveyance of decedent's interest under contract.
2716. Presumption where records have been removed.
2717. Right of life tenant to be considered in sale.
2718. Restitution from assets subsequently discovered.

§ 2701. When rents of real property may be received by the executor or administrator.

An executor or administrator may present a petition to the surrogate's court praying for leave to enter into possession of real property left by his decedent and to manage and control the same and receive the rents thereof. If from such petition it shall appear that a mortgage, lease or sale of such real property will be necessary unless the purposes specified in section 2703 of this title be otherwise fulfilled, a citation shall issue to all known persons within the state of New York who have the legal title to such real estate by descent or devise to show cause why the prayer of the petition should not be granted. Upon the return of the citation the surrogate may, in his discretion, grant the prayer of such petition upon such terms and conditions as justice shall require. The net rents so collected shall be held by the executor or administrator and be brought into court upon the judicial settlement of the account of such executor or administrator and there disposed of as provided in section 2711 of this title for the disposition of proceeds of mortgage, lease or sale of real estate.

New.

§ 2702. Real property subject to disposition for the satisfaction of charges against the same and for distribution.

The real property, or interest in real property, of which a decedent died seized, may be disposed of as prescribed in this title; except where it is exempted from levy and sale by virtue of an execution as prescribed in title second of chapter thirteen of this act, or where it can be disposed of under a valid power contained in a will for the purpose for which the same might be disposed of under this title.

But no such property, or interest in property, shall be mortgaged, leased or sold under a decree in surrogate's court to satisfy any claim, debt, or demand, unless a proceeding for a judicial settlement, or to compel a settlement, of the accounts of an executor or administrator shall have been commenced within eighteen months from the date when letters first issued to an executor or administrator.

From former § 2749 of this Code, modified. From 2 R. S. 111, § 66; Id., 100, § 2; Id., 103, § 20; L. 1837, c. 460, §§ 40–42; L. 1874, c. 267; L. 1894, c. 735.

§ 2703. For what purposes real property is subject to disposition.

The real property specified in section 2702 of this title may be mortgaged, leased or sold for any or all of the following purposes:

1. For the payment of the debts of the decedent, including judgment or other liens, excepting mortgage liens, existing thereon at the time of his death.

2. For the payment of his funeral expenses, including therein suitable church or other services, a burial lot and a headstone erected thereon.

3. For the payment of the reasonable expenses of administration as allowed by the surrogate.

4. For the payment of any transfer tax assessed upon the transfer of such property.

5. For the payment of any debt or legacy charged thereupon.

No mortgage, lease or sale shall be ordered for the purpose of any of the foregoing payments, if there be personal property applicable to the full payment and discharge thereof.

Such real property may also be sold:

6. For the payment and distribution of their respective shares to the parties entitled thereto, where any or all of said parties are infants, proven or adjudged incompetents, absentees, or persons unknown, whenever in his discretion the surrogate may so direct.

From former §§ 2749, 2756 of this Code, modified.

§ 2704. Sale to be refused if bond be given.

An order empowering an executor or administrator to mortgage, lease or sell shall not be granted if any of the persons interested in the estate or property execute and file in the surrogate's office a bond in such sum and with such sureties as the surrogate directs and approves, conditioned to pay all the charges against the same proved and allowed so far as the goods, chattels, rights and credits of the deceased are insufficient therefor, within such time as the surrogate may direct. Except that in a proper case the real estate may be sold for the purpose of distribution of the proceeds as provided in subdivision six of section 2703, notwithstanding the giving of such bond.

Former § 2765 of this Code, modified.

§ 2705. When and how real property may be mortgaged, leased or sold.

Upon a judicial settlement of the accounts of an executor or administrator, any party to the proceeding may allege and show by proof that the personal property left by the decedent is insufficient for the payment of the just demands and charges against the same;

or that the circumstances are such that the court has jurisdiction to order the mortgage, lease or sale of the real property left by the deceased for any of the reasons specified in section 2703. The petition and account filed in the proceeding shall be sufficient proof of the facts therein stated unless an issue is raised as to any of such statements. If any person interested in such real estate, or in any question raised with reference to the mortgage, lease or sale thereof, is not a party to such judicial settlement, the surrogate, before proceeding further shall cause such person to be brought in by supplemental citation.

New.

§ 2706. Trial and determination of claims and expenses; statute of limitations.

If any claim, demand, charge, or expense set forth in the account or presented on the judicial settlement is objected to by any party to the proceeding whose interest will be affected by its allowance or disallowance, such claim, demand, charge or expense shall be determined, notwithstanding its admission or allowance by the executor or administrator. Where a defense arises under the statute of limitations as to a claim so admitted or allowed the said claim shall be deemed to be rejected by the executor or administrator at the time of such objection, and the time between the presentation of the claim, or the commencement of an action where the claim was not presented, and the time of such objection shall not be a part of the time limited in this act for commencing an action thereon.

A judgment recovered against the executor or administrator upon a claim against decedent shall be prima facie evidence and proof of the claim against the real property of decedent, and the burden of disproving such judgment or of proving that the claim upon which it was rendered is invalid, or that the judgment was obtained by collusion, shall be upon the party disputing or objecting to the same.

New. In part, from former § 2755 of this Code.

§ 2707. Order to mortgage, lease or sell.

If it shall appear that it is a proper case for the disposition of the decedents' real estate, as provided in this title, on account of deficiency of personal estate, the surrogate shall make an order reciting the determination made, the amount and general nature of the various claims and demands which have been admitted or proved, a description of the property to be disposed of, and directing the executor or administrator to mortgage, lease or sell the whole or such part of the real property or interest therein, as the surrogate therein directs.

If it appears that one or more distinct parcels of which the decedent died seized has been devised by him or sold by his heirs the decree must provide that the several distinct parcels be sold in the following order:

1. Property which descended to the decedent's heirs and which has not been sold by them.
2. Property so descended which has been sold by them.
3. Property which has been devised which has not been sold by the devisee.

4. Property so devised which has been sold by the devisee.

Where an order is made directing the sale of the property, or interest, for distribution only, the order shall fix and determine the rights and interests of the respective parties therein, and if a person entitled to an estate or interest in the property sold is made a party as a person unknown, the court must provide for the protection of his rights, as far as may be, as if he were known and had appeared.

The proceeds of the sale of any real property sold by judgment of another court, which directs said proceeds to be paid into the surrogate's court subject to its order, may be directed by such order of the surrogate to be paid to the executor or administrator to be brought into the account on such judicial settlement and disposed of in accordance with the decree made thereupon.

After making the order for mortgage, lease or sale, the surrogate shall adjourn the judicial settlement to await the proceedings taken under the order.

Former § 2757 of this Code, modified. From 2 R. S. 103, §§ 15-20; see L. 1904, c. 750; L. 1911, c. 435.

§ 2708. Duty of executor or administrator to execute order after filing bond.

Before proceeding to execute the order directing that property be mortgaged, leased or sold the executor or administrator must first execute and file with the surrogate his bond, with two or more sureties, to the people of the state in a penalty fixed by the surrogate, conditioned for the faithful performance of the duties imposed upon the principal by the order and for the accounting by the principal for all moneys received by him whenever he is required so to do by a court of competent jurisdiction; unless the order directs that the proceeds of sale or mortgage be paid by the purchaser or mortgagee to a bank or trust company to the credit of the executor or administrator, subject to the further order of the court.

Former § 2758 of this Code, modified. From 2 R. S. 103, 104, §§ 21, 22; L. 1885, c. 213; L. 1894, c. 735; see L. 1904, c. 750.

§ 2709. Order to be executed and report made.

The executor or administrator shall thereupon execute the order, subject to the approval of the court, and make a report of his proceedings thereunder. The surrogate may confirm or reject the mortgage, lease or sale, extend the order to other parcels, or require a re-execution of the order upon such terms and on such conditions as he may direct, and he may relieve a purchaser from his purchase in a case where he might be so relieved in the supreme court, on such terms as justice shall require.

New.

§ 2710. Execution of order not affected by death, etc.

The death, removal, or disqualification, before the complete execution of the order, of all the executors or administrators does not suspend or affect the execution thereof; but the successor of the person who has died, been removed, or become disqualified, must proceed to complete all unfinished matters, as his predecessors might have completed the same; and he must give such security for the due performance of his duties as the surrogate prescribes.

Former § 2760 of this Code. From L. 1850, c. 162; see L. 1904, c. 750.

§ 2711. Execution of the order; decree of judicial settlement; conveyance to heirs.

When the order has been fully executed, the executor or administrator shall file, on or before the adjourned day of the judicial settlement, a supplemental account setting forth his proceedings under the order, the amount of the proceeds of the sale, and his expenses incurred thereunder. The surrogate shall thereupon continue and complete such judicial settlement and make such a disposition of the funds in the hands of the executor or administrator as justice shall require.

Where it is not necessary or advantageous to mortgage, lease or sell the real property of the deceased or of the estate, the parties interested may prove upon any such judicial settlement who are the real and true owners of any property devised by said will, or who are the only heirs-at-law of said deceased and entitled to succeed to his real estate, and thereupon such decree of judicial settlement may establish the rights and interests of the said parties and direct a conveyance to them by such executor or administrator according to their respective rights, in confirmation of their title thereto.

New.

§ 2712. Allowance on bid to creditor purchasing.

If, upon a sale for any purpose other than the distribution of the proceeds to the parties entitled thereto, a creditor of the decedent becomes the purchaser of any of the decedent's real property, the surrogate may, upon his application, direct the amount of his claim to be allowed, in the first instance, upon the purchase price; and such purchaser shall only be required to pay the balance at the time of the sale. But, in case the proceeds of the decedent's real property shall be insufficient to satisfy the cost and expenses of administration and the debts and funeral expenses of the decedent, the purchasing creditor shall be allowed and credited, upon the judicial settlement of the accounts of the executor or administrator, only the amount he may be entitled to receive upon his claim and shall then pay the difference between the amount originally allowed and the amount he is entitled to receive. In case any purchaser has credit on his bid, as aforesaid, no deed shall be delivered to him until the judicial settlement of the accounts of the executor or administrator nor until he shall have paid the entire amount required under the provisions of this section.

Former § 2764 of this Code. From L. 1904, c. 750.

§ 2713. Provision for payment of undetermined claims and debts not yet due.

If any claim remains undetermined at the making of the decree, or any debt is not yet due and the party holding the same does not consent to its present payment, the decree shall direct that sufficient funds be retained by the executor or administrator to meet any such claim or demand when determined, or when payable, and provide for the distribution of any surplus of the amount so retained.

New.

§ 2714. When conveyance not to affect purchaser or mortgagee from heir, etc.

A conveyance of real property, made pursuant to this title, does not affect, in any way, the title of a purchaser or mortgagee, in good faith and for value, from an heir or devisee of the decedent, unless letters testamentary or letters of administration, upon the estate of the decedent, were granted, by a surrogate's court having jurisdiction to grant them, upon a petition therefor, presented within two years after his death.

Former § 2777 of this Code, modified. From L. 1869, c. 845; L. 1873, c. 211.

§ 2715. Effect of conveyance of decedent's interest under contract.

A conveyance of the decedent's interest in all the real property, held by him under a contract for the purchase thereof, operates as an assignment of the contract to the purchaser; and vests in him, his heirs and assigns, all the right, title and interest of all the persons entitled, at the time of the sale, in and to the decedent's interest in the real property.

A conveyance of the decedent's interest in a part only of the real property, held under such a contract, transfers to the purchaser all the decedent's right, title and interest in and to the part so sold; and all rights, which would be acquired thereto, by the executor or administrator, or by any person entitled, at the time of the sale, to the interest of the decedent therein, by perfecting the title to the property contracted for, pursuant to the contract. Upon fully complying with the contract, the purchaser has the same right to enforce performance thereof, with respect to the part conveyed to him; and the executor or administrator, or his assignee, has the same right to enforce performance, with respect to the residue, as the decedent would have had, if he were living. Any title acquired by the executor or administrator, or his assignee, with respect to the part not sold, must be held in trust for the use of the persons entitled to the decedent's interest; subject to the dower of the widow, if any.

Former §§ 2782, 2783 of this Code. From 2 R. S. 111, § 69; Id., 112, §§ 74, 75.

§ 2716. Presumption where records have been removed.

Where the records of the surrogate's court have been heretofore, or are hereafter removed from one place to another, in either the same or another county or the records of such proceeding have been lost or destroyed and twenty-five years have elapsed after a sale or other disposition of real property, or of an interest in real property, as prescribed in this title, the due appointment of a guardian for each infant party to the special proceeding must be presumed, and can be disproved only by affirmative record evidence to the contrary.

Former § 2785 of this Code. From L. 1850, c. 82, §§ 1–3; L. 1869, c. 260; L. 1872, c. 92; L. 1878, c. 129.

§ 2717. Right of life tenant to be considered in sale.

Where any party to the proceeding has an existing or inchoate right of dower, or where any party to the proceeding has a tenancy by curtesy, or an estate for life or for years in the real estate directed to be sold, the court must determine whether the interests of all the parties will be better protected, or a more advantageous sale can be made of such real estate by including the sale of such right

or interest; and if the court shall so determine there may be included in the order a direction that such right or interest be sold; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. The regulations and provisions of article 2, title 1 of chapter 14 of this act, prescribing the rules of practice in relation to the right of dower, curtesy and estates for life, or for years in actions for the partition of real estate, so far as the same may be applicable, shall govern and control the disposition of moneys realized on such sale which shall belong to the owner of said right of dower, or tenant for life, or for years.

Former § 2800 of this Code, modified. From L. 1905, c. 430.

§ 2718. Restitution from assets subsequently discovered.

Where a decree has been made for the application of the proceeds of real property as prescribed in this title, and assets, which should have been applied thereto, are afterward discovered; or, for any other reason, money or other personal property of the decedent, which should have been applied thereto, afterward comes to the hands of the executor, administrator, legatee or next of kin, the heir, devisee, or other person aggrieved may maintain an action to procure reimbursement therefrom.

Former § 2801 of this Code. See L. 1894, c. 735; L. 1904, c. 750.

TITLE V.

Accounting and judicial settlement; effect and contents of decree on judicial settlement; costs, their amount, allowance and payment; fees of appraisers, referees, jurors and witnesses; commissions and allowances; appeals, how and to what court taken; undertakings and stay of execution; probate of heirship; definitions and application of other sections.

Article 1. Accounting by recording settlement or filing account; intermediate, compulsory and voluntary judicial settlement. Decree for payment and distribution and delivery of property.
2. Costs in special proceedings, when and how payable; security for costs. Compensation of special guardian, fees of appraisers, referees, jurors and witness. Commissions and compensation of executors, administrators, guardians and testamentary trustees.
3. Appeal, when, how and to what court taken, and power of appellate court. Undertaking to perfect appeal and stay execution.
4. Probate of heirship. Definitions, and application of other sections to this chapter.

ARTICLE FIRST.

Accounting by recording settlement or filing account; intermediate, compulsory and voluntary judicial settlement; decree for payment and distribution and delivery of property.

Sec. 2719. Recording instruments settling estates in part or in whole.
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2736. Id.; when specific property may be delivered.
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2738. Adjustment of advancements.
2739. Id.; share of infant.
2740. Legacy, etc., to unknown person to be paid into state treasury.
2741. When legacy, etc., to be paid to county treasurer.
2742. Effect of judicial settlement of account; decree.

§ 2719. Recording instruments settling accounts in part or in whole.

There may be recorded in the surrogate's office any instrument settling an account in whole or in part, executed by one or more executors, administrators, testamentary trustees, or guardians, and one or more legatees, devisees, distributees, creditors or wards who have attained full age. Every such instrument to be recorded shall be acknowledged, or proved, and duly certified; and the record

thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument and its due execution.

Former § 2502 of this Code, modified. From L. 1906, c. 350.

§ 2720. Judicial settlement where recovery has been had in negligence action.

Where limited letters testamentary or of administration have been granted for the prosecution of a cause of action, and a judgment or compromise thereof has been obtained and the proceeds are ready to be paid over; and where such recovery is not a part of the estate of the deceased but goes by special provision of law to designated persons or classes of persons; such executor or administrator may at any time file a petition for the judicial settlement of his account relating to such fund, and upon the return of a citation or upon the waiver of all the parties interested, if of full age and competent, the surrogate may take and settle such account, and direct payment to the parties entitled according to their respective rights and interests; and upon filing receipts for such payments the party paying the money and such executor or administrator shall be discharged from all further liability as to such cause of action and such fund. Where such recovery has been had and the amount thereof paid to the executor or administrator, he may in like manner have a judicial settlement of his account relating to such fund, at any time, and a decree made discharging him from further liability concerning the same.

New.

§ 2721. Filing intermediate account voluntarily or by order.

An executor, administrator, guardian or testamentary trustee may at any time voluntarily file in the surrogate's office an intermediate account, and the vouchers in support of the same. He may be required to file such account at any time, in the discretion of the surrogate, by an order made upon the petition of any person interested, or by direction of the surrogate. He may be required to attend and be examined under oath touching his receipts and disbursements or touching any other matter relating to his administration of the estate, or fund, and in the case of an executor or administrator as to any act done by him under color of his letters, or after decedent's death and before letters were issued, or touching any personal property owned or held by decedent at the time of his death.

Former § 2725 of this Code, in part; also includes portion of former §§ 2729, and of 2802 and 2803 relating to trustees. From 2 R. S. 116, § 20; Id., 92, § 52; L. 1911, c. 436.

§ 2722. Proceedings where account is filed pursuant to order.

On the return of the order, where one is made as prescribed in the foregoing section of this article, if the respondent fails either to file his account, appear, or to show good cause to the contrary, or to present in a proper case, a petition as prescribed in section 2729, an order must be made, directing him to account within such a time, and in such a manner as the surrogate prescribes, and to attend, from time to time, before the surrogate, for that purpose. If it appears that the account can be then judicially settled, a supplemental citation may be issued directed to the persons who must be

cited on a petition for a judicial settlement of his account. The pendency of a proceeding against the respondent to compel him to account does not preclude him from presenting a petition as prescribed in section 2729. If such petition is presented at or before the return day of the order, the citation issued thereon need not be directed to petitioner in the special proceeding pending against him and the two proceedings must be consolidated. When such account is filed in connection with a proceeding then pending any party may contest the account as to any matter affecting his interest, and the decree or other determination made shall go to the extent only of determining the question or questions necessary to be decided in order to grant or deny the relief asked for in the special proceeding in which the account was ordered to be filed. Where the accounting is made a judicial settlement by the issuing of a supplemental citation or the filing of a petition as above provided, the same proceedings shall be had as on a judicial settlement.

Former § 2727 of this Code, in part, modified. From 2 R. S. 92, 93 (Part 2, c. 6, tit. 3), §§ 53, 60; L. 1893, c. 686; L. 1901, c. 408; L. 1911, c. 432.

§ 2723. Voluntary intermediate judicial settlement of the account of an executor, administrator, guardian or testamentary trustee.

An executor, administrator, guardian or testamentary trustee may, at any time after one year has expired since letters were issued to him, or he was appointed and qualified, and not oftener than annually thereafter, file in the surrogate's court having jurisdiction an intermediate account and a petition for its judicial settlement.

If the surrogate entertain such application, a citation shall issue to all persons who would be required to be cited upon a voluntary final judicial settlement of such account, and the same proceedings shall be had and with like effect, so far as the settlement of such account is concerned, as though such proceeding were a final judicial settlement.

New. See former § 2802 of this Code.

§ 2724. Compulsory intermediate judicial settlement of the account of a guardian or testamentary trustee.

The surrogate of his own motion, or upon the petition of any person interested in the fund held by a guardian or testamentary trustee, may by order direct such guardian or testamentary trustee to make and settle an intermediate account of his proceedings. The proceedings upon the return of the order shall be the same as though the respondent had filed his petition for a voluntary intermediate judicial settlement as provided in section 2723 of this title, and the decree entered shall have the same force and effect as if made in such proceeding.

New. See former § 2803 of this Code.

§ 2725. Accounting by executor, etc., of deceased executors, etc.

Where an executor, administrator, guardian or testamentary trustee dies, the surrogate's court has the same jurisdiction, upon the petition of any person who would be required to be cited upon a voluntary judicial settlement of his account to compel the executor or administrator of the decedent to account, which it would have

against the decedent if his letters had been revoked, or he had been removed, by a surrogate's decree. An executor or administrator of a deceased executor, administrator, guardian, or testamentary trustee may voluntarily account for the acts and doings of the decedent, and for the trust property which had come into his possession or into the possession of the decedent. On the death of any executor, administrator, guardian or testamentary trustee while an accounting by or against him, as such, is pending before a surrogate's court, such court may continue said proceeding where his executor, administrator or successor has voluntarily made himself a party thereto or has been brought in by a citation to show cause why he should not be made a party, and proceed with such accounting and determine all questions and grant any relief that the surrogate would have power to determine or grant in case such decedent had not died or in a case where the executor or administrator of said last mentioned decedent had voluntarily petitioned for an accounting as provided for in this section. On a petition filed either by or against an executor or administrator of a deceased executor, administrator, guardian or testamentary trustee, the successor of such decedent, his executor or administrator, and all persons who would be necessary parties to a proceeding commenced by such decedent for a judicial settlement of his accounts shall be brought in. If upon such accounting, the surrogate finds that there can be a distribution, in whole or in part, to the parties entitled thereto, he may make a decree accordingly, and he may also therein direct payment and delivery, by the accounting party, upon such terms and security as may be proper, of the balance, if any, of said estate or fund. For the purpose of such payment and distribution the accounting party shall have all the powers and duties of the deceased representative, trustee or guardian.

Former § 2606 of this Code, modified. From L. 1884, c. 399; L. 1891, c. 175; L. 1897, c. 248; L. 1901, c. 409; L. 1902, c. 349.

§ 2736. When surrogate's court may require judicial settlement of account.

In either of the following cases, the surrogate's court may, from time to time, compel a judicial settlement of the account of an executor, administrator, guardian or trustee:

1. In the case of an executor or administrator,

a. Where fifteen days have elapsed after the time in which to present claims has expired, or one year has expired since letters were issued to him.

b. Where letters issued to him have been revoked, or, for any other reason, his powers have ceased.

c. Where the administrator is a temporary administrator.

d. Where he has sold, or otherwise disposed of, any of the decedent's real property, or the rents, profits or proceeds thereof, pursuant to a power contained in the decedent's will, or an order of the surrogate's court, and fifteen days have elapsed after the time in which to present claims has expired, or one year has elapsed since letters were issued to him.

2. In the case of a guardian.

a. Where the ward has attained the age of twenty-one years, or has died.

b. Where the guardian is a guardian in socage, or the guardian of the infant's person only.

c. Where letters issued to him have been revoked, or his powers have ceased.

3. In the case of a trustee,

a. Where the trustee has been removed, or for any other reason his powers have ceased.

b. Where the trusts, or one or more distinct and separate trusts, created by the terms of the will, have been executed, or are ready to be executed; so that the persons beneficially interested are, by the terms of the will, or by operation of law, entitled to receive any money or other personal property from the trustee.

Former § 2726 of this Code, modified. See also former §§ 2605, 2807, 2837, 2856. From 2 R. S. 92, 95, §§ 52, 68; Id., 104, § 24; Id., 106, 109, §§ 34, 57; L. 1837, c. 460, § 36; L. 1864, c. 71, § 7; L. 1881, c. 535; L. 1893, c. 686.

§ 2727. Compulsory judicial settlement; who may petition.

A petition praying for the judicial settlement of the accounts of a person described in the last section, and that such person may be cited to show cause why he should not render and settle such account may be presented in a case prescribed in the last section as follows:

1. Against an executor or administrator,

a. By a creditor or a person interested in the estate or fund,

b. By or on behalf of a child born after the making of the will, when interested in the estate.

2. Against a guardian,

a. By the ward after he has become twenty-one years of age,

b. By the executor or administrator of a ward who has died,

c. By the ward or a duly appointed guardian where a person has been acting as a guardian in socage.

3. Against a testamentary trustee,

a. By any person beneficially interested in the execution of any of the trusts, or by any person on behalf of an infant so interested, unless his account has been judicially settled within one year preceding the application.

In any case,

a. By a surety on the official bond of the person required to account, or the legal representative of such a surety,

b. By the successor, or by the remaining executor, administrator, guardian or trustee, where a representative, guardian or testamentary trustee has been removed or his letters revoked.

c. By the attorney-general of the state where any of the property or fund may belong to the state of New York, by reason of the death of any testator, intestate, or person interested without leaving known heirs-at-law or next of kin, as the case may be, or such heirs-at-law or next of kin are unknown.

New. See former §§ 2727, 2808, 2847, 2848, 2856.

§ 2728. Compulsory judicial settlement; citation; order to account and proceedings thereon.

On the presentation of a petition, as prescribed in the last section, a citation must be issued accordingly, and on the return of the citation if the person cited fails either to appear, or to file his account, or to show good cause to the contrary, or to present in a proper case,

a petition as prescribed in the next section, an order must be made, directing him to account within such a time, and in such a manner as the surrogate prescribes, and to attend, from time to time, before the surrogate, for that purpose. He is bound by such an order, without service thereof. If it appears that there is a surplus, distributable to creditors or persons interested, the surrogate may, at any time, issue a supplemental citation, directed to the persons who must be cited, on the petition for a judicial settlement of his account. The pendency of a proceeding against an executor, administrator, guardian or trustee to compel him to account does not preclude him from presenting a petition as prescribed in the next section. If such petition be presented at or before the return of a citation in and as prescribed in either of the foregoing sections of this title, the citation issued thereon need not be directed to petitioner in the special proceeding pending, and the two proceedings must be consolidated.

Former § 2727 of this Code, in part. From 2 R. S. 92, 93, §§ 53, 60; Id., 152, § 11; L. 1890, c. 62; L. 1893, c. 686; L. 1901, c. 408; L. 1911, c. 432.

§ 2730. Voluntary judicial settlement.

In either of the following cases an administrator, executor, guardian or testamentary trustee may present to the surrogate's court his account and a petition praying that his account may be judicially settled and that all necessary and proper parties may be cited to show cause why such settlement should not be had:

1. By an executor or administrator,

a. Where the time for presentation of claims as fixed by a notice duly published has expired; or one year has expired since letters were issued to him or his predecessor in office.

b. Where letters issued to the petitioner have been revoked.

2. By a guardian,

a. Where a petition for a compulsory judicial settlement of his accounts may be presented by any other person,

b. Where he has properly used and expended all of the estate of the infant, and the circumstances are such that, in the discretion of the surrogate, it is proper that such guardian should be discharged.

3. By a testamentary trustee.

a. Where one or more distinct and separate trusts created by the will, have been, or are ready to be, fully executed.

Former § 2728 of this Code, in part, rewritten, and combined with former §§ 2810, 2849, 2856.

§ 2730. Voluntary judicial settlement; citation.

Upon a voluntary judicial settlement of the account of an executor, administrator, guardian or testamentary trustee there must be cited:

1. All creditors or persons claiming to be creditors of the decedent, except such as by vouchers filed with the account appear to have been paid.

2. The sureties on his official bond, if any.

3. All co-executors, administrators, guardians or trustees who do not join in the petition.

4. The successor, if a successor has been appointed, in a case where the petitioner's letters have been revoked, or he has been removed, and if no successor has been appointed, all the persons interested who are required to be cited by this section.

5. The attorney-general in all cases where the decedent, ward or beneficiary died intestate as to any part of the estate or fund leaving no known heir-at-law or next of kin.

6. The widow or husband, if any, and all the heirs-at-law where the decedent, ward or beneficiary died intestate as to any real property, and all his next of kin where he died intestate as to any personal property.

7. All devisees, all trustees of any trust created by the will, and all legatees, except such as by voucher and release acknowledged, or proved, and duly certified and filed, appear to have been fully paid.

8. In the case of a guardian, there shall also be cited all persons who might have presented a petition for a compulsory settlement.

9. In the case of a trustee there shall also be cited all persons who are entitled, absolutely or contingently, by the terms of the will or by operation of law, to share in the fund, or in the proceeds of property held by the petitioner as a part of his trust.

Where any person required to be cited has died, his executor or administrator shall be cited, and if no legal representative has been appointed, the husband or widow and all the heirs-at-law or next of kin, or both, of such deceased person, who are interested.

From former § 2728 of this Code, rewritten; see also § 2850.

§ 2731. Proceedings on return of citation.

On the return of a citation, issued as prescribed in the last section, the surrogate must take the account, and hear the allegations and proofs of the parties, respecting the same and make such order or decree as justice requires. The executor, administrator, guardian or trustee may be examined under oath by any party to the proceeding as to any matter relating to his administration of the estate or fund. If any party interested shall demand in writing that a voucher be produced and filed for any payment alleged by the account to have been made, the accounting party shall produce and file such voucher or make satisfactory proof of such payment.

From former § 2728, in part, rewritten.

§ 2732. Affidavit to account.

To each account filed in the surrogate's court, as prescribed in this article, must be appended the affidavit of the accounting party, to the effect that the account contains, according to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements on account of the estate or fund, and of all money and other property belonging to the estate or fund, which have come to his hands, or been received by any other person, by his order or authority, for his use, and that he does not know of any error or omission in the account, to the prejudice of any creditor of, or person interested in, the estate or fund.

From former § 2729, in part, rewritten. From 2 R. S. 92, 93, §§ 54–56; L. 1893, c. 686.

§ 2733. Accounting for profit and loss.

No profit shall be made by an executor, administrator, guardian or testamentary trustee by the increase, nor shall he sustain any loss by the decrease or loss, without his fault, of any part of the estate

or fund; but he shall account for such increase, and be allowed for such decrease or loss on the settlement of his accounts.

From former §§ 2717, 2729 of this Code, in part.

§ 2734. Property of an estate or trust to be delivered upon order of the court.

The surrogate's court has jurisdiction to compel the executor, administrator, guardian or trustee, or successor of any deceased executor, administrator, trustee or guardian at any time to deliver over any property of the estate or trust which has come to his possession or is under his control, and if the same is delivered over after a decree, the court must allow such credit upon the decree as justice requires.

The said court has also jurisdiction when an executor, administrator, trustee or guardian has died, absconded, been removed, or become insane to direct the person so removed, or any person or corporation having possession or control of any property belonging to such estate or fund, to deliver the same to the court or to a successor duly appointed; or as directed by a decree made pursuant to section 2725 of this chapter.

First part of this section is from former § 2606 of this Code; the last sentence is from Id., § 2605.

§ 2735. Decree for payment and distribution.

Where an account is judicially settled, as prescribed in this article, and any part of the estate or fund remains and is ready to be distributed, the decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights. It may also award to a surviving husband, wife, or child, the same relief as to set off of exempt property which may be awarded in his or her favor, on a petition presented as prescribed in section 2671 of this chapter.

Former §§ 2724, 2743 of this Code, in part, modified. From 2 R. S. 94, § 71; L. 1895, c. 595; L. 1898, c. 565; L. 1906, c. 515.

§ 2736. Id.; when specific property may be delivered.

In either of the following cases, the decree may direct the delivery of an unsold chattel, or the assignment of an uncollected demand, or any other personal property, to a party or parties entitled to payment or distribution, in lieu of the money value of the property:

1. Where all the parties interested manifest their consent thereto by a writing filed in the surrogate's office.

2. Where any legatee or distributee files a consent to accept as payment in whole or in part any specified personal property at a value to be ascertained by appraisement.

3. Where it appears that a sale thereof, for the purpose of payment or distribution, would cause a loss to any infant or incompetent legatee or distributee, and the value thereof has been fixed by appraisement.

The value must be ascertained, if the consent does not fix it, by an appraisement under oath, made by one or more persons appointed by the surrogate for the purpose.

Former § 2744 of this Code. From 2 R. S. 94, § 72; L. 1878, c. 30.

§ 2737. Id.; when money or property may be retained.

Where an admitted debt of the decedent is not yet due, and the creditor will not accept present payment, with a rebate of interest; or when a debt not yet due has been disputed or rejected; or where an action is pending between the executor or administrator, and a person claiming to be a creditor of the decedent; or where on the judicial settlement of the account of a testamentary trustee a controversy respecting the right of a party to share in the fund, or other personal property held by the trustee, has not been determined; the decree must direct that a sum sufficient to satisfy the claim, or the proportion to which it is entitled, together with the probable amount of the interest and costs, or that any personal property the right to which is in controversy, be retained in the hands of the accounting party; or be deposited in a safe bank, or trust company, subject to the order of the surrogate's court; or be paid into the surrogate's court, for the purpose of being applied to the payment of the claim, or the satisfaction of any judgment when it is due, recovered, or settled; and that so much thereof, as is not needed for that purpose, be afterwards distributed according to law.

Former §§ 2745, 2812 of this Code, modified. From 2 R. S. 96, § 74.

§ 2738. Adjustment of advancements.

Where there is a surplus of personal property to be distributed, and the advancement as provided in section 99 of the Decedent Estate Law, consisted of personal property, or where a deficiency in the adjustment of an advancement of real property is chargeable on personal property, the decree for distribution, in the surrogate's court, must adjust all the advancements which have not been previously adjusted by the judgment of a court of competent jurisdiction. For that purpose, if any person to be affected by the decree, is not a party to the proceeding, the surrogate must cause him to be brought in by a supplemental citation.

Former § 2733 of this Code. From 2 R. S. 97, §§ 76–78. See L. 1893, c. 686; L. 1909, c. 65.

§ 2739. Payment of share of infant.

When a legacy or distributive share is payable to an infant, the decree shall direct that it be paid to his guardian, upon his filing sufficient security, unless the legacy does not exceed fifty dollars, or a distributive share does not exceed one hundred and fifty dollars, in which cases the decree may order it to be paid to his father, or to his mother, or to some competent person with whom the infant resides, or who has some interest in his welfare, for the use and benefit of such infant. If there be no guardian, the decree shall provide that the legacy or distributive share not disposed of in the manner aforesaid, shall be paid into or deposited with the surrogate's court.

Former § 2746 of this Code, in part, modified. From 2 R. S. 91, §§ 46–51; Id., 96, § 80; L. 1886, c. 358; L. 1900, c. 554; L. 1909, c. 65; L. 1911, c. 328; L. 1913, c. 10.

§ 2740. Legacy, etc., to unknown person to be paid into state treasury.

Where the person entitled to a legacy or distributive share is unknown, the decree must direct the executor, administrator, guardian or testamentary trustee to pay the amount thereof into the treasury of the State, for the benefit of the person or persons who

may thereafter appear to be entitled thereto. The surrogate's court, or the supreme court, upon the petition of a person claiming to be so entitled, and upon at least fourteen days' notice to the attorney-general, accompanied with a copy of the petition, may by a reference, or by directing the trial of an issue by a jury, or otherwise, ascertain the rights of the persons interested, and grant an order directing the payment of any money, which appears to be due to the claimant, but without interest, and deducting all expenses incurred by the State with respect thereto. The comptroller, upon the production of a certified copy of the order, must draw his warrant upon the treasury, for the amount therein directed to be paid; which must be paid by the State treasurer, to the person entitled thereto.

Former § 2747 of this Code. From 2 R. S. 98, § 81; L. 1877, c. 456.

§ 2741. When legacy, etc., to be paid into court.

Where it appears that the whereabouts of any legatee or distributee is unknown, the decree must direct the executor, administrator or testamentary trustee to pay into surrogate's court a legacy or distributive share, which is not paid to the person entitled thereto, at the expiration of six months from the time when the decree is made, or when the legacy or distributive share is payable by the terms of the decree; or where, at the expiration of six months after the making of the decree, it is shown to the court that payment of a legacy or distributive share can not be made to the person entitled thereto, an order may be made directing the payment of the same into court. The money, so paid into court can be paid out only by the special direction of the surrogate; or pursuant to the judgment of a court of competent jurisdiction. The state comptroller may institute any necessary proceeding before the surrogate's court to compel the deposit of such moneys in court, which have not been paid over or deposited after the expiration of six months.

Former § 2748 of this Code. From 2 R. S. 98, § 81.

§ 2742. Effect of judicial settlement of account; summary statement.

A judicial settlement of the account of an executor, administrator, guardian or testamentary trustee, either by the decree of the surrogate's court, or upon an appeal therefrom, is conclusive evidence against all the parties of whom jurisdiction was obtained and all persons deriving title from any of them at any time, as to all matters embraced in the account and decree.

Each decree, whereby an account is judicially settled, must contain, in the body thereof, a summary of the account as settled; or must refer to such a summary, which must be recorded in the same book, and is deemed a part of the decree.

Former §§ 2742, 2551, 2813 of this Code, in part. From 2 R. S. 94 (Part 2, c. 4, tit. 3), § 65; L. 1837, c. 460, § 2.

ARTICLE SECOND.

Costs in special proceedings, when and how payable; security for costs; compensation of special guardian, fees of appraisers, jurors, referees and witnesses, commissions and compensation of executors, administrators, guardians and trustees.

Sec. 2743. Costs in special proceedings.
2744. Costs; how made payable.
2745. Costs on order.
2746. When surrogate to fix amount of costs.
2747. Additional allowance in settling accounts.
2748. Compensation of special guardian.
2749. Allowance upon sale of real property.
2750. Security for costs.
2751. Costs of appeal.
2752. Fees of appraiser, referee, juror and witness.
2753. Commissions of executor, administrator, guardian or testamentary trustee.

§ 2743. Costs in special proceedings.

Costs shall be awarded in special proceedings in surrogate's court solely in accordance with the following sections, and shall include all disbursements of the party to whom they are awarded, which might be taxed in the supreme court. The sum allowed for costs must be fixed by the surrogate, and inserted in the decree or order, and must be awarded to the party.

Former § 2559 of this Code.

§ 2744. Costs; how made payable.

Except where special provision is otherwise made by law, costs, awarded by a decree or order may be made payable by the party personally, or out of the estate, or fund, or out of the share or interest therein of any person, or from both, in such proportion as the surrogate may direct, and justice requires.

Former § 2557 of this Code, modified. From 2 R. S. 223 (Part 3, c. 2, tit. 1), § 10; L. 1886, c. 784; L. 1887, c. 782, § 8.

§ 2745. Costs on order.

The costs upon granting or refusing to grant an order, are in the discretion of the surrogate, and when allowed may be collected in the same manner as costs allowed upon granting or refusing to grant an order in the supreme court.

New; substance found in former § 2556 of this Code.

§ 2746. When surrogate to fix amount of costs.

The surrogate, upon rendering a decree, may, in his discretion, fix such a sum as he deems reasonable, to be allowed as costs, to the petitioner, and to any other party who has succeeded in a contest, or whose attorney, in the absence of a contest, has rendered services in the proceeding of substantial benefit to him, or to the estate or fund, not exceeding, where there has not been a contest, twenty-five dollars, or where there has been a contest, seventy dollars; and, in addition thereto, where a trial or hearing upon the merits necessarily occupies more than one day, ten dollars for each additional day, necessarily occupied in the trial or hearing and in preparing therefor, and where a motion for a new trial is made, if it is granted, twenty-five dollars; if it is denied, fifteen dollars.

When the decree is made upon a contested application for probate of a will, costs, payable out of the estate or otherwise, shall not be awarded to an unsuccessful contestant of the will, unless he is a special guardian for an infant or incompetent, appointed by the surrogate, or is named as an executor in a paper propounded by him in good faith as the last will of the decedent; but where a person named as the executor in a will propounds the will for probate, such person so named as executor may, whether successful or not, in the discretion of the surrogate, be awarded costs and all necessary disbursements made by him and all expenses incurred in the attempt to sustain the will. The surrogate may order a copy of the stenographer's minutes to be furnished to the contestant's counsel, and charge the expense thereof to the estate, if he shall be satisfied that the contest is made in good faith.

Former § 2561 of this Code, modified; last paragraph from former § 2558, subd. 3.

§ 2747. Additional allowance in settling account.

In addition to the sums specified in the last section, the surrogate may, in his discretion, allow to an executor, administrator, guardian, or testamentary trustee, upon a judicial settlement of his account, or on an intermediate accounting required by the surrogate, such a sum, as the surrogate deems reasonable, for his counsel fees and other expenses, not exceeding ten dollars for each day necessarily occupied in preparing his account for settlement and in drawing, entering and executing the decree.

Former § 2562 of this Code. From L. 1863, c. 362, § 8; Id., c. 115; L. 1881, c. 535.

§ 2748. Compensation of special guardian.

A special guardian for an infant or incompetent shall receive a reasonable compensation for his services to be fixed by the surrogate, payable from the estate or fund, or from the interest of the ward therein, or from both in such proportion as the surrogate may direct.

New.

§ 2749. Allowance upon sale of real property.

Upon the disposition of real property of a decedent, as prescribed in this chapter, the executor or administrator disposing of the property, must be allowed by the surrogate out of the proceeds of the sale brought into court, his commissions and expenses; and such a further sum as the surrogate thinks reasonable, for the necessary services of his attorney and counsel therein.

Former § 2563 of this Code, modified. From L. 1844, c. 300, § 2.

§ 2750. Security for costs.

In any proceeding where an issue is raised by answer or objection by or on behalf of a non-resident of the state of New York against the proponent of a will, or an executor, administrator or trustee, or where the probate of a will has been tried before a jury which has disagreed, such proponent, executor, administrator or trustee shall be entitled in the discretion of the surrogate to have the person or persons raising such issue give security for costs.

New.

§ 2751. Costs of appeal.

The appellate court may award to the successful party the costs of the appeal; or it may direct that they abide the event of a new trial, or of the subsequent proceedings in the surrogate's court. In either case, the costs may be made payable out of the estate or fund, or personally by the unsuccessful party, as directed by the appellate court; or, if such direction is not given, as directed by the surrogate.

The costs of an appeal, when they are awarded in a surrogate's court, are the same as if they were awarded in the supreme court.

Former §§ 2560, 2589 of this Code. From 2 R. S. 608 (Part 3, c. 9, tit. 3), § 96; Id., 67 (Part 2, c. 6, tit. 1), § 61.

§ 2752. Fees of appraiser, referee, juror and witness.

An appraiser is entitled, in addition to his actual expenses, to a sum, to be fixed by the surrogate, not exceeding five dollars for each day actually and necessarily occupied by him in making the appraisal or inventory. The number of days' services and the expenses, if any, must be proved by the affidavit of the appraiser; and the sums payable therefor taxed by the surrogate, and paid by the executor or administrator.

A referee, juror, or witness is entitled to the same fees for his services and for traveling, as is allowed for like services in the supreme court.

Former §§ 2565, 2566 of this Code. From L. 1873, c. 225; 2 R. S. 59 (Part 2, c. 6, tit. 1), § 19.

§ 2753. [Am'd, 1916.] Commissions of executor, administrator, guardian or testamentary trustee.

On the settlement of the account of any executor, administrator, guardian or testamentary trustee, the surrogate must allow to him his just, reasonable and necessary expenses actually paid by him, and if he be an attorney and counselor-at-law of this state, and shall have rendered legal services in connection with his official duties, such compensation for such legal services as shall appear to the surrogate to be just and reasonable; and in addition thereto the surrogate must allow to such executor, administrator, guardian or testamentary trustee for his services in such official capacity, and if there be more than one, apportion among them according to the services rendered by them respectively:

For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum.

For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum.

For all sums above eleven thousand dollars, at the rate of one per centum.

The value of any real or personal property, and the increment thereof, received, distributed or delivered, shall be considered as money in making computation of commissions. But this shall not apply in case of a specific legacy or devise.

If an executor acting as trustee, or if a trustee or guardian, is required to receive income and pay over the same, and such executor, trustee or guardian pays over said income and renders an annual account to the beneficiary of all his receipts and disbursements on

account thereof, he shall be allowed, and may retain, the same commission on the amount so accounted for as he would be allowed upon principal on a judicial settlement; if he does not render such annual account, he shall be allowed, upon his judicial settlement, his commissions upon the total income from any money or property then payable to such beneficiary.

If the gross value of the principal of the estate or fund accounted for amounts to one hundred thousand dollars or more, each executor, administrator, guardian or testamentary trustee is entitled to the full compensation on principal and income allowed herein to a sole executor, administrator, guardian or testamentary trustee, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively. Where the will provides a specific compensation to an executor, administrator, testamentary guardian or trustee, he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, within four months from the date of his letters, or in the case of a testamentary trustee or guardian, from the date of his filing his oath, he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary or letters of general administration, are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law above the sum which he has already received in the other capacity.

Former § 2730 of this Code, modified. From 2 R. S. 93, §§ 58, 59; L. 1863, c. 362; L. 1881, c. 535; L. 1892, c. 636; L. 1893, c. 686; L. 1895, c. 595; L. 1905, c. 328; L. 1916, c. 596 (in effect May 19, 1916).

ARTICLE THIRD.

Appeal; when, how and to what court taken, and power of appellate court; undertaking to perfect appeal and stay execution; probate of heirship; definition and application of other sections to this chapter.

Sec. 2754. Appeal; when and to what court it may be taken.
2755. Who must be made parties.
2756. Time to appeal; how taken.
2757. Appeal may be on the law or the facts; case to be made; reversal.
2758. Certain provisions of chapter twelve made applicable.
2759. Security to perfect appeal.
2760. Id.; where decree is for money or delivery of property, etc.
2761. Security to stay proceedings in case of commitment.
2762. Amount and requisites of undertaking; action thereon.
2763. Power of appellate court; further testimony.
2764. Appeal; proceedings thereupon.

§ 2754. Appeal; when and to what court it may be taken.

An appeal to the appellate division of the supreme court may be taken from a decree of a surrogate's court, or from an order affecting a substantial right, made by a surrogate, or by a surrogate's court in a special proceeding, by any party aggrieved thereby, except where the decree or order was rendered or made upon his default in appearing.

Former §§ 2568, 2570 of this Code. From 2 R. S. 609 (Part 3, c. 9, tit. 3), § 104; Id., 711, § 118; Id., 62, § 35; L. 1895, c. 946.

§ 2755. Who must be made parties.

Each party who has appeared in the special proceeding in the surrogate's court, must be made a party to the appeal. A person not a party, may be brought in by an order of the appellate court, made after the appeal is taken, in such manner as the order may prescribe.

Former § 2573 of this Code, modified.

§ 2756. Time to appeal; how taken.

An appeal must be taken within thirty days after the service, upon the appellant, or upon the attorney, if any, who appeared for him in the surrogate's court, of a copy of the decree, or order from which the appeal is taken, and a written notice of the entry thereof, except that the party entering such decree or order shall not be entitled to further notice to limit his time to appeal.

An appeal must be taken by the service upon each party to the appeal, other than the appellant, and upon the surrogate, or the clerk of the surrogate's court, of a written notice, referring to the decree or order appealed from, and stating that the appellant appeals from the same, or from a specified part thereof. Where a party to the special proceeding in the court below appeared in person, the notice of appeal must be personally served upon him; where he appeared by an attorney, it must be served personally, either upon him or upon his attorney.

Former §§ 2572, 2574 of this Code, consolidated and modified. From 2 R. S. 66 (Part 2, c. 6, tit. 1), § 55; Id., 608, §§ 90, 102, 105–107.

§ 2757. Appeal may be on the law or the facts; case to be made; reversal.

The appeal may be taken upon questions of law, or upon the facts, or upon both. If it is taken from a decree rendered upon the trial by the surrogate, or by the surrogate and a jury, of an issue of fact, it must be heard upon a case, to be made and settled by the surrogate, as prescribed by law, for the making and settling of a case upon an appeal in an action.

Such appeal brings up for review, by each court to which the appeal is carried, each decision, to which an exception is duly taken by the appellant, as prescribed in section 2542. But such a decree or order shall not be reversed, for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby.

Former § 2576 of this Code, with part of former § 2545.

§ 2758. Certain provisions of chapter twelve made applicable.

The provisions of the following sections of this act, to wit: sections 1295 to 1299 both inclusive, and 1301 to 1303, and 1305 to 1309, both inclusive, apply to an appeal taken as prescribed in this article, and for the purposes of such application the word "judgment" shall mean a decree.

Former § 2575 of this Code.

§ 2759. Security to perfect appeal.

To render a notice of appeal effectual for any purpose, except in a case specified in the next section, or where it is specially prescribed by law, that security is not necessary to perfect the appeal, the appellant must give a written undertaking, with at least two sureties, to the effect that the appellant will pay all costs and damages which may be awarded against him upon the appeal, not exceeding two hundred and fifty dollars.

Former § 2577 of this Code. See 2 R. S. 66 (Part 2, c. 6, tit. 1), § 56; Id., 10, § 108.

§ 2760. Id.; where decree is for money or delivery of property, etc.

In every case except one in which the letters of an executor, administrator or guardian have been revoked, or a trustee has been removed a notice of appeal by an executor, administrator, testamentary trustee, guardian or other person appointed by the surrogate's court, from a decree, directing him to pay or distribute money, or to deposit money in a bank or trust company, or to deliver property; or by an executor or administrator from an order granting leave to issue an execution against him, as prescribed in section 1825 of this act, does not stay the execution of the decree appealed from unless the appellant gives an undertaking, with at least two sureties, in a sum therein specified, to the effect that if the decree or order, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay all costs and damages, which may be awarded against him upon the appeal, and will pay the sum so directed to be paid or collected, or, as the case requires will deposit or distribute the money, or deliver the property, so directed to be deposited, distributed, or delivered, or the part thereof as to which the decree or order is affirmed.

Former § 2578 of this Code. From 2 R. S. 116 (Part 2, c. 6, tit. 5), § 21; L. 1870, c. 359, § 12; L. 1882, c. 399.

§ 2761. Security to stay proceedings in case of commitment.

An appeal from a decree or an order, directing the commitment of an executor, administrator, testamentary trustee, guardian, or other person appointed by the surrogate's court, or an attorney or counsel employed therein, for disobedience to a direction of the surrogate, or for neglect of duty; or directing the commitment of a person refusing to obey a subpœna, or to testify, when required according to law; does not stay the execution of the decree or order appealed from, unless the appellant gives an undertaking with at least two sureties, in a sum therein specified, to the effect that if the decree or order appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will, within twenty days after the affirmance or dismissal, surrender himself in obedience to the decree or order, to the custody of the sheriff of the county, wherein he was directed to be committed.

Former § 2579 of this Code, in part. From 2 R. S. 610, 611 (Part 3, c. 9, tit. 3), § 111-115.

§ 2762. Amount and requisites of undertaking; action thereon.

The sum specified in an undertaking, executed as prescribed in either of the last two sections, must be fixed by the surrogate, or by a judge of the appellate court, who may require proof, by affidavit, of the value of any property, or of such other facts as he deems proper.

An undertaking, given as prescribed in the last three sections, must be to the people of the state; must contain the name and residence of each of the sureties thereto; must be approved by the surrogate or a judge of the appellate court; and must be filed in the surrogate's office. The surrogate may, at any time in his discretion, make an order authorizing any person aggrieved to bring an action upon the undertaking, in his own name, or in the name of the people. Such action may be prosecuted in the same manner, and with the same effect as an action upon an administrator's bond; and the proceeds of the action must be paid or distributed as directed by the surrogate, to or among the persons aggrieved, to the extent of the pecuniary injuries sustained by them, and the balance, if any, must be paid into the surrogate's court.

Former §§ 2580, 2581, of this Code, modified; the last sentence is from former § 2579.

§ 2763. Power of appellate court; further testimony.

Where an appeal is taken upon the facts, the appellate court has the same power to decide the questions of fact, which the surrogate had; and it may, in its discretion, receive further testimony or documentary evidence, and appoint a referee.

The appellate court may reverse, affirm, or modify, the decree or order appealed from, and each intermediate order, specified in the notice of appeal, which it is authorized by law to review, and as to any or all of the parties; and it may, if necessary or proper, grant a new trial or hearing. Upon an appeal from a determination of the surrogate, made upon an application pursuant to subdivision six of section 2490 the appellate court has the same power as the surrogate, and his determination must be reviewed as if an original application were made to that court. The decree or order appealed from may be enforced, or restitution may be awarded, as the case

requires, as prescribed in title first of chapter twelfth of this act, with respect to an appeal from a judgment.

Former §§ 2481, 2586, 2587 of this Code.

§ 2764. Appeal; proceedings thereupon.

In the appellate division of the supreme court the order made upon an appeal from a decree or an order of a surrogate's court must be entered with the clerk of the appellate division, and a certified copy thereof annexed to the papers transmitted from the court below upon which the appeal was heard, must be transmitted to the court from which the appeal was taken, and the court below shall enter the judgment or order necessary to carry the determination of the appellate division into effect.

Former § 2585 of this Code. See L. 1895, c. 946.

ARTICLE FOURTH.

Probate of heirship; definitions, and application of other sections to this chapter.

Sec. 2765. Heir, etc., may apply to establish heirship.
2766. What facts to be ascertained; decree thereupon.
2767. Decree to be recorded; effect thereof.
2768. Definition of expressions used in this chapter.
2769. Application of chapter; confirmation of previous acts.
2770. Certain provisions made applicable to proceedings in surrogate's courts.
2771. Effect of this chapter on laws applicable to certain counties.

§ 2765. Heir, etc., may apply to establish heirship.

Where a person, seized in fee of real property within the state, dies intestate, or without having devised his real property, his heirs, or any of them, or any person deriving title from or through such heirs, or any of them, may present to the surrogate's court which has acquired jurisdiction of the estate, or, if no surrogate's court has acquired such jurisdiction, then to the surrogate's court of the county where the real property, or any part thereof is situated, a petition, describing the real property, setting forth the facts upon which the jurisdiction of the court depends, and the interest or share of the petitioner, and of each other heir of the decedent, in the real property, and praying for a decree establishing the right of inheritance thereto, and that all the heirs of the decedent may be cited to show cause why the prayer of the petition should not be granted. Upon the presentation of such a petition a citation must be issued accordingly, except in a case where the petitioner was a party to a judicial settlement, the decree upon which determined the rights of the parties to such real estate.

Former § 2654 of this Code. From L. 1873, c. 552, §§ 1, 2; L. 1892, c. 115.

§ 2766. What facts to be ascertained; decree thereupon.

Upon the return of the citation, the surrogate's court must hear the allegations and proofs of the parties and determine all the issues raised. The petitioner must establish the fact of the decedent's death; the place of his residence at the time of his death; his intestacy, either generally, or as to the real property in question; the heirs entitled to inherit the property in question; the name, age, residence and relationship to the decedent, of each; and the interest or share of each in the property. The surrogate, when these facts are established, must make a decree, describing the property, and declaring that the right of inheritance thereto has been established to his satisfaction, in accordance with the facts, which must be recited in the decree.

Former § 2656 of this Code. From L. 1873, c. 522, §§ 1, 2.

§ 2767. Decree to be recorded; effect thereof.

A certified copy of a decree, made as prescribed in the last section may be recorded in the office of the clerk, or of the register, as the case requires, of each county in which the real property is situated, as prescribed by law for recording a deed, and, from the time when such copy is so recorded, the decree, or the record thereof, is con-

clusive evidence of the facts so declared to be established thereby against all parties to such proceeding.

Former § 2657 of this Code. From L. 1873, c. 552, §§ 1, 2; L. 1874, c. 127.

§ 2768. [Am'd, 1916.] Definition of expressions used in this chapter.

In construing the provisions of this chapter, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

1. The word "intestate," signifies a person who died without leaving a valid will; but where it is used with respect to particular property it signifies a person who died without effectually disposing of that property by will whether he left a will or not.

2. The word "assets," signifies personal property applicable to the payment of the debts of a decedent.

3. The word "debts" includes every claim and demand, upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action; and the word "creditor" includes every person having such a claim or demand, any person having a claim for expense of administration, or any person having a claim for funeral expenses.

4. The word, "will," signifies a last will and testament, and includes all the codicils to a will.

5. The expression, "letters of administration," includes letters of temporary administration.

6. The expression, "testamentary trustee," includes every person, except an executor, an administrator with the will annexed, or a guardian, who is designated by a will, or by any competent authority, to execute a trust created by a will; and it includes such an executor or administrator, where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator.

7. The word, "surrogate," where it is used in the text, or in a bond or undertaking, given pursuant to any provision of this chapter, includes every officer or court vested by law with the functions of surrogate.

8. The expression, "judicial settlement," where it is applied to an account, signifies a decree of a surrogate's court, whereby the account is made conclusive upon the parties to the special proceeding, either for all purposes, or for certain purposes specified in the statute; and an account thus made conclusive is said to be "judicially settled."

9. The expression, "intermediate account," denotes an account filed in the surrogate's office, for the purpose of disclosing the acts of the person accounting, and the condition of the estate or fund in his hands, and not made the subject of a judicial settlement.

10. The expression, "upon the return of a citation," where it is used in a provision requiring an act to be done in the surrogate's court, relates to the time and place at which the citation is returnable, or to which the hearing is adjourned; includes a supplemental citation, issued to bring in a party who ought to be but has not been cited; and implies that before doing the act specified, due proof must be made, that all persons required to be cited have been duly cited.

11. The expression, "persons interested," where it is used in

connection with an estate or a fund, includes every person entitled, either absolutely or contingently, to share in the estate or the proceeds thereof, or in the fund, as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee or otherwise except as a creditor. Where a provision of this chapter prescribes that a person interested may object to an appointment or may apply for an inventory, an account, or increased security, an allegation of his interest, duly verified, suffices, although his interest is disputed; unless he has been excluded by a judgment, decree, or other final determination, and no appeal therefrom is pending.

12. The term, "next of kin," includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed residue of the assets of a decedent after payment of debts and expenses, other than a surviving husband or wife.

13. The expression, "real property," includes every estate, interest, and right, legal or equitable, in lands, tenements, or hereditaments, except those which are determined or extinguished by the death of a person seized or possessed thereof, or in any manner entitled thereto, and except those which are declared by law to be assets. The word, "inheritance," signifies real property as defined in this subdivision, descended as prescribed by law. The expression, "personal property," signifies every kind of property which survives a decedent, other than real property as defined in this subdivision, and includes a right of action conferred by special statutory provision upon an executor or administrator.

14. The word "guardian" refers to a guardian of an infant's person or property, or both, appointed by the surrogate's court or the supreme court, and includes a guardian appointed by will or deed.

15. Whenever in this chapter a paper or instrument is required to be "acknowledged, or proved, and duly certified," the same shall be acknowledged or proven in the same manner as a deed is required to be acknowledged or proved and certified to be recorded in that county, except that when executed within the state of New York, no certificate of the county clerk shall be required.

16. The word "respondent" when used in this chapter signifies every party to a special proceeding, except the petitioner.

17. The words "surrogate's court" and "surrogate" where they refer to jurisdiction mean the particular court or surrogate having jurisdiction of the estate or fund.

18. [Am'd, 1916.] Whenever in this chapter a citation, order, notice or paper is directed to be deposited in the "post-office" or in a "specified post-office," such deposit may be made or directed to be made in any post-office, branch post-office, sub-station or letter box maintained and exclusively controlled by the United States government.

Former § 2514 of this Code, with additions. Am'd by L. 1916, c. 447 (in effect May 29, 1916).

§ 2769. Application of chapter; confirmation of previous acts.

Each provision of this chapter, relating to the jurisdiction of the surrogate's court, to take the proof of a will, and to grant letters testamentary or letters of administration or regulating the mode of proceeding in any manner connected with the estate of the decedent applies, unless otherwise expressly declared therein, whether the will was made, or the decedent died, before or after this chapter takes effect. All acts hitherto of surrogates and officers acting as

such in completing by certifying in their own names any uncertified wills, and by signing and certifying in their own names any uncertified records of wills and of other proofs and examinations taken in the proceedings of probate thereof, before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements.

Former § 2482 of this Code. From 2 R. S. 68 (Part 2, c. 6, tit. 1), § 65b; L. 1893, c. 686.

§ 2770. Certain provisions made applicable to proceedings in surrogate's courts.

Except where a contrary intent is expressed in, or plainly implied from the context of, a provision of this chapter, all other portions of this act, and the general rules of practice apply to surrogates' courts and to the proceedings therein, so far as they can be applied to the substance and subject matter of a proceeding without regard to its form.

Former § 2538 of this Code.

§ 2771. [Am'd, 1915.] Effect of this chapter.

Nothing in this chapter shall repeal, amend or modify any existing law specially applying to any county, which is inconsistent with any section of this chapter, nor in any manner affect any litigation, action or special proceeding pending at the time when this act takes effect, except as hereinafter stated, and such pending action or special proceeding shall proceed under the practice established, the same as though not affected by this act; provided, however, that the provisions of this chapter relating to the trial by jury of controverted questions of fact shall apply to all such pending actions or special proceedings.

New. Am'd by L. 1915, c. 274 (in effect April 13, 1915).

CHAPTER XIX.

Courts of Justices of the Peace, and Proceedings Therein.

TITLE I.— Jurisdiction and General Powers.
TITLE II.— Commencement of Action; Appearance of Parties; Provisional Remedies.
TITLE III.— Pleadings; Including Counterclaims, and Proceedings upon Answer of Title.
TITLE IV.— Proceedings Between the Joinder of Issue and the Trial.
TITLE V.— Trial and its Incidents.
TITLE VI.— Judgment; and Docketing the Same.
TITLE VII.— Executions.
TITLE VIII.— Appeals.
TITLE IX.— Costs.
TITLE X.— Action or Special Proceeding, Relating to an Animal Straying upon the Highway.
TITLE XI.— Provisions Specially Relating to Courts of Justices of the Peace in the City of Brooklyn.
TITLE XII.— Miscellaneous Provisions.

TITLE I.

Jurisdiction and general powers.

Sec. 2861. Justice's jurisdiction must be specially conferred by statute.
2862. General civil jurisdiction.
2863. No jurisdiction in certain cases.
2864. Confession of judgment.
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2873. Record of conviction.
2874. Requisites of commitment.
2875. Fine to be paid to overseer or superintendent of the poor.

§ 2861. Justice's jurisdiction must be specially conferred by statute.

A justice of the peace has such jurisdiction in civil actions and special proceedings, as is specially conferred upon him by statute, and no other.

From Co. Proc., § 58.

§ 2862. [Am'd, 1896, 1906.] General civil jurisdiction.

Except as otherwise prescribed in the next section, a justice of the peace has jurisdiction of the following civil actions:

1. An action to recover damages upon or for breach of a contract, express or implied, other than a promise to marry, where the sum claimed does not exceed two hundred dollars.

2. An action to recover damages for a personal injury, or an injury to property, where the sum claimed does not exceed two hundred dollars.

3. An action for a fine or penalty, not exceeding two hundred dollars.

4. An action upon a bond conditioned for the payment of money, where the sum claimed to be due does not exceed two hundred dollars; the judgment to be rendered for the sum actually due. Where the sum secured by the bond is to be paid in instalments, an action may be brought for each instalment, as it becomes due.

5. An action upon a surety bond, taken by any justice of the peace.

6. An action upon a judgment, either foreign or domestic, rendered in any inferior court not of record, where the sum claimed does not exceed two hundred dollars. An action upon a judgment, foreign or domestic, rendered in a court of record, where the sum claimed does not exceed fifty dollars.

7. An action to recover one or more chattels, with or without damages for the taking, withholding, or detention thereof, where the value of the chattel, or of all the chattels, as stated in the affidavit made on the part of the plaintiff, does not exceed two hundred dollars.

8. An action to recover damages for an escape from the jail liberties, as provided by chapter two, title two, articles four and five of this act, where the sum claimed does not exceed fifty dollars.

From Co. Proc., § 53. Subd. 8 added by L. 1896, c. 303 (in effect Sept. 1, 1896). Subd. 6, am'd by L. 1906, c. 246 (in effect Sept. 1, 1906).

§ 2863. [Am'd, 1882, 1895, 1909.] No jurisdiction in certain cases.

But a justice of the peace cannot take cognizance of a civil action, in either of the following cases:

1. Where the people of the State are a party, except for one or more fines or penalties not exceeding two hundred dollars.

2. Where the title to real property comes in question, as prescribed in title third of this chapter.

3. Where the action is to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction, or malicious prosecution, or where it is brought under sections 1837, 1902, or 1969 of this act, or sections 28 or 101 of the Decedent Estate Law.[1]

4. Where, in a matter of account, the sum total of the accounts of both parties proved to the satisfaction of the justice, exceeds four hundred dollars.

5. Where the action is brought against an executor or administrator as such, except where the amount of the claim is less than the sum of fifty dollars, and the claim has been duly presented to the executor or administrator and rejected by him.

From Co. Proc., § 54. Am'd by L. 1882, c. 399; L. 1895, c. 527; L. 1909, c. 65.

§ 2864. Confession of judgment.

A justice of the peace has also jurisdiction to render judgment, upon the confession of a defendant, as prescribed in title sixth of this chapter, where the sum confessed does not exceed five hundred dollars.

From Co. Proc., § 53, subd. 8.

§ 2865. [Am'd, 1882.] Actions by and against officers, etc.; and by executors, etc.

An action, cognisable by a justice of the peace, may be brought by or against a corporation; by or against a natural person in his own right; by or against a town or county officer in his official character; or by an executor or administrator, trustee of an express trust, or a receiver in supplementary proceedings.

From 2 R. S. 226 (Part 3, c. 2, tit. 4), § 5; L. 1847, c. 470, § 45. Am'd by L. 1882, c. 399.

[1] Section 28 of the Decedent Estate Law is the same as § 1868 of this edition of the Code; as to § 101, see the foot-note on page 506.

§ 2866. [Am'd, 1911.] Tavern-keepers disqualified.

A justice of the peace, who is an innholder or tavern-keeper engaged in the liquor traffic or at whose inn or tavern liquor is sold, has no power or jurisdiction under any provision of this chapter; but if a judgment has been actually rendered by him, before he became so disqualified, he may give a transcript thereof, or issue execution thereupon, or satisfy the judgment, upon payment thereof.

From L. 1846, c. 140. Am'd by L. 1911, c. 600 (in effect Sept. 1, 1911).

§ 2867. Members of legislature not compelled to act.

A justice of the peace, who is a member of the senate or assembly, is not obliged to take cognizance of a civil action or special proceeding; but he may take cognisance thereof, in his discretion.

From 2 R. S. 226, § 7.

§ 2868. [Am'd, 1897, 1899.] Justices to hold court; general powers.

A justice of the peace must hold, within his town or city, a court for the trial of any action or special proceeding, of which he has jurisdiction, brought before him; but such a court shall not be held in a room in any part of which trafficking in liquors is authorized or in any adjoining room. He must hear, try and determine the same according to law and equity, and for that purpose, where special provision is not otherwise made by law, the court is vested with all the necessary powers possessed by the supreme court.

From Id., § 1. Am'd by L. 1897, c. 404; L. 1899, c. 105 (in effect Sept. 1, 1899).

§ 2869. [Am'd, 1893, 1894, 1895, 1898, 1903.] In what town, etc., action must be brought.

An action must be brought before a justice of a town or city wherein one of the parties resides, or a justice of an adjoining town or city in the same county, except in one of the following cases:

1. Where the defendant has absconded from his residence, it may be brought before a justice of the town or city in which the defendant, or a portion of his property, is at the time of the commencement of the action.

2. Where the plaintiff is not a resident of the county, or if there are two or more plaintiffs when all are non-residents thereof, it must be brought in the town where the defendant resides, or in any adjoining town thereto.

3. Where the defendant is a non-resident of the county, it may be brought before a justice of the town or city, in which he is at the time of the commencement of the action.

4. Where it is specially prescribed by law, that a particular action may be brought before a justice of the town, city, county, or district, where an offense was committed, or where property is found.

5. In any town adjoining an incorporated city, no justice of such town shall have jurisdiction of any action brought against a resident of such adjoining city, unless one of the parties plaintiff in such action is a resident of such town.

A defendant designated in section 2879, section 2880, or section 2881 of this act, is deemed, for the purposes of this section, a resident of the town or city, where the person, to whom a copy of the summons is delivered, resides.

From 2 R. S. 226, §§ 8, 9. Am'd by L. 1894, c. 306; L. 1895, c. 158; L. 1898, c. 112 (in effect Sept. 1, 1898). Subd. 5 added by L. 1893, c. 74; am'd by L. 1903, c. 521 (in effect Sept. 1, 1903).

§ 2870. Criminal contempts.

A justice of the peace has power to punish, for a criminal contempt, a person guilty of either of the following acts:

1. Disorderly, contemptuous, or insolent behavior towards him, while engaged in the trial of an action, the rendering of a judgment, or any other judicial proceeding; where such behavior directly tends to interrupt the proceedings, or to impair the respect due to his authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt his official proceedings.

3. Resistance wilfully offered, in his presence, to the execution of his lawful mandate.

He has not power to punish, for a criminal contempt, in any other case.

From 2 R. S. 273 (Part 3, c. 2, tit. 4), § 274.

§ 2871. Id.; how punished.

Punishment for a contempt, specified in the last section, may be by fine not exceeding twenty-five dollars, or by imprisonment in the county jail not exceeding five days, or both, in the discretion of the justice. Where a person is committed to prison for the non-payment of such a fine, he must be discharged at the expiration of ten days; but where he is also committed for a definite time, the ten days must be computed from the expiration of the definite time.

From Id., § 275.

§ 2872. Offender to be heard.

A person shall not be punished by a justice of the peace, for a contempt, until an opportunity has been given him to be heard in his defence. And, for that purpose, the justice must issue a warrant, directed, generally, to any constable of the county, requiring the constable to bring the offender before him.

From Id., § 276.

§ 2873. Record of conviction.

A justice, who convicts a person of a contempt, must, within ten days after the conviction, make up, subscribe, and file in the county clerk's office, a record thereof, stating therein the particular circumstances of the offence, and the punishment awarded by him upon the conviction.

From Id., § 277.

§ 2874. Requisites of commitment.

A warrant of commitment for a contempt must set forth the particular circumstances of the offence; otherwise it is void.

From Id., § 278.

§ 2875. Fine to be paid to overseer or superintendent of the poor.

An officer, who collects or receives a fine, imposed by a justice of the peace for a contempt, must, within ten days thereafter, pay the money, for the benefit of the poor, to the overseer or superintendent of the poor of the town, city, or district, wherein the fine was imposed; or, where there is no such officer, to the officer or officers performing corresponding functions under another name; unless the board of supervisors has directed the payment of fines and penalties to the supervisor of the town, in a case where it is authorised by law so to do.

New.

TITLE II.

Commencement of action; appearance of parties; provisional remedies.

Article 1. Commencement of action.
2. Appearance of parties.
3. Order of arrest
4. Attachment of property.
5. Replevin.

ARTICLE FIRST.

Commencement of action.

Sec. 2876. Action; how commenced.
2877. Contents of summons.
2878. Service of summons.
2879. Id.; upon a corporation.
2880. Id.; special provisions relating to railroad corporations.
2881. Id.; relating to express, insurance and telegraph companies.
2882. Last two sections qualified.
2883. Second and third summons; effect thereof.
2884. Where name of defendant is unknown.
2885. Return of summons.

§ 2876. Action; how commenced.

An action is commenced before a justice of the peace, either by the voluntary appearance and joinder of issue by the parties, or by the service of a summons.

From 2 R. S. 227 (Part 3, c. 2, tit. 4), §§ 11, 12, 13.

§ 2877. [Am'd, 1904.] Contents of summons.

The summons must be directed, generally, to any constable of the county where the justice resides; and it must command him to summon the defendant to appear before the justice, at a place specified therein, to answer the complaint of the plaintiff in a civil action. Where the summons is accompanied with an order to arrest the defendant, it must be made returnable immediately upon the arrest of the defendant, within twelve days after the day when it was issued; in every other case, it must be returnable at a time therein specified, not less than six nor more than twelve days after the day when it was issued. A summons shall not be made returnable on a legal holiday.

From Id., § 14. Am'd by L. 1904, c. 99 (in effect Sept. 1, 1904).

§ 2878. Service of summons.

Personal service of the summons must be made by delivering a copy thereof to the defendant; except where it is specially prescribed in this chapter that personal service may be made by delivering a copy to another person. Where service of a summons is personal, it must be made at least six days before the time of appearance specified therein; except where it is accompanied with an order of arrest.

From Id., § 15; L. 1876, c. 277.

§ 2879. [Am'd, 1904.] Id.; upon a corporation.

Where the defendant to be served is a corporation, or person, company or partnership doing business in another county than that in which he or it resides, the summons may be personally served upon it or him by delivering a copy thereof to an officer, managing agent or person to whom a copy of the summons in an action

brought against the corporation in the supreme court might be delivered as prescribed in sections 431 and 432 of this act, or, to any director, managing agent or trustee of the corporation, person, partnership or company by whatever official title he or it is called.

From Co. Proc., § 64, subd. 15; L. 1847, c. 470, § 45. Am'd by L. 1904, c. 527 (in effect April 29, 1904).

§ 2880. [Am'd, 1900.] Id.; special provision relating to railroad corporations.

Where the defendant to be served is a railroad corporation, and no officer thereof resides in the county, to whom a copy of the summons may be delivered, as prescribed in the last section, it may be personally served, by delivering a copy thereof to a local superintendent of repairs, freight agent, agent to sell tickets, or station keeper of the corporation, residing in the county; unless, at least thirty days before it was issued, the corporation had filed, in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against it, may be served; in which case, the summons may be personally served by delivering a copy to the person so designated.

From L. 1854, c. 282, §§ 14, 15. Am'd by L. 1900, c. 511 (in effect Sept. 1, 1900).

§ 2881. [Am'd, 1895, 1905.] Id.; relating to express, insurance and telegraph companies.

Where the defendant to be served is a corporation, association, partnership or person doing business in the state as an express company, an insurance company, or a telegraph company, and no person resides in the county to whom a copy of the summons may be delivered, as prescribed in the foregoing sections of this article, it may be personally served on the express company by delivering a copy thereof to any local or general agent to receive freight or parcels, route agent, or messenger of the defendant, residing in the county, and on any insurance company by delivering a copy thereof to any local or general agent of the defendant, residing in the county, and on any telegraph company by delivering a copy thereof to any office manager of the defendant, residing in the county; unless at least thirty days before it was issued, the defendant had filed in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against the defendant may be served; in which case the summons may be personally served by delivering a copy thereof to the person so designated.

From L. 1864, c. 411, §§ 1, 2. Am'd by L. 1895, c. 849; L. 1905, c. 211 (in effect September 1, 1905).

§ 2882. Last two sections qualified.

Where a person has been designated, as prescribed in either of the last two sections, and the designation has been revoked, or it appears, by affidavit or the return of the constable, to whom a summons has been duly delivered for service, that the person designated is dead, or has ceased to reside within the county; or that he cannot, after due diligence, be found within the county, so as to deliver a copy of the summons to him; the original summons, or the second or third summons, issued as prescribed in the next section, may be served as if the designation had not been made. Such a designation may be revoked by a writing, executed and filed in like manner as required for the purpose of making the designation.

New.

§ 2883. Second and third summons; effect thereof.

Where it appears, by the return of the constable, to whom a summons has been duly delivered for service, that it was not served, for any cause, a second summons may be issued by the same justice, in the same action, within twenty days after the first summons was issued; and, upon the like return thereof, a third summons may be issued, within twenty days after the second was issued. The second or the third summons, as the case may be, relates back to the time when the first summons was issued; and, with respect to all proceedings before actual service, the service thereof has the same effect, as if the first summons had been seasonably served. For the purpose of issuing a new summons, as prescribed in this section, a previous summons may be returned upon the sixth, or any subsequent day, before the return day thereof.

New.

§ 2884. Where name of defendant is unknown.

Where the plaintiff is ignorant of the name, or part of the name of a defendant, that defendant may be designated in the summons, and in any other process or proceeding in the action, by a fictitious name, or by so much of his name as is known, adding a description, identifying the person intended. The person so designated must thereupon be regarded as a defendant in the action, and as sufficiently described therein for all purposes. When his name, or the remainder of his name, becomes known, the justice, before whom the action is pending, must amend the proceedings already taken, by the insertion of the true or full name, in place of the fictitious name, or part of a name; and all subsequent proceedings must be taken under the name so inserted.

From 2 R. S. 274 (Part 3, c. 2, tit. 4), § 282.

§ 2885. Return of summons.

A constable, who serves a summons, must, at or before the time when the same is returnable, make and deliver to the justice a written return thereof, under his hand, stating the time when, and the manner in which, he served it. A constable who fails seasonably to serve a summons, delivered to him for service, must make a written return thereof under his hand, stating that it was not served, and the reason why he failed to serve it.

From 2 R. S. 228, § 16.

ARTICLE SECOND.

Appearance of parties.

Sec. 2886. Parties may appear in person or by attorney.
2887. Guardian ad litem for infant plaintiff.
2888. Id.; for infant defendant.
2889. When constable, etc., may not act as attorney.
2890. Authority of attorney; how proved.
2891. Plaintiff to prove his case.
2892. Defendant may offer to compromise; proceedings thereupon.
2893. Justice to wait one hour.

§ 2886. Parties may appear in person or by attorney.

A party to an action before a justice of the peace, who is of full age, may appear and prosecute or defend the same, in person or by attorney, at his election, unless he has been judicially declared to be incompetent to manage his affairs.

From 2 R. S. 232 (Part 3, c. 2, tit. 4), §§ 39, 41.

§ 2887. Guardian ad litem for infant plaintiff.

Before a summons is issued in behalf of, or an issue is joined without summons by, an infant plaintiff, the justice must appoint a competent and responsible person, nominated by the plaintiff or his general guardian, to appear as his guardian for the purpose of the action. The written consent of the person so appointed must be filed with the justice, before his appointment. The guardian so appointed is responsible for the costs.

From Id., § 40.

§ 2888. Id.; for infant defendant.

After the service and return of a summons against an infant defendant, no other proceeding shall be taken in the action, until a person has been appointed to appear as his guardian for the purpose of the action. Upon the nomination of the defendant, the justice must appoint a proper person for that purpose. If the defendant does not appear upon the return of the summons, or if he neglects or refuses to nominate, the justice may, on the application of the plaintiff, appoint any proper person as his guardian. The written consent of the person, so appointed, must be filed with the justice before his appointment. The guardian so appointed is not responsible for any costs.

From Id., §§ 42, 43.

§ 2889. [Am'd, 1909.] When constable, etc., may not act as attorney.

Subject to the provisions of sections 271 and 272 of the Penal Law,[1] any person, other than the constable who served the summons or the venire, or the law partner or clerk of the justice, may be the attorney for a party to an action before a justice of the peace.

From Id., § 44; L. 1864, c. 421. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 2890. Authority of attorney; how proved.

The attorney's authority may be conferred orally or in writing; but the justice shall not suffer a person to appear as an attorney, unless his authority is admitted by the adverse party, or proved by the affidavit or oral testimony of himself, or another.

From 2 R. S. 233, § 45.

[1] Sections 271 and 272 of the Penal Law are the same as §§ 63 and 64 of this edition of the Code.

§ 2891. [Am'd, 1906.] Plaintiff to prove his case, except where a verified complaint is served.

If a defendant fails to appear and answer, the plaintiff cannot recover without proving his case, except in an action which has been commenced by the service of a summons and verified complaint as provided by section 2936 of this code; in such action, in case the defendant fails to answer said complaint, as provided by section 2938 of this code, at the time of the return of said summons he shall be deemed to have admitted the allegations of the complaint as true, and the court shall, upon filing the summons and complaint, with due proof of service thereof, enter judgment for the plaintiff and against the defendant, for the amount demanded in such complaint, with costs, without further proof.

From Co. Proc., § 64, subd. 8. Am'd by L. 1906, c. 291 (in effect Sept. 1, 1906).

§ 2892. Defendant may offer to compromise; proceedings thereupon.

Except in an action to recover a chattel, the defendant may, upon the return of the summons and before answering, file with the justice a written offer to allow judgment to be taken against him for a sum therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more of the defendants, against whom a separate judgment may be taken. If the plaintiff thereupon, before taking any other proceeding in the action, files with the justice a written acceptance of the offer, the justice must render judgment accordingly. If an acceptance is not filed, the offer cannot be given in evidence upon the trial; but, if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, and must pay the defendant's costs from that time.

From Id., subd. 15.

§ 2893. Justice to wait one hour.

Upon the return of a summons duly served, the justice must wait one hour, after the time specified therein for its return, unless the parties sooner appear.

From 2 R. S. 233 (Part 3, c. 2, tit. 4), § 46.

ARTICLE THIRD.

Order of arrest.

Sec. 2894. Order of arrest; in what cases it may be granted.
2895. Id.; in what actions.
2896. Id.; upon what papers.
2897. Id.; its contents.
2898. Duty of constable.
2899. Return. When plaintiff notified must appear.
2900. Constable to keep defendant in custody.
2901. Motion to discharge from arrest.
2902. Effect of discharging defendant.
2903. When plaintiff must prove extrinsic facts.
2904. Privilege from arrest.

§ 2894. Order of arrest; in what cases it may be granted.

At the time when the summons is issued, in an action specified in the next section, the justice who issues the summons must, upon the application of the plaintiff, and upon compliance by him with the provisions of this article, grant an order for the arrest of the defendant, in either of the following cases:

1. Where the defendant to be arrested is not a resident of the county.

2. Where the plaintiff is not a resident of the county; or, if there are two or more plaintiffs, where all are non-residents thereof.

3. Where it appears to the satisfaction of the justice, by the affidavit of the plaintiff or another person, that the defendant is about to depart from the county, with intent not to return thereto.

But such an order cannot be granted, where the defendant, against whom it is applied for, is a female.

From 2 R. S. 228, § 17; Id., 253, § 158.

§ 2895. Id. in what actions.

An order of arrest shall not be granted, except where the action is brought for one or more of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury, of which a justice of the peace has jurisdiction; an injury to property, including the wrongful taking, detention, or conversion of personal property; misconduct or neglect in office, or in a professional employment; fraud; or deceit. But this subdivision does not apply to a claim for damages in an action to recover a chattel.

3. To recover for money received, or to recover a chattel; where it appears that the money was received, or that the chattel was embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counsellor, or by an officer or agent of a corporation or banking association, in the course of his employment; or by a factor, agent, broker, or other person in a fiduciary capacity.

From L. 1831, §§ 30, 31.

§ 2896. Id.; upon what papers.

Where it appears to the justice, by the affidavit of the plaintiff or another person, that a sufficient cause of action exists, against the defendant, and that the case is within the provisions of the last two sections, he must grant the order of arrest. But before granting it, he must require a written undertaking to the defendant, on the part of the plaintiff, with one or more sureties, approved by the justice, to the effect that, if the defendant recovers judgment, the plaintiff will pay all costs which may be awarded

to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be at least one hundred dollars.

From 2 R. S. 228, 229, §§ 17, 19.

§ 2897. Id.; its contents.

The order must be subscribed by the justice and indorsed upon or attached to the summons. It must briefly recite the ground of arrest; and it must direct the constable, who serves the summons, to arrest the defendant; to bring him forthwith before the justice; and to notify the plaintiff of the arrest, if he can do so with reasonable diligence.

From Id., § 20.

§ 2898. Duty of constable.

The constable must, at the time of serving the summons, execute the order of arrest, by arresting the defendant, and taking him forthwith before the justice. If the justice is absent, or unable to try the action, the constable must forthwith take the defendant before another justice of the same town or city; who must take cognizance of the action, and proceed therein, as if the summons had been issued, and the order of arrest had been granted by him.

From Id., § 21.

§ 2899. Return. When plaintiff notified must appear.

The constable, executing the order of arrest, must forthwith deliver to the justice the order, and a written return thereto, under his hand, stating the manner in which he has executed it, and either that he has notified the plaintiff, or that he could not do so, with reasonable diligence. If he returns that he has notified the plaintiff, the latter must appear within one hour after the defendant is brought before the justice; otherwise judgment of nonsuit must be rendered against him

From Id., § 22.

§ 2900. Constable to keep defendant in custody.

The constable executing the order, or another constable, by direction of the justice, must keep the defendant in custody, until he is discharged by the order of the justice, or judgment is rendered in his favor; but the detention shall not, in any case, exceed twelve hours from the time when the defendant is brought before the justice; unless, within that time, a venire is issued, or the trial of the action is commenced, or unless either is delayed with the express assent of the defendant.

From Id., § 25.

§ 2901. Motion to discharge from arrest.

A defendant, arrested as prescribed in this article, may, without notice, upon the appearance of the plaintiff before the justice, or at any time afterwards before judgment, upon two days' notice given personally to the plaintiff, or to his agent or attorney who appeared for him before the justice, apply to the justice for an order, discharging him from the arrest. The application may be founded upon the papers upon which the order of arrest was granted, and upon the complaint, if it has been made. The justice must grant the application, where it appears that the case is not within the provisions of sections 2894 and 2895 of this act. The justice must also, upon the defendant's application, grant an order discharging him from arrest, if the plaintiff fails to take out, from

the justice, an execution upon a judgment in his favor, before the expiration of one hour after he is entitled thereto.

New.

§ 2902. Effect of discharging defendant.

The discharge of the defendant from arrest, before judgment, as prescribed in the last section, or in section 2963 of this act, does not affect the jurisdiction of the justice over the action, which must proceed, as if it had been commenced in the ordinary manner. His discharge from arrest, after judgment, as prescribed in the last section, does not affect the execution.

New.

§ 2903. When plaintiff must prove extrinsic facts.

Where an order of arrest has been granted and executed, in a case specified in subdivision third of section 2895 of this act, the plaintiff cannot recover upon a default, and the defendant is entitled to judgment upon a trial, unless the plaintiff establishes all the matters of fact, which are required, by that subdivision, to entitle him to an order of arrest.

New.

§ 2904. Privilege from arrest.

This article does not abridge or otherwise affect a privilege from arrest given by law, or a right of action for the breach thereof. A privileged person is entitled to be discharged from arrest, by the order of the justice before whom he is brought, upon proof, by affidavit, of the facts entitling him to a discharge; or he may apply for and obtain an order for his discharge, as prescribed in section 564 of this act.

New.

ARTICLE FOURTH.

Attachment of property.

Sec. 2905. In what actions, warrant of attachment may be granted.
2906. What must be shown to procure a warrant.
2907. Warrant; form and contents thereof.
2908. Undertaking.
2909. Warrant; how executed; perishable property may be sold.
2910. Service of summons and warrant upon defendant.
2911. Undertaking by defendant; redelivery to him.
2912. Claim by third person; bond and delivery thereupon.
2913. Action upon bond.
2914. When defendant may prosecute bond.
2915. Return of warrant.
2916. Motion to vacate or modify warrant, etc.
2917. Effect of vacating warrant.
2918. Proceedings where summons not personally served.

§ 2905. In what actions, warrant of attachment may be granted.

In an action brought before a justice of the peace a warrant of attachment against the property of one or more defendants must be granted, upon the application of the plaintiff, as prescribed in this article, where the action is brought upon a judgment, or to recover for one or more of the following causes:

1. Breach of a contract, express or implied.
2. Wrongful conversion of personal property.
3. Any other injury to personal property, in consequence of negligence, fraud, or other misconduct.

From 2 R. S. 230, §§ 26, 27; see L. 1831, c. 300, § 34.

§ 2906. What must be shown to procure a warrant.

To entitle the plaintiff to such a warrant, he must show, by affidavit, to the satisfaction of the justice as follows:

1. That a sufficient cause of action exists against the defendant, to recover damages for one or more of the causes specified in the last section. If the action is upon a judgment, or to recover for breach of a contract, the affidavit must show that the plaintiff is entitled to recover a sum stated therein, over and above all counterclaims known to him.

2. That the defendant is either a foreign corporation; or not a resident of the State; or, if the defendant is a natural person, and a resident of the State, that he has departed, or is about to depart, from the county where he last resided, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed, with the like intent; or if the defendant is a natural person, or a domestic corporation, that he or it has removed, or is about to remove, property from the county where the defendant, being a natural person, last resided, or, being a corporation, last kept its principal office, or from the county in which the action is brought, with intent to defraud his or its creditors, or has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property, with the like intent; or that the defendant, being a natural person of full age, and a resident of the State, has been continuously without the United States for the space of six months or more, immediately before the application, and either that he has not made a designation of a person, upon whom to serve a summons in his behalf, as prescribed in section 430 of this act, or that service upon the person so designated cannot be made, with due diligence, in the county where the person making the designation resides.

The affidavit must be filed with the justice, when the warrant is granted.

From 2 R. S. 230, §§ 26, 28; L. 1831, c. 300, § 34.

§ 2907. Warrant; form and contents thereof.

The warrant must be granted by the justice who issues the summons, at the time when the summons is issued; and it must be indorsed thereupon, or annexed thereto. It must be subscribed by the justice, and must briefly recite the ground of the attachment. It must require the constable, to whom the summons is delivered, to attach, on or before a day specified therein, which must be at least six days before the return day of the summons, and safely to keep, as much of the defendant's goods and chattels, within his county, as will satisfy the plaintiff's demand, with the costs and expenses, and to make return of his proceedings thereon to the justice, at the time when the summons is returnable. The amount of the plaintiff's demand must be specified in the warrant, as stated in the affidavit.

From 2 R. S. 230, § 30.

§ 2908. Undertaking.

Before granting the warrant, the justice must require a written undertaking to the defendant, on the part of the plaintiff, with one or more sureties, approved by the justice, to the effect that, if the defendant recovers judgment, or the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least two hundred dollars; and that if the plaintiff recovers judgment, he will pay to the defendant all money received by him from property taken by virtue of the warrant of attachment, or upon any bond given therefor, over and above the amount of the judgment, and interest thereupon.

From Id., § 29.

§ 2909. [Am'd, 1908.] Warrant; how executed; perishable property may be sold.

The constable to whom the warrant of attachment is delivered, must execute it at least six days before the return day of the summons, by levying upon and taking into his custody so much of the goods and chattels of the defendant, not exempt from levy and sale by virtue of an execution, including money and bank-notes, which he finds within his county, as will satisfy the plaintiff's demand, with the costs and expenses. He must safely keep the property attached, to be disposed of as prescribed in this article, and must immediately make an inventory thereof, stating therein the estimated value of each item or article. Provided, however, if property attached is perishable, the justice who issued the warrant may, by an order made and entered upon his docket, and with or without notice, as the urgency of the case in his opinion requires, direct the constable to sell such property at public auction, and thereupon the constable must sell it accordingly. A certified copy of the order directing the sale shall be delivered to such constable. Such order must prescribe the time and place of the sale, and notice thereof must be given in such manner and for such time as directed by the order. The constable shall retain in his hands the proceeds of such sale until the final determination of the action.

From Id., § 31. Am'd by L. 1908, c. 32[a] (in effect May 6, 1908).

§ 2910. Service of summons and warrant upon defendant.

The constable must, immediately after making the inventory, and at least six days before the return day of the summons, serve the summons, together with the warrant of attachment and inventory, upon the defendant, by delivering to him personally a

copy of each, if he can, with reasonable diligence, be found within the county; or, if he cannot be so found, by leaving a copy of each, certified by the constable, at the last place of residence of the defendant in the county, with a person of suitable age and discretion; or, if such a person cannot be found there, by posting it on the outer door, and also depositing another copy in the nearest post-office, inclosed in a sealed postpaid wrapper, directed to the defendant at his residence; or, if the defendant has no place of residence in the county, by delivering it to the person in whose possession the property attached is found.

From 2 R. S. 230, § 31; L. 1881, c. 300, § 36.

§ 2911. Undertaking by defendant; redelivery to him.

The defendant, or his attorney or agent in his behalf, may, at any time before judgment is rendered in the action, execute and deliver to the constable an undertaking to the plaintiff, in a sum specified therein, at least twice the value of the property attached, as stated in the inventory; with one or more sureties, approved by the constable, or by the justice who issued the warrant; and to the effect that, if judgment is rendered against the defendant, and an execution is issued thereupon, within six months after the giving of the undertaking, the property attached shall be produced to satisfy the execution. Thereupon the constable must redeliver the property to the defendant.

From 2 R. S. 231, §§ 32, 34.

§ 2912. Claim by third person; bond and delivery thereupon.

If a person, not a party to the action, claims any property attached, which is not reclaimed by the defendant, as prescribed in the last section, he may, at any time after the seizure, and before execution is issued upon a judgment rendered in the action, execute, and file with the justice, a bond to the plaintiff, with one or more sureties, approved by the constable or by the justice; in a penalty at least twice the value of the property claimed; and conditioned that, in an action upon the bond, to be commenced within three months thereafter, the claimant will establish that he was the general owner of the property claimed, at the time of the seizure; or, if he fails so to do, that he will pay to the plaintiff the value thereof, with interest. The constable must thereupon deliver the property claimed to the claimant.

From Id., §§ 33, 34.

§ 2913. Action upon bond.

A judgment for the plaintiff, in an action upon a bond, given as prescribed in the last section, must award to him the value of the property seized and delivered to the claimant, with interest thereupon from the time of the delivery. If the amount so recovered exceeds the amount, which the plaintiff recovers, in the action in which the warrant of attachment was issued, he is liable to the defendant in that action for the excess.

From Id., §§ 36, 37.

§ 2914. When defendant may prosecute bond.

If the warrant of attachment is vacated or annulled, the defendant may maintain an action, upon the bond specified in the last two sections, in his own name, in the same manner and with the like effect, as the plaintiff might have done, if the warrant had remained in full force.

From Id., § 38.

§ 2915. Return of warrant.

The constable executing the warrant of attachment must, at the time when and place where it is returnable, make a return thereto, under his hand, stating all his proceedings thereupon. He must deliver to the justice, with the return, each bond or undertaking delivered to him, pursuant to any of the foregoing provisions of this article, and a certified copy of the inventory of the property attached. The return must state the manner in which the warrant and inventory were served, and, if they were served otherwise than by delivering a copy thereof to the defendant personally, the reason therefor, and the name of the person to whom the copy was delivered, unless his name is unknown to the constable; in which case, the return must describe him so as to identify him, as nearly as may be.

From Id., § 35; L. 1831, c. 300, § 36.

§ 2916. Motion to vacate or modify warrant, etc.

A defendant, whose property has been attached, may, upon the return of the summons, apply to the justice, who issued the warrant of attachment, to vacate or modify it, or to increase the plaintiff's security. Such an application may be founded upon the papers upon which the warrant was granted; or upon proof, by affidavit, on the part of the defendant; or upon both. If it is founded upon proof on the part of the defendant, it may be opposed by new proof, by affidavit, upon the part of the plaintiff, tending to sustain any ground for the attachment, recited in the warrant, but no other. The justice may, upon the return of the summons, or at any other time to which the action is adjourned, vacate the warrant of attachment upon his own motion, if he deems the papers, upon which it was granted, insufficient to authorize it.

New.

§ 2917. Effect of vacating warrant.

Vacating the warrant of attachment does not affect the jurisdiction of the justice to hear and determine the action, where the defendant has appeared generally in the action; or where the summons was personally served upon him; or where judgment may be taken against him, as being indebted jointly with another defendant, who has been thus summoned, or has thus appeared. In every other case, the justice, who vacates a warrant of attachment against the property of a defendant, must dismiss the action as to him.

New.

§ 2918. Proceedings where summons not personally served.

Where the defendant has not appeared, and the summons has not been personally served upon him, and property of the defendant has been duly attached by virtue of a warrant, which has not been vacated, the justice must proceed to hear and determine the action; but, in an action subsequently brought, the judgment is only presumptive evidence of indebtedness, and the defendant is not barred from any counterclaim against the plaintiff. The execution, issued upon a judgment so rendered, must require the constable to satisfy it out of the property so attached, without containing a direction to satisfy it out of any other property.

From L. 1831, c. 300, § 39.

ARTICLE FIFTH.

Replevin.

Sec. 2919. When action for a chattel may be brought.
2920. Plaintiff may procure replevin; affidavit and undertaking.
2921. Requisition.
2922. Id.; how executed. Service of summons, etc.
2923. Return of constable.
2924. Defendant may except to sureties; proceedings thereon.
2925. Defendant may reclaim chattel; proceedings thereon.
2926. Justification of sureties.
2927. When and to whom constable must deliver chattel.
2928. Penalty for wrong delivery by constable.
2929. Claim of title by third person.
2930. Defendant may demand judgment for return.
2931. Proceedings in the action; action upon undertaking.
2932. Proceedings when summons not personally served.
2933. When action not affected by failure to replevy.

§ 2919. When action for a chattel may be brought.

An action to recover a chattel, with or without damages for the wrongful taking, withholding, or detention thereof, can be brought before a justice of the peace of the county in which the chattel is found, in a case, and subject to the qualifications, specified in sections 1689, 1690, 1691, and 1692, and subdivision seventh of section 2862 of this act.

From Co. Proc., § 53, subd. 10; L. 1860, c. 131, § 4.

§ 2920. Plaintiff may procure replevin; affidavit and undertaking.

The plaintiff may, at the time when the summons is issued, but not afterwards, require the chattel to be replevied, as prescribed in this article. For that purpose, he must deliver to the justice an affidavit and an undertaking, similar, in all respects, to the affidavit and undertaking required to be delivered to a sheriff, as prescribed in sections 1695, 1697, 1699, and 1712 of this act; except that the sureties in the undertaking must be approved by the justice.

From L. 1860, c. 131, §§ 2, 3, 4.

§ 2921. Requisition.

Upon receiving the affidavit and undertaking, the justice must indorse upon or attach to the affidavit a written requisition, subscribed by him, requiring the constable, to whom the summons is delivered, to replevy the property described in the affidavit, on or before a day specified in the requisition, which must be at least six days before the return day of the summons. The affidavit and requisition must be delivered to the constable, with the summons.

From Id., § 4.

§ 2922. Id.; how executed. Service of summons, etc.

The constable must execute the requisition, as a sheriff is required to execute a requisition, in an action brought to recover a chattel, as prescribed in sections 1700, 1701, and 1702 of this act; except that he must serve the summons, affidavit, and requisition within the time and in the manner prescribed, by section 2910 of this act, for the service of a summons, warrant of attachment, and inventory.

From Id., § 5.

§ 2923. Return of constable.

The constable must, on or before the return day of the summons, make a return to the requisition, under his hand, stating all his proceedings thereupon; and file it, with the affidavit and requisition, with the justice. The return must state the manner in which the summons, affidavit, and requisition were served; and, if they were served otherwise than by delivering the requisite copies to the defendant personally, the reason therefor, and the name of the person to whom the copies were delivered, unless his name is unknown to the constable; in which case, the return must describe him so as to identify him, as nearly as may be.

From L. 1860, c. 181, § 5.

§ 2924. Defendant may except to sureties; proceedings thereon.

At any time after the chattel has been replevied, and at least two days before the return day of the summons, the defendant, unless he requires a return of the chattel, may serve upon the plaintiff, or upon the constable, a written notice that he excepts to the plaintiff's sureties; otherwise he is deemed to have waived all objections to them. If such a notice is served, the sureties must justify upon the return of the summons; or the plaintiff must then give a new undertaking to the same effect as the original undertaking, with other sureties, who must then appear and justify before the justice.

From Id., § 6.

§ 2925. Defendant may reclaim chattel; proceedings thereon.

At any time before the return day of the summons, the defendant may, if he does not except to the plaintiff's sureties, serve upon the justice a notice that he requires the return of the chattel replevied. With the notice he must deliver to the justice an affidavit and undertaking, similar, in all respects, to those required to be given by a defendant upon requiring a return of a chattel, as prescribed in sections 1704 and 1712 of this act, omitting the provision in the undertaking, "or if the action abates in consequence of the defendant's death." The sureties in the undertaking must justify before the justice upon the return of the summons. If the plaintiff has stated separately in his affidavit the value of one or more chattels or classes of chattels, as prescribed in section 1697 of this act, the defendant may require a delivery of part of the property replevied, as prescribed in that section.

From Id., § 7.

§ 2926. Justification of sureties.

Except as otherwise expressly prescribed in this article, the examination and qualifications of the sureties, and the allowance of the undertaking, upon a justification pursuant to either of the last two sections, must be the same as upon a justification of bail, as prescribed in sections 579, 580, and 581 of this act, substituting the justice for the judge; but after such allowance, the undertaking must be filed with the justice. The constable is thereupon exonerated from liability.

From Id., § 8.

§ 2927. When and to whom constable must deliver chattel.

If the defendant neither excepts to the plaintiff's sureties, nor requires the return of the chattel, within the time prescribed for

that purpose; or if he fails to procure the allowance of his undertaking; or if the plaintiff, after the defendant has excepted to his sureties, duly procures the allowance of his undertaking, the constable must, except in the case specified in the next section but one, immediately deliver the chattel to the plaintiff. If the plaintiff, after the defendant has excepted to his sureties, fails to procure the allowance of his undertaking; or if the defendant, after he has required the return of the chattel, procures the allowance of his undertaking, the constable must immediately deliver the chattel to the defendant.

From Id., § 7.

§ 2928. Penalty for wrong delivery by constable.

A constable who delivers to either party, without the consent of the other, a chattel replevied by him, except as prescribed in the last section, or, by virtue of an execution issued upon a judgment in the action, forfeits to the party aggrieved the sum of one hundred dollars; and is also liable to him for all damages which he sustains thereby.

New.

§ 2929. Claim of title by third person.

The provisions, regulating the proceedings, where a person, not a party, claims property which has been replevied, and the rights of such a person, and of the sheriff, as prescribed in sections 1709, 1710, 1711, and 1712 of this act, apply to a like case in an action, brought as prescribed in this article, substituting the constable for the sheriff; except that service of a notice and of a copy of the claimant's affidavit, upon the plaintiff's attorney, as prescribed in section 1709, must be made, either upon the plaintiff personally, or upon the attorney who appears for him before the justice; and that the sum specified in the undertaking, given by the plaintiff to the constable, need not exceed, in any case, three hundred dollars.

From L. 1860, c. 131, § 9. See Co. Proc., § 216.

§ 2930. Defendant may demand judgment for return.

Where a chattel has been replevied, and the defendant has not required the return thereof, pending the action, as prescribed in the foregoing sections of this article, he may in his answer, demand judgment for the return thereof, either with or without damages for the taking, withholding, or detention.

From L. 1860, c. 131, § 11.

§ 2931. Proceedings in the action; action upon undertaking.

Section 1373, section 1731, excluding subdivision first thereof, and sections 1722, 1726, 1730, 1732, 1733, 1734, and 1735 of this act, substituting the constable for the sheriff, apply to the proceedings in an action in a justice's court to recover a chattel, and to an action against the sureties in an undertaking given therein, except as otherwise specially prescribed in this chapter.

From Id., §§ 10, 11; L. 1865, c. 616.

§ 2932. Proceedings when summons not personally served.

Where the defendant does not appear, and the summons has not been personally served upon him, and a chattel, or part of a chattel, to recover which the action is brought, has been replevied, and the proceedings thereupon have been duly taken, the pro-

scribed in this article; the justice must proceed to hear and determine the action, with respect to that chattel or part of a chattel; or, if the action is brought to recover two or more chattels, with respect to those which have been replevied; in like manner and with like effect, as if the summons had been personally served.

From L. 1880, c. 131, § 12.

§ 2933. When action not affected by failure to replevy.

Where the summons has been personally served upon the defendant, or where he appears, the justice must proceed to hear and determine the action, although the plaintiff has not required the chattel to be replevied, or the constable has not been able to replevy it.

New.

TITLE III.

Pleadings; including counterclaims, and proceedings upon answer of title.

Sec. 2934. When issue to be joined.
2935. Pleadings.
2936. Complaint.
2937. What causes of action may be joined.
2938. Answer.
2939. Demurrer.
2940. General rules of pleading.
2941. Account, or instrument for payment of money.
2942. Court may require items to be exhibited.
2943. Immaterial variance to be disregarded.
2944. Amendment of pleadings.
2945. Counterclaims.
2946. Id.; where executor or trustee is a party.
2947. Consequence of neglect to plead counterclaim.
2948. The last section qualified.
2949. Judgment upon counterclaim.
2950. Judgment when accounts exceed $400.
2951. Answer of title.
2952. Undertaking thereupon.
2953. In what court new action to be brought.
2954. When action before justice to be discontinued.
2955. Effect of failure to give undertaking.
2956. When title comes in question on plaintiff's own showing.
2957. Pleadings in new action. Undertaking before justice, when applicable.
2958. Answer of title as to one of several causes of action.

§ 2934. [Am'd, 1893.] When issue to be joined.

At the place, and within one hour after the time specified in the summons for the return thereof; or, where an order of arrest is granted and executed, within twelve hours after the defendant is brought before the justice; or, where no summons is issued, at the time when the parties voluntarily appear to join issue, the pleadings of the parties must be made, and issue must be joined. Where both parties appear upon the return of the summons, an issue must be joined before an adjournment is had, except when the defendant refuses or neglects to plead. Where an issue of fact or an issue of law is joined in a justice's court, or before a justice of the peace in the city of Brooklyn, or in any of the towns in the county of Kings, in which the judgment demanded by either party in his pleadings exceeds the sum of one hundred dollars; or, when in an action to recover a chattel or chattels, the value of which as fixed by either party in his pleadings or affidavits exceeds one hundred dollars, the defendant may, after issue joined and before an adjournment is granted upon his application, apply to the justice before whom the action is brought for an order removing the action into the county court of the county of Kings. Such an order must be granted upon the defendant filing with the justice an undertaking in a sum fixed by the justice, not exceeding twice the amount of the damages claimed or twice the value of the chattel or of all the chattels claimed, as stated in the pleading or affidavits, with one or more sureties, approved by the justice, to the effect that the defendant will pay to the plaintiff the amount of any judgment, including costs, that may be recovered against him in the county court in the action so removed. From the time of the granting of the order the county court of Kings county has cognizance of the action, and the same shall be tried and determined by said county court as if originally brought therein. The justice must forthwith deliver to

the clerk of the county court all processes, pleadings and other papers in the action which must be filed, entered or recorded, as the case requires, in the latter office. Costs in an action so removed shall be the same as in an original action commenced in said county court.

From 2 R. S. 233 (Part 3, c. 2, tit. 4), § 47; L. 1845, c. 26. Am'd by L. 1893, c. 380.

§ 2935. Pleadings.

The pleadings in a justice's court are:

1. The plaintiff's complaint.
2. The defendant's answer.
3. The defendant's demurrer to the complaint, or to one or more distinct causes of action, separately stated therein.
4. The plaintiff's demurrer to one or more counterclaims stated in the answer.

From Co. Proc., § 64, subd. 1.

§ 2936. [Am'd, 1906.] Complaint.

The complaint must state, in a plain and direct manner, the facts constituting the cause of action. In an action arising on contract for the recovery of money only, or on an account, the plaintiff or his agent, at or before the time of the issuing of the summons, may make a written complaint as above provided, specifying the amount actually due the plaintiff from the defendant, and praying judgment for the amount so due, which said complaint shall be signed by the plaintiff or his agent and verified in the manner and as provided by section 526 of this code. Said summons and complaint shall be attached and shall be served upon the defendant by delivering to and leaving with him, personally, true copies thereof, not less than six nor more than twelve days before the return day of said summons; and the official certificate of the constable making such service shall be sufficient evidence thereof.

From Id., subd. 3. Am'd by L. 1906, c. 291 (in effect Sept. 1, 1906).

§ 2937. What causes of action may be joined.

The plaintiff may unite, in the same complaint, two or more causes of action, where they all arise out of

1. The same transaction, or transactions connected with the same subject of action; or
2. Contract, express or implied; or
3. Personal injuries, and injuries to property, or either.

But it must appear, upon the face of the complaint, that all the causes of action so united belong to one of the foregoing subdivisions of this section; that they are consistent with each other; that they require the same judgment; and, except as otherwise prescribed by law, that they affect all the parties. Where a cause of action, for which a defendant might be arrested, is united with a cause of action, for which he cannot be arrested, an execution against the person of the defendant cannot be issued upon the judgment.

New.

§ 2938. [Am'd, 1906.] Answer.

The answer may contain a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof. It may also set forth, in a plain and direct manner, new matter constituting one or more defenses or counterclaims. In case the defendant appears and answers in an action in which a verified complaint has been served, his answer shall be in writing and shall be verified as above provided for the verification of the complaint.

From Co. Proc., § 64, subd. 4. Am'd by L. 1906, c. 291 (in effect Sept. 1, 1906).

§ 2939. Demurrer.

In a case specified in subdivision third or fourth of section 2935 of this act, a party may demur to the pleading of the adverse party, or, if it is a complaint, to one or more distinct and separate causes of action, where it is not sufficiently explicit to be understood; or where it does not state facts sufficient to constitute a cause of action, or counterclaim, as the case may be. If the court deems the demurrer well founded, it must permit the pleading to be amended; and if the party fails so to amend, the defective pleading, or part of a pleading demurred to, must be disregarded. If the court deems the demurrer not well founded, it must permit the party making it to plead over, at his election.

From Co. Proc., § 64, subds. 6, 7.

§ 2940. General rules of pleading.

A pleading, except as otherwise prescribed in section 2951 of this act, may be oral or written. If it is oral, the substance thereof must be entered by the justice in his docket-book; if it is written, it must be filed by him, and a reference to it made in his docket-book. A pleading is not required to be in any particular form; but it must be so expressed, as to enable a person of common understanding to know what is intended.

From Id., subds. 2, 5.

§ 2941. Account, or instrument for payment of money.

For the purpose of setting forth a cause of action, defence, or counterclaim, founded upon an account, or upon an instrument for the payment of money only, it is sufficient for the party to deliver the instrument, or a copy of the account to the court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or to set off.

From Id., subd. 9.

§ 2942. Court may require items to be exhibited.

The court may, upon the request of either party, made when issue is joined, require the adverse party to exhibit his account or demand, or to state the nature thereof, as far as it is in his power so to do, at that or another specified time; and in case of his default, it may preclude him from giving evidence of such parts thereof, as have not been so exhibited or stated.

From Id., subd. 14.

§ 2943. Immaterial variance to be disregarded.

A variance, between an allegation in a pleading and the proof, must be disregarded as immaterial, unless the court is satisfied that the adverse party has been misled thereby, to his prejudice.

From Id., subd. 10.

§ 2944. Amendment of pleadings.

The court must, upon application, allow a pleading to be amended, at any time before the trial, or during the trial, or upon appeal, if substantial justice will be promoted thereby. Where a party amends his pleading after joinder of issue, or pleads over upon the decision of a demurrer, and it is made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party, in consequence of the amendment or pleading over, an adjournment must be granted. The court may also, in its discretion, require, as a condition of allowing an amendment, the payment of costs to the adverse party.

From Id., subd. 11.

§ 2945. Counterclaims.

Sections 501 and 502 of this act apply to a counterclaim in an action brought in a justice's court; except that such a counterclaim cannot be interposed, unless it is of such a nature, that a justice's court has jurisdiction of a cause of action founded thereon.

Substituted for 2 R. S. 284 (Part 3, c. 2, tit. 4), § 50.

§ 2946. Id.; where executor or trustee is a party.

Sections 505 and 506 of this act apply to a counterclaim in an action against a person sued in a representative capacity, or in favor of an executor or administrator, except that the defendant cannot take judgment against the plaintiff upon a counterclaim, for a sum exceeding two hundred dollars.

From Id., §§ 55, 56.

§ 2947. Consequence of neglect to plead counterclaim.

Where the defendant, in an action to recover damages upon or for breach of a contract, neglects to interpose a counterclaim, consisting of a cause of action in his favor to recover damages for a like cause, which might have been allowed to him upon the trial of the action, he, and every person deriving title thereto through or from him, are forever thereafter precluded from maintaining an action to recover the same, or any part thereof.

From Id., § 57.

§ 2948. The last section qualified.

But the prohibition contained in the last section does not extend to either of the following cases:

1. Where the amount of the counterclaim is two hundred dollars more than the judgment which the plaintiff recovers.
2. Where the counterclaim consists of a judgment, rendered before the commencement of the action, in which it might have been interposed.
3. Where the counterclaim consists of a claim for unliquidated damages.
4. Where the counterclaim consists of a claim, upon which another action was pending, at the time when the action was commenced.
5. Where judgment is taken against the defendant, without personal service of the summons upon him, or an appearance by him.

From Id., § 58; L. 1840, c. 317; L. 1831, c. 300, § 39.

§ 2949. Judgment upon counterclaim.

Where a counterclaim is established, which equals the plaintiff's demand, the judgment must be in favor of the defendant. Where it is less than the plaintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment for the excess, or so much thereof as is due from the plaintiff, unless it is more than the sum of two hundred dollars. If it is more than two hundred dollars, or if no part of it is due from the plaintiff, the justice must, at the election of the defendant, either:

1. Set off so much of the counterclaim as is sufficient to satisfy the plaintiff's demand, and render judgment for the defendant for his costs; in which case, the defendant may maintain an action for the residue; or,
2. Render a judgment of discontinuance with costs; in which case, the defendant may thereafter maintain an action for the whole.

Where part of the excess is not due from the plaintiff, the judgment does not prejudice the defendant's right to recover, from another person, so much thereof as the judgment does not cancel.

From 2 R. S. 234, §§ 52, 58, and § 58, subd. 3.

§ 2950. Judgment when accounts exceed $400.

Where, upon the trial of an action, the sum total of the accounts of both parties, proved to the satisfaction of the justice, exceeds four hundred dollars, judgment of discontinuance must be rendered against the plaintiff, with costs.

From Id., § 54.

§ 2951. Answer of title.

The defendant may, either with or without other matter of defence, set forth in his answer facts, showing that the title to real property will come in question. Such an answer must be in writing; and it must be signed by the defendant, or his attorney or agent, and delivered to the justice. The justice must, thereupon, countersign the answer, and deliver it to the plaintiff.

From Co. Proc., § 55.

§ 2952. Undertaking thereupon.

In the case specified in the last section, the defendant must also deliver to the justice, with the answer, a written undertaking, executed by one or more sureties, approved by the justice; to the effect that, if the plaintiff, within twenty days thereafter, deposits with the justice a summons and complaint in a new action, for the same cause, to be brought in the proper court, as prescribed in the next section, the defendant will, within twenty days after the deposit, give a written admission of the service thereof. Where the defendant was arrested in the action before the justice, the undertaking must further provide, that he will, at all times, render himself amenable to any mandate, which may be issued to enforce a final judgment in the action so to be brought. If the defendant fails to comply with the undertaking, the sureties are liable thereupon, to an amount not exceeding two hundred dollars.

From Id., § 56.

§ 2953. In what court new action to be brought.

The court in which a new action is to be brought, as prescribed in the last section, is the supreme court, or the county court of the justice's county, at the plaintiff's election; except that, where the justice is a justice of the peace of the city of Buffalo, it is the superior court of Buffalo.[1]

From Id., § 56.

§ 2954. When action before justice to be discontinued.

Upon the delivery of the undertaking to the justice, the action before him is discontinued, and each party must pay his own costs. The costs so paid by either party must be allowed to him, if he recovers costs in the new action, to be brought as prescribed in the last two sections. If the plaintiff fails to deposit with the justice a summons and complaint in the new action, before the expiration of twenty days after the delivery of the under-

[1] The Superior Court of Buffalo was abolished by the Constitution of 1894 (Art. VI, § 5), and its jurisdiction transferred to the Supreme Court (see Appendix I, post).

taking, the defendant may maintain an action against the plaintiff to recover his costs before the justice.

From Id., § 57.

§ 2955. Effect of failure to give undertaking.

If the undertaking is not delivered to the justice, he has jurisdiction of the action, and must proceed therein; and the defendant is precluded, in his defence, from drawing the title in question.

From Id., § 58.

§ 2956. When title comes in question on plaintiff's own showing.

If, however, it appears, upon the trial, from the plaintiff's own showing, that the title to real property is in question, and the title is disputed by the defendant, the justice must dismiss the complaint, with costs, and render judgment against the plaintiff accordingly.

From Id., § 59.

§ 2957. Pleadings in new action. Undertaking before justice, when applicable.

In the new action, to be brought after an action before a justice is discontinued, by the delivery of an answer and an undertaking, as prescribed in the last six sections of this act, the plaintiff must complain for the same cause of action only, upon which he relied before the justice; and the defendant's answer must set up the same defence only, which he made before the justice. If the action is to recover a chattel, which was replevied in the justice's court, each undertaking, given in the justice's court, continues to be valid in, and is applicable to, the new action.

From Id., § 60.

§ 2958. Answer of title as to one of several causes of action.

Where, in an action before a justice, the plaintiff has two or more causes of action, and the defence, that the title to real property will come in question, is interposed as to one or more, but not as to all of them; the defendant may deliver an answer and undertaking as prescribed in sections 2951 and 2952 of this act, with respect to the cause or causes of action only, in which title will so come in question. Whereupon the justice must discontinue the action as to those causes of action only; the plaintiff may commence a new action therefor in the proper court; and the original action must proceed as to the other causes.

From Id., § 62.

TITLE IV.

Proceedings between the joinder of issue and the trial.

Article 1. Adjournments.
2. Compelling the attendance of a witness.
3. Commission to take testimony.

ARTICLE FIRST.

Adjournments.

Sec. 2959. Adjournment by justice.
2960. Adjournment on application of plaintiff.
2961. Adjournment on application of defendant.
2962. Id.; undertaking thereupon.
2963. Undertaking to procure discharge of defendant from custody.
2964. When defendant to be discharged.
2965. Subsequent adjournments.
2966. Justice may impose conditions upon adjournment.
2967. Adjournment when warrant to attach absent witness is issued.
2968. Adjournment not to exceed ninety days.

§ 2959. Adjournment by justice.

At the time of the return of a summons, or of the joinder of issue without process, but at no other time, the justice may, in his discretion and upon his own motion, adjourn the trial of the action not more than eight days, unless the defendant has been arrested; in which case, no such adjournment shall be made.

From 2 R. S. 238 (Part 3, c. 2, tit. 4), § 67, 68.

§ 2960. Adjournment on application of plaintiff.

At the time of the return of a summons, or of the joinder of issue without process, the justice must, upon the application of the plaintiff, adjourn the trial of the action, not more than eight days, to a time fixed by the justice. But such an adjournment shall not be granted unless the plaintiff or his attorney, if required by the defendant, makes oath that the plaintiff cannot, for want of some material testimony or witness, specified by him, safely proceed to trial.

From Id., §§ 69, 70.

§ 2961. Adjournment on application of defendant.

At the time of the joinder of issue, the justice must, upon the application of the defendant, adjourn the trial of the action, upon his complying with the following requirements:

1. The defendant or his attorney must, if required by the plaintiff, or by the justice, make oath that he verily believes that the defendant has a good defence to the action, and that he cannot safely proceed to trial, for want of some material testimony or witness, specified by him.

2. If required by the plaintiff, and the defendant has not been arrested in the action, an undertaking must be given to the plaintiff in behalf of the defendant, as prescribed in the next section. But such an undertaking need not be given, where the action is to recover a chattel.

Such an adjournment must be for such a reasonable time, fixed by the justice, as will enable the defendant to procure the testimony or witness.

From Id., § 74, and § 70, subd. 2.

§ 2962. Id.; undertaking thereupon.

The undertaking prescribed in the last section must be executed by one or more sureties, approved by the justice; and must be to the effect that, if the plaintiff recovers judgment in the action; and if, before the expiration of ten days after the plaintiff becomes entitled to an execution upon the judgment, the defendant removes, secretes, assigns, or in any way disposes of any part of his property, liable to levy and sale by virtue of an execution, except for the necessary support of himself and his family, and if an execution upon the judgment is returned wholly or partly unsatisfied; the sureties will, upon demand, pay to the plaintiff the sum due upon the judgment.

From L. 1831, c. 300, § 40.

§ 2963. Undertaking to procure discharge of defendant from custody.

Where the defendant has been arrested, the trial must be adjourned upon his application, upon the same terms, and in the same manner, as where he has not been arrested; except that the undertaking prescribed in the last section need not be given. A defendant, who procures such an adjournment, must continue, during the time of adjournment, in the custody of the constable: unless he gives an undertaking to the plaintiff, with one or more sureties, approved by the justice, to the effect that, if the plaintiff recovers judgment in the action; and if an execution is issued thereupon against the person of the defendant, within ten days after the plaintiff is entitled to the same; and if a return is made thereto, on or after the return day thereof, that the defendant cannot be found; the sureties will pay to the plaintiff the amount due upon the judgment. If such an undertaking is given, the defendant must be discharged from custody.

From 2 R. S. 239, 240, §§ 71, 76, 77.

§ 2964. When defendant to be discharged.

If the trial of an action, in which the defendant has been arrested, is adjourned with the consent of both parties, or upon the application of the plaintiff, the defendant must be discharged from custody.

From Id., § 72.

§ 2965. Subsequent adjournments.

The justice must, upon the application of the defendant, grant a second or subsequent adjournment of the trial of the action, upon the defendant's giving security, if required, as prescribed in the foregoing provisions of this article, where he applies for a first adjournment; and upon his proving, by his own oath or otherwise, to the satisfaction of the justice, that he cannot safely proceed to trial for want of some material testimony or witness; and that he has used due diligence to obtain the testimony or witness. But if the defendant has given an undertaking upon a former adjournment, a new undertaking need not be given, unless it is required by the justice, or by the sureties in the former undertaking.

From Id., §§ 75, 76.

§ 2966. Justice may impose conditions upon adjournment.

Upon granting the defendant's application for an adjournment, where the trial has been once adjourned, or where the plaintiff is a non-resident of the county, the justice may, in his discretion,

upon the plaintiff's application, direct that any witness on the part of the plaintiff, who is in attendance, be then examined under oath before the justice. Thereupon the testimony of the witness must be reduced to writing, certified by the justice, and retained by him; to be read upon the trial, with the same effect, and subject to the same objections, as if it was then given orally by the witness.

From Id., § 70, subd. 2.

§ 2967. Adjournment when warrant to attach absent witness is issued.

Where, upon a trial, a warrant of attachment is issued to compel the attendance of a witness, who has failed to appear in obedience to a subpoena, the justice may, in his discretion, adjourn the trial, for such a time as he deems necessary for the return of the warrant, not exceeding five days.

New.

§ 2968. Adjournment not to exceed ninety days.

The trial of an action shall not be adjourned to a time beyond ninety days from the joinder of issue, without the consent of both parties, except in one of the following cases:

1. Where a venire has been duly issued, but a jury has not been procured, so that it is necessary to issue a new venire, or to summon one or more talesmen, the trial may be adjourned, not more than two days beyond the ninety days, in order to enable the jury to be procured.

2. Where a jury has not been able to agree upon a verdict and is discharged, the trial may be adjourned a sufficient time beyond the ninety days, to enable a new jury to be procured, as prescribed in title fifth of this chapter.

3. Where a warrant of attachment has been issued to compel the attendance of a witness, as prescribed in the last section, or a warrant has been issued to commit a recusant witness, as prescribed in title fifth of this chapter, an adjournment made thereupon, as prescribed by law, is not deemed a part of the ninety days.

From 2 R. S. 239, 240, §§ 74, 78.

ARTICLE SECOND.

Compelling the attendance of a witness.

Sec. 2969. When justice may issue subpœna.
2970. Subpœna; how served.
2971. Warrant of attachment against defaulting witness.
2972. Id.; how executed; fees thereupon.
2973. Id.; when witness is in adjoining county.
2974. Fine for refusing to attend, or to testify.
2975. Id.; how imposed.
2976. Minute of conviction.
2977. Execution thereupon.
2978. Money collected; how applied.
2979. Defaulting witness liable for damages.

§ 2969. When justice may issue subpœna.

A justice of the peace may issue a subpœna, to compel a witness to attend, in the county where the justice resides, or in an adjoining county, but not otherwise, for the purpose of testifying upon the trial of an action, pending before himself, or before another justice. The subpœna may require the witness, except as otherwise expressly prescribed by law, to bring with him any book or paper, relating to the merits of the action. But a justice shall not issue a subpœna to compel the attendance of a witness before another justice, unless the person applying therefor proves, by his own oath, or the oath of another person, that an action is actually pending before the other justice.

From 2 R. S. 240 (Part 3, c. 2, tit. 4, §§ 80, 81).

§ 2970. Subpœna; how served.

A subpœna may be served by a constable, or by any other person. It must be served by reading it, or stating its contents, to the witness, and by paying and tendering to him his lawful fee for one day's attendance as a witness. Where it is served by a constable, his return thereto, stating the manner of service and the sum paid, is presumptive evidence of the facts therein stated.

From Id., § 82.

§ 2971. Warrant of attachment against defaulting witness.

Where it is made to appear, to the satisfaction of the justice, by affidavit or other proof, that a person, duly subpœnaed to attend before him in an action, has refused or neglected to attend as a witness in obedience to the subpœna; and no just cause for the neglect or refusal is shown to exist; and the party, in whose behalf the witness was subpœnaed, or his attorney, makes oath that the testimony of the witness is material; the justice must issue a warrant of attachment, directed generally to any constable of the county, for the purpose of compelling the attendance of the witness.

From Id., § 83; L. 1834, c. 285.

§ 2972. Id.; how executed; fees thereupon.

Such a warrant of attachment must be executed in the same manner as an order of arrest. The fees of the justice and constable for issuing and serving it, must be paid by the person against whom it is issued, unless he shows a reasonable excuse, to the satisfaction of the justice, for his omission to attend; in

which case, the party procuring the warrant must pay them, and, if he recovers costs, the amount thereof must be allowed to him as part of his costs.

From Id., § 84.

§ 2973. Id.; when witness is in adjoining county.

Where the delinquent witness is within an adjoining county, the constable, to whom the warrant of attachment is directed, may arrest the witness in that county, and bring him before the justice. The constable, while he is within the adjoining county for that purpose, has all the powers of a constable of that county, with respect to the warrant so issued to him.

New.

§ 2974. Fine for refusing to attend, or to testify.

A person, duly subpoenaed as a witness, who, without a reasonable excuse, proved by his oath or the oath of another person, fails to attend; or, attending, refuses to testify; must be fined, by the justice before whom the action is pending, for each non-attendance or refusal, such a sum, not less than one dollar nor more than ten dollars, as the justice thinks it reasonable to impose upon him, as a fine therefor.

From 2 R. S. 241, § 85.

§ 2975. Id.; how imposed.

The fine may be summarily imposed by the justice, upon the application of the party in whose behalf the witness was subpoenaed, at any time during the trial, when the defaulting witness is present, and has an opportunity to be heard. If it is not imposed during the trial, the justice, at any time within five days after judgment is rendered, must, upon the application of the party, issue a warrant, directed generally to any constable of the county, commanding him to arrest the defaulting witness, and to bring him before the justice, at a time and place therein specified, the time to be not more than twelve days after issuing the warrant, to show cause why a fine should not be imposed upon him.

From Id., § 86.

§ 2976. Minute of conviction.

The justice imposing the fine must enter in his docket-book a minute of the conviction, of the cause thereof, of the amount of the fine, and of the costs. The minute is deemed a judgment against the delinquent, in favor of the officer to whom fines are directed to be paid, by section 2875 of this act.

From Id., § 87.

§ 2977. Execution thereupon.

If the whole amount of the fine and costs is not forthwith paid to the justice, he must issue an execution, directed generally to any constable of the county, commanding the constable to collect the sum remaining unpaid, of the goods and chattels of the delinquent, within the county, and, for want thereof, to take him, and convey him to the jail of the county, there to remain until he pays that sum, not exceeding thirty days. Upon the delinquent being committed to jail, the keeper thereof must keep him in close custody therein, until he is entitled to a discharge, as specified in the execution.

From Id., § 88.

§ 2978. Money collected; how applied.

The money collected by virtue of the execution must be forthwith paid by the constable to the justice. The justice must, within ten days after he receives a fine, or any part thereof, from the constable or the delinquent, pay the money to the officer, to whom the fines are directed to be paid, by section 2875 of this act, for the use of the poor.

From Id., § 89.

§ 2979. Defaulting witness liable for damages.

A person, subpoenaed as prescribed in this article, who neglects or refuses to obey the subpoena, or to testify, is also liable to the party, in whose behalf he was subpoenaed, for all damages which the party sustains by reason of his neglect or refusal.

From Id., § 90.

ARTICLE THIRD.

Commission to take testimony.

Sec. 2980. Commission to examine witness upon interrogatories.
2981. Id.; orally.
2982. When and how granted.
2983. Adjournment.
2984. Execution and return of commission.
2985. Receipt thereof by justice.
2986. When deposition evidence.
2987. Powers of commissioners.

§ 2980. Commission to examine witness upon interrogatories.

Where the defendant has neglected to appear upon the return of a summons, or has failed to answer the complaint, or where an issue of fact has been joined in an action; and it appears, by affidavit, upon the application of either party, that a witness, not within the county where the action is pending, or an adjoining county, is material in the prosecution or defence of the action, the justice may award a commission to one or more competent persons, authorizing them, or either of them, to examine the witness under oath, upon interrogatories to be settled by the justice, or by the written agreement of the parties, and indorsed upon or annexed to the commission; to take and certify the deposition of the witness; and to return the same by mail, addressed to the justice.

From L. 1888, c. 243, § 2; L. 1847, c. 329.

§ 2981. Id.; orally.

If both parties expressly consent, a commission granted as prescribed in this article may issue without written interrogatories, and the deposition may be taken upon oral questions. In that case, section 900 of this act applies to the execution of the commission; and a copy of that section must be annexed thereto. Notice of the time or place of the examination of a witness, by virtue thereof, need not be given.

New.

§ 2982. When and how granted.

The commission may be granted by the justice without notice, upon the application of the plaintiff, made at the return of the summons, or upon the application of either party, made at the time of the joinder of issue. It may also be granted at any time after the joinder of issue, upon the application of either party, accompanied with proof, by affidavit, that six days' written notice of the application has been served upon the adverse party, either personally, or by service upon the attorney, who appeared for him before the justice.

From L. 1838, c. 243, § 3.

§ 2983. Adjournment.

Where a commission is granted upon the application of the plaintiff, he is entitled to one or more adjournments of the trial, as may be necessary to procure the commission to be executed and returned; not exceeding the length of time for which the trial might be adjourned upon the application of the defendant.

From L. 1841, c. 133, § 1.

§ 2984. Execution and return of commission.

The commission must be executed and returned, as prescribed in section 901 of this act; and a copy of that section must be annexed thereto, except that subdivision sixth thereof may be omitted.

From L. 1838, c. 243, § 4.

§ 2985. Receipt thereof by justice.

The justice, to whom the package containing the commission is transmitted by mail, must receive it from the post-office, and open and file it, indorsing thereupon the date of his so doing. It must remain on file with him, until the trial; but either party is entitled to inspect it on file.

Id.

§ 2986. When deposition evidence.

Sections 902 and 903 of this act apply to a commission, issued as prescribed in this article; and to the execution thereof. A deposition taken thereunder may be read in evidence upon the trial by either party, and has the effect specified in section 911 of this act.

Id.

§ 2987. Powers of commissioners.

Where the commission is executed within the State, the commissioner, or, if there are two or more, a majority of them, have the same power to issue a subpoena, to swear a witness, and to compel his attendance, that a justice of the peace has, in an action pending before him.

From L. 1841, c. 188, § 2.

TITLE V.

Trial and its incidents.

Sec. 2988. Effect of failure of defendant to appear.
2989. When justice to try issue of fact.
2990. When jury trial may be demanded.
2991. Drawing Jurors.
2992. Venire in action between two towns, etc.
2993. Venire; service and return thereof.
2994. Ballots; how prepared.
2995. Drawing jury.
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2997. New venire, etc.
2998. Juror's oath.
2999. Jury to hear proofs.
3000. Witness's oath.
3001. Witness refusing to be sworn, etc. Warrant thereupon.
3002. Contents of warrant; imprisonment of recusant witness.
3003. Adjournment thereupon.
3004. Ex parte affidavit; when evidence.
3005. Competency of witness; how determined.
3006. Constable to keep jury; his oath.
3007. Rendition of verdict; plaintiff need not be called.
3008. Jury, when to be discharged; new venire.
3009. Fine to be imposed on defaulting juror.

§ 2988. [Am'd, 1906.] Effect of failure of defendant to appear.

Where the defendant makes default in appearing or pleading, upon the return of a summons, which has been duly served as prescribed in this chapter, the justice must hear the allegations and proofs of the plaintiff, and render judgment according to law and equity, as the very right of the case appears, except in an action commenced by the service of a summons and verified complaint as provided by section 2936 of this code, in which case judgment may be entered as provided by section 2891 of this code.

From 2 R. S. 242 (Part 3, c. 2, tit. 4), § 92. Am'd by L. 1906, c. 291 (in effect Sept. 1, 1906).

§ 2989. When justice to try issue of fact.

Where an issue of fact has been joined, if neither party demands a trial by jury, the justice must try the issue, hear the allegations and proofs of the parties, and render judgment as prescribed in the last section.

From Id., § 91.

§ 2990. [Am'd, 1889, 1897, 1909.] When jury trial may be demanded.

At the time when an issue of fact is joined, either party may demand a trial by jury, and unless so demanded at the joining of issue a jury trial is waived. The party demanding a trial by jury shall thereupon pay to the justice the statutory fees for the attendance of each person to be summoned and for the jurors to serve upon the trial, and also the fees to which the constable is entitled for notifying the persons to be drawn as jurors. The fees so deposited shall be delivered by the justice to the constable serving the venire, and by him shall be paid out as required by law. In default of a deposit as aforesaid the justice shall proceed as if no demand for trial by jury had been made. And the town clerk of every town in this State shall deliver to each of the justices of the peace in his town a certified copy of the list filed with him, in pursuance of section 505 of the Judiciary Law, and he shall also deliver to each of said justices a certified copy of any such list hereafter filed with him, within ten days after the same shall be filed. The town clerk is entitled to a fee of one dollar for each copy of said list so delivered. Any town clerk who shall neglect to deliver a copy of the list to each of the justices of the town

within the time above prescribed, shall forfeit ten dollars for each failure, to be sued for and recovered by the overseers of the poor of said town for the use of the poor of said town.

From Id., § 93. Am'd by L. 1889, c. 505; L. 1897, c. 146; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 2991. [Am'd, 1889, 1909.] Drawing jurors.

When a trial by jury is duly demanded, the justice must forthwith openly draw twelve ballots from a box or other receptacle containing the names of the persons who are returned as jurors of the town to the courts of record of the county upon the last list thereof received by him from the town clerk as jurors to attend and try said cause, on a day to which the cause shall then be adjourned by him, not more than eight days from the joining of issue, unless the parties consent to a longer adjournment, which consent shall be entered in the justice's minutes. The ballots shall be of the same description as those prescribed in section 2994 of this act, but they may be, or may previously have been prepared by a justice. If a person whose name is thus drawn, in the judgment of the justice, resides more than three miles from the place of trial the justice may set aside such juror, and he may excuse any juror who comes within the provisions of section 544 of the Judiciary Law, and in either case draw another ballot, and continue to do so until twelve are drawn. After the adjournment of the court, at which a jury trial has been had, the justice must deposit the ballots containing the names of those who attended and served, in another box kept by him. The ballots containing the names of those who did not appear and serve must be returned by the justice to the box from which they were taken. If at the time of drawing jurors for the court there is not a sufficient number of ballots remaining in the original box, the justice, upon drawing all the ballots therein, must draw the necessary number from the second box containing the names of those jurors who have before served, as in this section prescribed, and must continue to draw from that box until a new list of jurors is delivered to him by said town clerk.

From 2 R. S. 242, §§ 94, 95. Am'd by L. 1889, c. 505; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 2992. Venire in action between two towns; etc.

Where the action is between two towns or cities, or between a town and a city, the venire must direct the constable to notify twelve men of the county, who are qualified and not exempt, as prescribed in the last section, and who are not interested in the matter at issue, to form a jury for the trial of the action.

From 2 R. S. 242, § 96.

§ 2993. [Am'd, 1889.] Venire; service and return thereof.

The justice must insert the names of the jurors so drawn, in a venire, and deliver or cause it to be delivered to a constable of the county disinterested between the parties. The constable must, at least three days before the day therein stated, notify each of the persons whose names have been therein inserted, by reading it or stating the substance thereof to the person so served. But the service shall not be affected by the constable's failure, after diligent search, to find any of the persons so named. The constable must make his return upon the venire, certifying that he has so personally served it upon each of the jurors whose names are therein inserted, or if any were not served, stating the reason for such omission. Any constable making a false return upon such venire is guilty of a misde-

meanor. Any person so served and not attending at the time and place to which the cause was so adjourned, is guilty of a contempt of court, punishable by a fine not exceeding ten dollars, which the justice may impose forthwith by an entry in his minutes of the imposition of such fine, to be collected by execution issued by the justice as upon a judgment, with costs of the levy, and which fine shall be paid over to the use of the poor of the county by the justice, but upon the presentation of a reasonable and sufficient excuse by or on behalf of the person so fined, the justice may, at any time, remit such fine, or any part thereof.

From 2 R. S. 243, §§ 97, 98; L. 1847, c. 470, § 53. Am'd by L. 1889, c. 505.

§ 2994. Ballots; how prepared.

For the purpose of procuring a jury to try the action, the justice must prepare, or cause to be prepared, ballots, uniform, as nearly as may be, in appearance, by writing the name of each person returned, who attends, upon a separate piece of paper. The constable, in the presence of the justice, must roll up or fold each ballot in the same manner, as nearly as may be, so as to resemble the others, and so that the name is not visible. The ballots must be deposited in a box, or other convenient receptacle.

From Id., § 99.

§ 2995. [Am'd, 1889.] Drawing jury.

The justice must then openly draw out, one after another, six of the ballots. If a person, whose name is drawn, is challenged and set aside, or is excused, another ballot must be drawn, and so on, successively, until the required number of jurors is obtained. The parties may elect to try the cause by a less number than six jurors, at any time before a witness is sworn. The persons so selected as herein provided, constitute the jury to try the action.

From Id., § 100. Am'd by L. 1889, c. 505.

§ 2996. [Am'd, 1889.] Jurors in default.

If a sufficient number of competent jurors do not attend, the justice shall issue an attachment against all defaulting jurors, and shall place the same in the hands of the officer who summoned the same, commanding him forthwith to attach such jurors and to bring them before him at a time specified not more than thirty-six hours thereafter, to which the cause must be adjourned. The juror or jurors so attached shall, in addition to the fine specified in section 2993 of this act, be required to pay the expense of the attachment and service thereof; which shall be the officer's fees, together with all necessary expense incurred by him in serving said attachment, to be audited and fixed, to be enforced in the same manner, and when collected to be paid to the officer or the party who has paid the same. Any person so attached and disobeying or resisting the service of said attachment is guilty of a misdemeanor.

From 2 R. S. 243, § 101. Am'd by L. 1889, c. 505.

§ 2997. [Am'd, 1889, 1892.] New venire, etc.

If the constable to whom the venire is delivered does not return it as required thereby, or it is for any reason set aside, the justice must proceed to draw another jury, in the manner

prescribed in the foregoing sections of this title, which shall be summoned in like manner as the first jury; and if a full jury, drawn from those returned as prescribed in the foregoing sections cannot be obtained, the justice may direct the constable to require the attendance forthwith, or at such time as he may designate, not longer than twenty-four hours after the issuing thereof, of such a number of talesmen, from the bystanders or from the town, qualified to serve as jurors, as he deems sufficient for the purpose; or in his discretion he may draw from the jury box, double the number of jurors required to complete the jury in the manner required by the foregoing sections, which shall be summoned in like manner as the first jury, and he shall continue to do so till a jury is obtained. Nothing hereinbefore contained shall preclude the justice from adjourning the trial of the case, on his own motion, or on the application of either of the parties to the action, as provided by sections 2959 to 2968 of the Code of Civil Procedure.

From 2 R. S. 243, § 102. Am'd by L. 1889, c. 505; L. 1892, c. 567.

§ 2998. Juror's oath.

The justice must administer an oath or affirmation to each juror, well and truly to try the matter in difference between ————, plaintiff, and ————, defendant, and unless discharged by the justice, a true verdict to give, according to the evidence.

From 2 R. S. 243, § 103.

§ 2999. Jury to hear proofs.

After the jurors have been duly sworn, they must sit together, and hear the allegations and proofs of the parties, which must be made publicly, in their presence.

From 2 R. S. 244, § 104.

§ 3000. Witness's oath.

A person offered as a witness must, before any testimony is given by him, be duly sworn or affirmed, to the effect that the evidence which he shall give, relating to the matter in difference between ————, plaintiff, and ————, defendant, shall be the truth, the whole truth, and nothing but the truth.

From Id., § 108.

§ 3001. Witness refusing to be sworn, etc. Warrant thereupon.

Where a witness, attending before a justice in an action, refuses to be sworn or affirmed in the form prescribed by law; or to answer a pertinent and proper question; or neglects or refuses to produce a book or paper which he has been duly subpoenaed to produce, as prescribed in section 2969 of this act, or duly required to produce by an order, made as prescribed in section 867 of this act; and the party, at whose instance he attended, makes oath that the testimony of the witness, or that the book or paper is so far material, that without it he cannot safely proceed with the trial of the action, the justice may, by warrant, commit the witness to the jail of the county.

From 2 R. S. 274, § 279.

§ 3002. Contents of warrant; imprisonment of recusant witness.

The warrant must specify the cause for which it is issued. If it is issued for refusing to answer a question, the question

must be specified therein; if for neglecting or refusing to produce a book or paper, the same must be described with convenient certainty. The recusant witness must be closely confined, by virtue of the warrant, until he submits to be sworn or affirmed, or to answer, or to produce the book or paper required, as the case may be; or is otherwise discharged according to law.

From Id., § 280.

§ 3003. Adjournment thereupon.

The justice must thereupon, from time to time, at the request of the party in whose behalf the witness attended, adjourn the trial, until the witness testifies, or produces the book or paper required, or dies, or becomes a lunatic, or is discharged according to law.

From Id., § 281.

§ 3004. Ex parte affidavit; when evidence.

An ex parte affidavit shall not be received in evidence upon a trial, without the consent of both parties, except in a case where it is specially allowed by law.

From 2 R. S. 244, § 105.

§ 3005. Competency of witness; how determined.

An objection to the competency of a witness must be tried and determined by the justice. Where the ground of the objection depends upon a matter of fact, evidence may be given thereupon, as upon any other question of fact; except that, if the witness is examined thereupon by the party objecting, no other testimony shall be received from either party as to his competency.

From Id., § 107.

§ 3006. Constable to keep jury; his oath.

After hearing the allegations and proofs, the jury must be kept together in a private and convenient place, under the charge of a constable, until they all agree upon their verdict; and, for that purpose, the justice shall administer to the constable the following oath: "You swear in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors upon this trial together, in a private and convenient place, without any meat or drink except such as shall be ordered by me: that you will not suffer any communication to be made to them, orally or otherwise; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed upon their verdict, until they are discharged: and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed upon."

From Id., § 109.

§ 3007. Rendition of verdict; plaintiff need not be called.

When the jurors have agreed upon their verdict, they must publicly deliver it to the justice, who must enter it in his docket-book. It is not necessary to call the plaintiff before receiving the verdict; and the plaintiff cannot submit to a nonsuit or withdraw the action, after the cause has been committed to the jury.

From Id., § 110.

§ 3008. Jury, when to be discharged; new venire.

Where the justice is satisfied that the jurors cannot agree upon a verdict, after having been out a reasonable time, he may

discharge them, and issue a new venire, returnable within forty-eight hours; unless the parties consent, and their consent is entered in the justice's docket-book, that the justice may render judgment upon the evidence already before him; which he may do, in that case.

From 2 R. S. 245, § 111.

§ 3009. Fine to be imposed on defaulting juror.

A person duly notified to attend as a juror, who fails to attend, or, attending, refuses to serve, without a reasonable excuse, proved by his oath, or the oath of another person, is liable to the same fine, to be imposed and collected, with costs, in like manner, and applied to the same use, as is prescribed in article second of title fourth of this chapter, with respect to a person subpoenaed as a witness, and not attending, or attending and refusing to testify.

From Id., § 112; L. 1878, c. 146.

TITLE VI.

Judgment; and docketing the same.

Sec. 3010. Judgment by confession.
3011. Id.; mode of confessing judgment.
3012. Id.; when void.
3013. Judgment of nonsuit.
3014. Judgment upon verdict, etc.
3015. When judgment to be rendered.
3016. Remitting part of verdict, etc.
3017. Transcript of judgment; docketing the same.
3018. Id.; when execution may issue against person.
3019. Id.; in actions for a chattel.
3020. Judgment against joint debtors.
3021. Docketing the same; action thereupon.
3022. Docketing judgment in another county.
3023. Justice may give transcript, after expiration of his term.

§ 3010. Judgment by confession.

A justice of the peace may enter a judgment upon the confession of the defendant, in any case, where the amount confessed does not exceed the sum of five hundred dollars, with such a stay of execution, if any, as is agreed upon by the parties to the judgment.

From 2 R. S. 245 (Part 3, c. 2, tit. 4), § 113; Co. Proc., § 58, subd. 8.

§ 3011. Id.; mode of confessing judgment.

A judgment upon confession shall not be rendered, unless the following requisites are complied with:

1. The defendant must personally appear before the justice.
2. The confession must be in writing, signed by the defendant, and filed with the justice.
3. If the judgment is confessed for a sum exceeding fifty dollars, the confession must be accompanied with the affidavit of the defendant and of the plaintiff, stating that the defendant is honestly and justly indebted to the plaintiff in the sum specified therein, over and above all just demands which the defendant has against the plaintiff; and that the confession is not made or taken with intent to defraud any creditor.

From 2 R. S. 245, § 114.

§ 3012. Id.; when void.

A judgment confessed, otherwise than as prescribed in the last section, is void, as against every person, except a purchaser in good faith of property, real or personal, thereunder, and the defendant making the confession.

From 2 R. S. 246, § 115.

§ 3013. Judgment of nonsuit.

Judgment of nonsuit, with costs, must be rendered against a plaintiff prosecuting an action before a justice of the peace, in either of the following cases:

1. If he discontinues or withdraws the action.
2. If he fails to appear within one hour after the summons is returnable, or within one hour after the time to which the trial has been adjourned.
3. If he is nonsuited upon the trial.

From Id.; § 119.

§ 3014. Judgment upon verdict, etc.

Where a verdict, or the decision of the justice upon a trial without a jury, is rendered in favor of either party, the justice

must render judgment against the adverse party in conformity thereto, with costs, except as is otherwise specially prescribed by law.

From id., §§ 120, 121.

§ 3015. When judgment to be rendered.

Where the plaintiff is nonsuited, or discontinues or withdraws the action; or where judgment is confessed, or a verdict is rendered; or where, at the close of the trial, the defendant is in custody; the justice must forthwith render judgment, and enter it in his docket-book. In every other case, he must render judgment and enter it in his docket-book, within four days after the cause has been finally submitted to him.

From 2 R. S. 247, § 124.

§ 3016. Remitting part of verdict, etc.

Where a verdict, or the decision of the justice upon a trial without a jury, is rendered in favor of either party for a sum of money, the prevailing party may remit any portion thereof, and take judgment for the residue.

From id., § 125.

§ 3017. [Am'd, 1894.] Transcript of judgment; docketing the same.

A justice of the peace who renders a judgment, except in an action to recover a chattel, must, upon the application of the party in whose favor the judgment was rendered, and the payment of the fee therefor, deliver to him a transcript of the judgment. The county clerk of the county in which the judgment was rendered must, upon the presentation of the transcript and payment of the fee therefor, if within six years after the rendering thereof, indorse thereupon the date of its receipt, file it in his office and docket the judgment as of the time of the receipt of the transcript in the book kept by him for that purpose, as prescribed in article third, title first of chapter eleven of this act. Thenceforth the judgment is deemed a judgment of the county court of that county, and must be enforced accordingly; except that an execution can be issued thereupon only by the county clerk, as prescribed in section 3043 of this act, and that the judgment is not a lien upon, and cannot be enforced against, real property, unless it is for twenty-five dollars or more, exclusive of costs.

From Co. Proc., § 65. Am'd by L. 1894, c. 307.

§ 3018. Id.; when execution may issue against person.

If the action, in which the judgment is rendered, is one of the actions specified in subdivision first or second of section 2895 of this act, or if an order of arrest was granted, and was executed, in a case specified in subdivision third of that section, and, in either case, if the defendant is a male person, the justice must insert, in each transcript given by him, as prescribed in the last section, the words, "defendant liable to execution against his person"; and a like note must also be made in the docket of the judgment, made by the county clerk.

New.

§ 3019. Id.; in action for a chattel.

A justice of the peace, who renders judgment for a chattel, which has been delivered to the unsuccessful party, or for the value thereof, in case a return thereof cannot be had, must,

where the value exceeds twenty-five dollars, upon the application of the party in whose favor the judgment was rendered, and payment of the fee therefor, deliver to him a transcript of the judgment, stating the particulars thereof. The county clerk of the county, in which the judgment was rendered, must, upon the presentation of the transcript, and payment of the fees therefor, indorse thereupon the date of its receipt, file it in his office, and docket the judgment, as of the time of the receipt of the transcript, in the book kept by him for that purpose, as prescribed in article third of title first of chapter eleventh of this act, and must also enter in the docket the particulars of the judgment, as stated in the transcript of the justice. Thenceforth the judgment is deemed a judgment of the county court of that county, and must be enforced accordingly; except that an execution can be issued thereupon only by the county clerk, as prescribed in section 3043 of this act.

New.

§ 3020. Judgment against joint debtors.

Where an action is brought against two or more persons, jointly indebted upon contract, and the summons is served upon one or more, but not upon all of them, if the plaintiff recovers judgment, it must be entered against all, in the mode prescribed in section 1932 of this act. Sections 1933, 1934, and 1935 of this act apply to such a judgment, and to each execution issued thereupon; except that, where the justice or the county clerk issues the execution, he must make the indorsement prescribed in section 1934 of this act.

From 2 R. S. 247, §§ 122, 123.

§ 3021. Docketing the same; action thereupon.

The justice who gives a transcript of a judgment, taken as prescribed in the last section, must distinctly designate, in the transcript, each defendant who was not summoned. Thereupon the clerk, who dockets the judgment, must make in the docket, under or opposite the name of each defendant not summoned, an entry, as prescribed in section 1936 of this act; and the provisions of that section apply to the judgment so docketed. An action, upon a judgment so docketed, can be maintained in a justice's court against the defendants summoned, only in a like case, and with like effect, as if they were the only defendants in the original action. An action may be maintained against the defendants not summoned, as prescribed in section 1937 of this act, in any court having jurisdiction thereof; and the plaintiff is entitled to costs, upon recovering final judgment therein, where the sum remaining unpaid is twenty-five dollars or more.

New.

§ 3022. Docketing judgment in another county.

The clerk, with whom a transcript given by a justice is filed, as prescribed in either of the foregoing sections of this title, must furnish to any person applying therefor, and paying the fees allowed by law, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk, to whom such a transcript is presented, must, upon payment of the fees therefor, immediately file it, and docket the judgment in the appropriate docket-book kept in his office, in like manner as the judgment was docketed by the first county clerk. The judgment, when docketed as prescribed in this section, has the like effect, with respect to the enforcement thereof, or any proceedings there-

under, or by virtue thereof, in the county where it was so docketed, as if it was rendered by a justice of the peace of that county, and docketed upon filing his transcript; except that where an application for leave to issue an execution is necessary, it must be made to the county court of the county where the judgment was rendered.

From Co. Proc., §§ 63, 284.

§ 3023. Justice may give transcript, after expiration of his term.

A justice of the peace, whose term of office has expired, may make a transcript of a judgment rendered by him, as prescribed in either of the foregoing sections of this title.

New.

TITLE VII.

Executions.

Sec. 3024. When justice may issue execution.
3025. General requisites of execution.
3026. Execution upon judgment for money.
3027. Renewal of execution.
3028. Property exempt from execution.
3029. Indorsement of levy; notice of sale.
3030. Mode of levy and sale.
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3032. Execution against the person; imprisonment of judgment debtor.
3033. When judgment debtor to be discharged.
3034. Affidavit; discharge.
3035. Penalty for not discharging.
3036. Affidavit a defence to action for escape.
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3038. Execution upon judgment in action for a chattel.
3039. Action against constable for not returning execution.
3040. Constable not to act under execution after return day.
3041. Action against constable for money collected.
3042. Duty of constable whose term of office has expired.
3043. Execution upon judgment docketed with county clerk.

§ 3024. When justice may issue execution.

At any time within five years after entry of a judgment, the justice of the peace, who rendered it, being in office, may issue an execution thereupon, unless it has been docketed in the county clerk's office.

From Co. Proc., § 64, subds. 12, 18.

§ 3025. General requisites of execution.

An execution, issued by a justice, must be directed generally to any constable of the same county. It must intelligibly describe the judgment, stating the names of the parties in whose favor, and against whom, the time when, and the name of the justice by whom, the judgment was rendered; and it must be made returnable to the justice, within sixty days after its date.

From 2 R. S. 249, § 131; Co. Proc., § 64, subd. 12.

§ 3026. Execution upon judgment for money.

An execution, issued upon a judgment for a sum of money, must specify, in the body thereof, the sum recovered, and the sum actually due upon the judgment at the date of the execution; and, except in a case where special provision is otherwise made by law, it must, substantially, require the constable to satisfy the judgment, together with his fees, out of the personal property of the judgment debtor within the county, not exempt from levy and sale by virtue of an execution; and to bring the money before the justice, by the return day of the execution, to be rendered, by the justice, to the party who recovered the judgment. If the judgment was recovered against a male person, in either of the actions specified in subdivision first or second of section 2895 of this act; or if an order of arrest was granted and was executed, in a case specified in subdivision third of that section, the execution must also command the constable, if sufficient personal property cannot be found to satisfy the judgment, to arrest the judgment debtor, and to convey him to the jail of the county, there to remain until he pays the judgment, or is discharged according to law. If the judgment was rendered in an action to recover a penalty or forfeiture given by a statute of the State, the justice must indorse upon the execution a

reference to the statute, as prescribed in section 1897 of this act, with respect to a copy of the summons.

From 2 R. S. 249, 251, §§ 131, 143.

§ 3027. Renewal of execution.

After the return, wholly or partly unsatisfied, of an execution, issued by a justice of the peace, he may, from time to time, within five years after the judgment was rendered, issue a new execution or renew the former execution. An execution is renewed by a written indorsement thereupon to that effect, signed by the justice, and dated upon the day when it is made. If part of the execution has been satisfied, the indorsement must state the sum remaining due. Each indorsement renews the execution for sixty days from the date thereof. A justice whose term of office has expired may thus issue or renew an execution.

From 2 R. S. 252, §§ 145, 147; Id., 271, § 258; L. 1840, c. 347; L. 1846, c. 276; L. 1857, c. 512; L. 1879, c. 305; Co. Proc., § 64, subd. 12.

§ 3028. Property exempt from execution.

The same personal property is exempt from levy and sale, by virtue of an execution issued by a justice of the peace, which is exempt from levy and sale, by virtue of an execution issued out of the supreme court, and in the like cases, and under the same circumstances, as prescribed in sections 1389, 1390, 1391, 1392, 1393, and 1394 of this act, and the other special provisions of law, relating to such an exemption.

From 2 R. S. 254, § 169.

§ 3029. Indorsement of levy; notice of sale.

A constable, who takes personal property into his custody, by virtue of an execution, must indorse upon the execution the time of levying upon it. He must immediately post conspicuously, in at least three public places of the city or town, in which the property was taken, written or printed notices, signed by him, describing the property, and specifying the place, within the same city or town, where, and the time, not less than six days after the posting, when it will be exposed for sale.

From Id., 252, § 148.

§ 3030. Mode of levy and sale.

The provisions of sections 1384, 1385, 1386, 1387, 1405, 1409, 1410, 1411, 1412, and 1428 of this act, substituting the constable for the sheriff, apply to and govern the levy upon and sale of personal property, by virtue of an execution issued by a justice of the peace; except where a different rule is prescribed in this act.

New.

§ 3031. Return of execution.

The constable must return the execution to the justice, and pay to him the amount of the judgment, with interest, or so much thereof as he has collected; returning the surplus, if any, to the person from whose property it was collected.

From 2 R. S. 252, § 149.

§ 3032. Execution against the person; imprisonment of judgment debtor.

For want of sufficient personal property, whereon to levy, the constable must, if the execution requires it, arrest the judgment debtor, and convey him to the jail of the county. The keeper of the jail must thereupon keep the judgment debtor in custody,

in all respects as if the execution was issued out of the supreme court, until the judgment and the fees of the constable are paid; or until the judgment debtor is thence discharged, in due course of law; except that if the execution has an indorsement, showing that the judgment was rendered in an action for a penalty or forfeiture, given by a statute of the State, the sheriff shall not admit the judgment debtor to the liberties of the jail.

From 2 R. S. 251, 252, §§ 148, 151.

§ 3033. [Am'd, 1883.] When judgment debtor to be discharged.

If a person committed to jail by virtue of an execution issued by a justice of the peace, or out of the municipal court of Buffalo, or by virtue of an execution issued by a county clerk, on a transcript of a judgment recovered before a justice of the peace, or in the said municipal court of Buffalo, has a family within the State, for which he provides, he must be discharged, after remaining in custody, either with or without being admitted to the jail liberties, thirty days; otherwise he must be discharged after so remaining sixty days.

From Id., § 152. Am'd by L. 1883, c. 394.

§ 3034. Affidavit; discharge.

In order to procure a discharge, as prescribed in the last section, the prisoner must make, and deliver to the sheriff or jailer, an affidavit, stating the facts which entitle him thereto, according to the provisions of that section. Upon receiving such an affidavit, the sheriff or jailer must forthwith discharge the prisoner from his custody. He must thereupon deliver the affidavit to the clerk of the county, who must file it in his office, without fee.

From 2 R. S. 252, §§ 153, 154.

§ 3035. Penalty for not discharging.

A sheriff or jailer, who refuses to discharge the prisoner, upon receiving such an affidavit, forfeits twenty-five dollars for each day, during which he detains the prisoner; to be recovered by the latter, in addition to any damages, which he sustains by reason of the false imprisonment.

From Id., § 155.

§ 3036. Affidavit a defence to action for escape.

The receipt of such an affidavit is a defence, to an action brought against the sheriff or jailer, by reason of the prisoner's discharge.

From Id., § 156.

§ 3037. Discharge not to affect judgment.

Notwithstanding the discharge of a judgment debtor, as prescribed in the last four sections, the judgment remains valid as against his property; and a new execution may be issued accordingly, as if he had not been imprisoned.

From Id., § 157.

§ 3038. Execution upon judgment in action for a chattel.

In an action for a chattel, the possession of which has not been delivered to the prevailing party, an execution, for the delivery of the possession thereof to him, as well as for any damages recovered by him, may be issued by the justice; unless the judgment has been docketed in the county clerk's office, as prescribed in title sixth of this chapter. It must be to the same

effect, and executed in the same manner, as a like execution issued upon a judgment rendered in the supreme court; except that it must be directed generally to any constable of the county; and that the direction to satisfy a sum of money, out of the property of the judgment debtor, must be in the form prescribed in this title for a like direction, where an execution is issued by a justice of the peace, upon a judgment for a sum of money.

From L. 1860, c. 181, § 10; L. 1865, c. 616.

§ 3039. Action against constable for not returning execution.

If a constable fails to return an execution within five days after the return day thereof, the party, in whose favor it was issued, may recover, in an action against the constable, the amount of the execution, if it was issued upon a judgment for a sum of money; or if it was for the delivery of the possession of a chattel, the value of the chattel, as specified in the judgment, together with the damages and costs awarded thereby; and, in either case, with interest from the time when the judgment was rendered.

From 2 R. S. 253, § 159.

§ 3040. Constable not to act under execution after return day.

A constable shall not levy upon or sell property, or arrest a defendant, or take possession of a chattel, by virtue of an execution, after the time limited therein for its return, unless the execution has been renewed; nor shall he do any act under a renewed execution, after the expiration of the time for which it has been renewed.

From Id., § 161.

§ 3041. Action against constable for money collected.

Where money, collected by a constable upon an execution, is not paid over by him according to law, any person entitled thereto may maintain an action in his own name, upon the instrument of security given by the constable and his sureties; and may recover therein the sum so collected, with interest from the time when it was collected.

From Id., § 163.

§ 3042. Duty of constable whose term of office has expired.

A constable, to whom an execution is delivered, whose term of office expires on or before the return day thereof, must proceed thereupon in the same manner, as if his term of office had not expired; and he and his sureties are liable for any neglect of duty, with respect to the execution; or for money collected thereunder, or for damages sustained by reason of any act done by the constable, touching the execution, in the same manner, and to the same extent, as if his term of office had not expired.

From 2 R. S. 274, §§ 285, 286; see L. 1872, c. 788.

§ 3043. Execution upon judgment docketed with county clerk.

Where a judgment, rendered by a justice of the peace, has been docketed with a county clerk, upon the filing either of a transcript from the justice's docket, or of a transcript from the clerk's docket of another county, the execution, to be issued thereupon by the county clerk, must be in the same form, and

executed in the same manner, as an execution issued upon a judgment of the county court; except as otherwise prescribed in section 1367 of this act; and except, also, that, where the judgment is for a sum less than twenty-five dollars, exclusive of costs, the direction to satisfy the judgment out of the real property of the judgment debtor must be omitted. In that case the provisions of this act, relating to the satisfaction of an execution out of the judgment debtor's real property, are not applicable thereto.

From Co. Proc., § 64, subd. 25.

TITLE VIII.

Appeals.

Article 1. Appeals generally.
2. Appeal where a new trial is not had in the appellate court.
3. Appeal for a new trial in the appellate court.

ARTICLE FIRST.

Appeals generally.

Sec. 3044. Justice's judgment reviewed by appeal.
3045. Who may appeal; to what court appeal to be taken.
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3056. Id.; when justice is dead, etc.
3057. Proceedings when error in fact is alleged.
3058. Restitution upon reversal.
3059. Setting off costs and recovery.
3060. Certain sums may be included in disbursements.
3061. Judgment-roll.

§ 3044. Justice's judgment reviewed by appeal.

The only mode of reviewing a judgment, rendered by a justice of the peace in a civil action, is by an appeal, as prescribed in this title.

From Co. Proc., § 351.

§ 3045. [Am'd, 1895.] Who may appeal; to what court appeal to be taken.

An appeal may be taken by any party aggrieved by the judgment. Except where the judgment is rendered by a justice of the peace of the city of Buffalo, the appeal must be to the county court of the county where the judgment was rendered.

From Id., §§ 325, 352. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3046. [Am'd, 1882.] Appeal; when and how taken.

An appeal must be taken, within twenty days after the entry of the judgment in the justice's docket; except that, where a defendant appeals from a judgment rendered in an action, wherein he did not appear, and the summons was not personally served upon him, the appeal may be taken within twenty days after personal service upon him, on the part of the plaintiff, of written notice of the entry of the judgment; but not after the expiration of five years from the entry of the judgment. An appeal is taken by serving upon the justice by whom the judgment was rendered, and upon the respondent, a written notice of appeal, subscribed either by the appellant, or by his attorney in the appellate court.

From Co. Proc., §§ 353, 354. Am'd by L. 1882, c. 390.

§ 3047. [Am'd, 1913.] Service of notice upon justice; payment of costs and fee.

Service of the notice of appeal upon the justice, must be made by delivering it to him personally, or to his clerk, appointed pursuant to law, or by mailing such notice to the justice at his office in the manner prescribed by service of notice by mail in section 797 of this act; but if the justice is dead, or if neither he nor his clerk can, after reasonable diligence, be found within the county, service of the notice upon the justice may be made by delivering it to the clerk of the appellate court. Unless the justice is dead, the appellant must, at the time of serving the notice, pay to the person to whom it is delivered the costs of the action, included in the judgment, and the sum of two dollars, as the fee of the justice for making the return.

From Co. Proc., §§ 354, 359. Am'd by L. 1913, c. 445 (in effect Sept. 1, 1913).

§ 3048. [Am'd, 1913.] Service of notice upon respondent.

Service of the notice of appeal upon the respondent may be made, by delivering it, in any part of the State, to the respondent personally, or in one of the following methods:

1. By leaving it at his residence, with a person of suitable age and discretion or by serving the notice upon the respondent by mail, or in case an attorney appeared for respondent at the trial, the notice may be served upon the attorney, either personally, or in the manner prescribed for service of notice by mail in section 797 of this act.

2. If service cannot be made, with due diligence, upon the respondent, in the manner prescribed in the foregoing subdivision, the notice of appeal may be served upon him by delivering it to the clerk of the appellate court.

From Id., § 354. Am'd by L. 1913, c. 445 (in effect Sept. 1, 1913).

§ 3049. Amendment; when allowed.

Where the appellant, seasonably and in good faith, serves the notice of appeal, upon either the justice or the respondent, but omits, through mistake, inadvertence, or excusable neglect, to serve it upon the other, or to do any other act necessary to perfect the appeal, the appellate court, upon proof by affidavit of the facts, may, in its discretion, permit the omission to be supplied, or an amendment to be made, upon such terms as justice requires.

From Id., § 327.

§ 3050. Undertaking to stay execution upon judgment.

If the appellant desires a stay of execution, he must give a written undertaking, executed by one or more sureties, approved by the justice who rendered the judgment, or by a judge of the appellate court, to the effect that, if the appeal is dismissed; or if judgment is rendered against the appellant in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied: the sureties will pay the amount of the judgment, or the portion thereof remaining unsatisfied, not exceeding a sum, specified in the undertaking, which must be at least one hundred dollars, and not less than twice the amount of the judgment; or, if the judgment in the justice's court is for the recovery of a chattel, that the sureties will pay the sum fixed by that judgment as the value of the chattel, together with the damages, if any, awarded for the taking, withholding, or detention thereof. A copy of the undertaking, with a notice of the delivery thereof, must be served with the notice of appeal, and

in like manner. Section 1305 of this act applies to such an undertaking.

From Co. Proc., §§ 355, 356.

§ 3051. Proceedings; how stayed.

The delivery of the undertaking to the justice or to his clerk appointed pursuant to law, and service of a copy thereof, and of notice of the delivery thereof, stay the issuing of an execution upon the judgment. If an execution has been issued, the service of a copy of the undertaking, certified by the justice or the clerk, or accompanied with an affidavit, showing that it is a copy, and that the original has been duly filed, upon the officer holding the execution, stays further proceedings thereunder.

From Id., § 357.

§ 3052. Id.; when justice is dead, etc.

Where the justice is dead, or cannot, with due diligence, be found within the county, and he has no clerk, appointed pursuant to law, or the clerk cannot, with due diligence, be found within the county, the undertaking may be filed with the clerk of the appellate court. In that case, notice of the filing must be given to the respondent, as prescribed in section 3048 of this act, for service of a notice of appeal upon him. The filing of the undertaking has the same effect, as the delivery thereof to the justice; and a copy thereof, certified by the county clerk, served upon the officer holding an execution, has the same effect, as if it was certified, as prescribed in the last section.

From Id., § 358.

§ 3053. Return.

The justice must, after ten and within thirty days from the service of the notice of appeal, and the payment of the costs and fee, as prescribed in section 3047 of this act, make a return to the appellate court, annex thereto the notice of appeal and the undertaking, if any has been delivered to him or to his clerk, and file the same with the clerk of the appellate court. The return must contain all the proceedings, including the evidence and the judgment; unless the appellant has, in his notice of appeal, demanded a new trial, in a case where he is entitled thereto, as prescribed in article third of this title. In the latter case, the justice must return the summons, together with each warrant of attachment, order of arrest, or requisition to replevy, or execution granted by him in the action, with the proof of the service thereof; the pleadings, or copies thereof; the proceedings upon the trial; and the judgment; with a brief statement of the amount and nature of the claims litigated by the parties. But he need not return the evidence, or any part thereof, unless he is required so to do by the special order of the appellate court.

From Id., § 360.

§ 3054. Id.; when justice has gone out of office.

Where the justice has gone out of office, he must, nevertheless, make a return in the same manner, and his return has the same effect, as if he remained in office.

From Id., § 361.

§ 3055. Further return; how compelled.

If the return is defective, the appellate court may direct the justice to make a further or amended return, as often as is necessary. The appellate court may compel the justice, by

attachment, to make and file a return, or a further or amended return. The court is always open for those purposes. Where the justice has removed to another county of the State, the appellate court may compel him to make the return, as if he was still within the county where the judgment was rendered.

From Co. Proc., §§ 360, 362, 368.

§ 3056. Id.; when justice is dead, etc.

If the justice dies, becomes a lunatic, absconds, removes from the State, or otherwise becomes unable to make the return, the appellate court may receive affidavits, or examine witnesses, as to the evidence and other proceedings taken, and the judgment rendered, before the justice; and may determine the appeal, as if a return had been duly made by the justice.

From Id., § 363.

§ 3057. Proceedings when error in fact is alleged.

Where an appeal is founded upon an error in fact in the proceedings, not affecting the merits of the action, and not within the knowledge of the justice, the court may determine the matter upon affidavits; or, in its discretion, upon the examination of witnesses; or in both methods.

From Id., § 366.

§ 3058. Restitution upon reversal.

Where the judgment of the justice is reversed or modified, the appellate court may make or compel restitution of property or of a right, lost by means of the erroneous judgment; but not so as to affect the title of a purchaser, in good faith and for value, of property sold by virtue of a warrant of attachment in the action, or an execution issued upon the judgment. In that case, the appellate court may compel the value, or the purchase-price to be restored, or deposited to abide the event of the action, as justice requires. Six days' notice of an application for an order for restitution must be given; and, if the application is granted before judgment, the proper direction may be included therein.

From Id., § 369.

§ 3059. Setting off costs and recovery.

If, upon the appeal, a sum of money is awarded to one party, and costs are awarded to the adverse party, the appellate court must set off the one against the other, and render judgment for the balance.

From Id., § 370.

§ 3060. Certain sums may be included in disbursements.

Where costs are awarded to the appellant, he may include, in the disbursements upon the appeal, the costs and fee paid to the justice upon taking the appeal; and, where the judgment rendered by the justice was against the appellant, he may also include, in those disbursements, the costs of the action, before the justice, which he would have been entitled to recover, if the judgment of the justice had been in his favor.

From Id., § 371.

§ 3061. Judgment-roll.

The clerk, immediately after entering final judgment upon the determination of an appeal, must attach together and file such

of the following papers, as were used upon the appeal; which constitute the judgment-roll:

1. The return of the justice, or a certified copy thereof; the notice of appeal; and the undertaking, if any has been given.

2. The verdict, report, or decision, and each offer, if any, made as prescribed in article third of this title.

3. A certified copy of the judgment, together with each notice of exceptions, or case, which is then on file.

4. Every other paper, then on file, and a certified copy of every order, which in any way involves the merits, or necessarily affects the judgment.

From Id., § 267.

ARTICLE SECOND.

Appeal where a new trial is not had in the appellate court.

Sec. 3062. Hearing of appeal; dismissal thereof.
3063. Judgment.
3064. When new trial in justice's court may be directed.
3065. Id.; proceedings before justice.
3066. Costs; when awarded.
3067. Amount of costs.

§ 3062. [Am'd, 1883, 1895.] Hearing of appeal; dismissal thereof.

If the case is one where the appellant is not entitled to, or has not demanded, a new trial in the appellate court, as prescribed in section 3068 of this act, the respondent may, within twenty days of the service on him of the notice of appeal, serve upon the appellant or his attorney a written stipulation that the judgment appealed from may be reversed with five dollars' costs and disbursements of the appeal, and thereafter no further steps shall be taken in such appeal, except to enter judgment in pursuance of such stipulation for the enforcement thereof; in case such stipulation shall not be so served, the appeal may be brought to a hearing in the appellate court at any term thereof at which such an appeal can be heard, held after the return is filed, upon a notice by either party of not less than eight days. It must be placed upon the calendar, and must continue thereupon without further notice until it is finally disposed of. If, after being regularly placed upon the calendar, neither party brings it to a hearing before the end of the second term thereafter at which it might be noticed for hearing and heard, the court must dismiss the appeal unless it directs the same to be continued for cause shown.

From Co. Proc., § 364. Am'd by L. 1883, c. 390; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3063. [Am'd, 1893, 1900, 1911.] Judgment.

In a case specified in the last section, the appeal must be heard upon the original papers or a certified copy thereof, and a copy or copies thereof need not be furnished for the use of the court. The appellate court must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits. It may affirm, modify, or reverse the judgment of the justice, in whole or in part, and as to any or all of the parties, and for errors of law or of fact, and where the judgment is contrary to or against the weight of the evidence the appellate court may, upon its reversal of a judgment, order a new trial before the same justice or before another justice of the same county to be designated in the order, and at a time and place to be specified in the order, and in such a case the costs of the appeal shall be in the discretion of the appellate court.

From Co. Proc., § 365, 366. Am'd by L. 1893, c. 380; L. 1900, c. 558; L. 1911, c. 364 (in effect Sept. 1, 1911).

§ 3064. When new trial in justice's court may be directed.

If the appeal is taken by a defendant, who failed to appear before the justice, either upon the return of the summons, or at the time to which the trial of the action was adjourned; and he shows, by affidavit or otherwise, that manifest injustice has been done, and renders a satisfactory excuse for his default;

the appellate court may, in its discretion, set aside the judgment appealed from, or stay proceedings thereunder, and by order direct a new trial, before the same justice, or before another justice of the same county, designated in the order, at such a time and place, specified in the order, and upon such terms, as it deems proper.

From Co. Proc., § 366.

§ 3065. [Am'd, 1893.] Id.; proceedings before justice.

Where a new trial is directed before a justice, as prescribed in the last two sections, the parties must appear before him, at the time and place specified in the order of the appellate court, without service of any notice, or of a copy of the order. Thereupon the like proceedings must be had in the action, as upon the return of a summons personally served.

From Co. Proc., § 366. Am'd by L. 1893, c. 380.

§ 3066. Costs; when awarded.

Upon an appeal provided for in this article, the award of costs is regulated as follows:

1. If the appeal is dismissed, because neither party brings it to a hearing, as prescribed in this article, costs shall not be awarded to either party.

2. If the judgment is reversed for an error in fact, not affecting the merits; or if a new trial is directed, before the same or another justice, as prescribed in this article; the costs of the appeal are in the discretion of the appellate court.

3. If the judgment is affirmed, costs must be awarded to the respondent.

4. If the judgment is reversed, costs must be awarded to the appellant.

5. If the judgment is affirmed only in part, the costs, or such a part thereof, as to the appellate court seems just, not exceeding ten dollars, besides disbursements, may be awarded to either party.

From Co. Proc., §§ 365, 371.

§ 3067. Amount of costs.

Upon an appeal, provided for in this article, costs, when awarded, must be as follows, besides disbursements:

To the appellant, upon reversal, thirty dollars.

To the respondent, upon affirmance, twenty-five dollars.

From Id., § 371.

ARTICLE THIRD.

Appeal for a new trial in the appellate court.

Sec. 3068. When appellant may demand new trial in appellate court.
3069. Undertaking to be given.
3070. Offer to compromise before return.
3071. Proceedings in appellate court.
3072. Offer to compromise after return.
3073. Amount of costs.

§ 3068. [Am'd, 1893.] When appellant may demand new trial in appellate court.

Where an issue of fact or an issue of law was joined before the justice, and the sum, for which judgment was demanded by either party in his pleading, exceeds fifty dollars; or where, in an action to recover a chattel, the value of the property, as fixed, together with the damages recovered, if any, exceeds fifty dollars; the appellant may, in his notice of appeal, except when the appeal is to the county court of Kings county, demand a new trial in the appellate court; and thereupon he is entitled thereto, whether the defendant was or was not present at the trial. An appeal from a judgment of a justice's court or by a justice of the peace in the city of Brooklyn, or any of the towns in the county of Kings must be taken and disposed of in the manner prescribed in articles first and second of this chapter and title, and not otherwise.

From Code Proc., § 352. Am'd by L. 1893, c. 380.

§ 3069. Undertaking to be given.

To render such an appeal effectual, the appellant must, at the time of the service of the notice of appeal upon the justice, give the undertaking required, by this title, to stay the execution of the judgment.

From Co. Proc., § 355.

§ 3070. [Am'd, 1885, 1895.] Offer to compromise before return.

Upon an appeal, provided for in this article, from a judgment for a sum of money only, either party may, within fifteen days after service of the notice of appeal, serve upon the adverse party, or upon his attorney, a written offer to allow judgment to be rendered in the appellate court, in favor of either party, for a specified sum. If the offer is not accepted, it cannot be proved upon the trial. If the party, within ten days after service of the offer upon him, serves upon the party making the same, or upon his attorney, written notice that he accepts the offer, he must file it, with an affidavit of service of the notice of acceptance, with the clerk of the appellate court, who thereupon must enter judgment accordingly. Where an offer is made as above provided, the party refusing to accept the same shall be liable for costs of the appeal, unless the recovery shall be more favorable to him than the sum offered. If neither party makes an offer, as provided herein, the party in whose favor the verdict, report or decision in the appellate court is given, shall be entitled to recover his costs upon the appeal. Costs when awarded according to the provisions of this section shall be in amounts provided in section 3073 of this article.

From Id., § 371. Am'd by L. 1885, c. 522; L. 1895, c. 356.

§ 3071. Proceedings in appellate court.

Upon an appeal, provided for in this article, after the expiration of ten days from the time of filing the justice's return, the action is deemed an action at issue in the appellate court; and all the proceedings therein, including the entry, enforcement, and review of the judgment, are the same, as if the action had been commenced in the appellate court, except as otherwise specially prescribed in this chapter.

From Co. Proc., §§ 364, 366.

§ 3072. Offer to compromise after return.

Either party may, at any time after the action is deemed at issue in the appellate court, and before the trial, serve upon the adverse party, a written offer to allow judgment to be taken against him, for a sum, or property, or to the effect, therein specified, with or without costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more defendants, against whom a separate judgment may be taken; and, if it is accepted, the action becomes severed, and may proceed against the other defendants, as if it had been originally commenced against them only. If the party receiving the offer, within ten days thereafter, serves upon the adverse party, notice that he accepts it, he may file it, with proof of acceptance; and thereupon the clerk must enter judgment accordingly. If the offer is not thus accepted, it cannot be proved upon the trial; and if the party, to whom it was made, fails to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

From Id., § 366, subd. 5.

§ 3073. Amount of costs.

Upon an appeal, provided for in this article, costs, when awarded, must be as follows, besides disbursements:

For all proceedings before notice of trial, fifteen dollars.

For all subsequent proceedings before trial, ten dollars.

For the trial of an issue of law, fifteen dollars.

For the trial of an issue of fact, twenty dollars.

For the argument of a motion for a new trial on a case, fifteen dollars.

For each term, not more than five, at which the appeal is regularly on the calendar, excluding the term, at which it is tried, or otherwise finally disposed of, ten dollars.

From Id., § 371.

TITLE IX.

Costs.

Sec. 3074. When prevailing party to recover costs. What costs allowed.
3075. When neither party to recover costs.
3076. Amount of costs limited.
3077. Costs upon demurrer.
3078. Taxation of costs.
3079. Increased costs.
3080. Costs on judgment for one or more defendants.
3081. Costs wrongfully collected may be recovered back.

§ 3074. [Am'd, 1903.] Whom prevailing party to recover costs. What costs allowed.

Except as otherwise specially prescribed by law, a party who recovers judgment in an action in a justice's court, is entitled to costs; which must be included in the judgment. Costs consist of the fees, allowed by law, for services necessarily rendered in the action, at the request of the party entitled to costs, or paid by him, as prescribed by law; and of such other expenses, as a party is entitled to include in his costs, by express provision of law. The defendant in an action brought in a justice's court may require security for costs to be given, where the plaintiff is a foreign corporation. So far as practicable, the provisions of title three of chapter twenty-one of this act, shall apply to the proceedings for requiring such security, the requisites of the undertaking and the justification of sureties therein.

From 2 R. S. 247, § 126; L. 1857, c. 775, § 2; L. 1866, c. 692, § 2. Am'd by L. 1903, c. 276 (in effect Sept. 1, 1903).

§ 3075. [Am'd, 1909]. When neither party to recover costs.

In either of the following cases, costs shall not be awarded to either party, but each party must pay his own costs:

1. Where the action is discontinued by the absence of the justice for more than one hour, after the summons is returnable, or after the time to which the trial has been adjourned.

2. Where the justice is disqualified, for a reason specified in section 35 of the Judiciary Law.

3. Where the action is discontinued, upon the ground that the defendant is an infant, for whom a guardian ad litem has not been appointed.

4. In an action to recover one or more chattels, where the plaintiff recovers a chattel, or part of a chattel, or the value thereof, and the defendant also recovers a chattel, or part of a chattel, which has been replevied and delivered to the plaintiff, or the value thereof. The plaintiff is entitled to costs, where both parties recover, as specified in this subdivision, unless the chattel, for which the defendant recovers, has been replevied and delivered to the plaintiff.

New. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 3076. [Am'd, 1895.] Amount of costs limited.

The sum to be awarded, as costs, to the prevailing party, except where it is otherwise specially prescribed by law, is limited as follows:

1. It cannot exceed fifteen dollars, besides the fees of witnesses, where, upon the trial of an issue of fact or of law, either party recovers damages to the amount of fifty dollars or more, or one or more chattels, the value of which, as fixed, together with the damages, if any, amounts to fifty dollars or more; or, where,

if the defendant recovers judgment, the sum for which the plaintiff demanded judgment, was fifty dollars or more, or the value of all the chattels, to recover which the action was brought, was stated in the complaint at fifty dollars or more.

2. In every other case, it cannot exceed ten dollars, besides the fees of witnesses, attending from another county.

But the prevailing party is entitled, in addition to the sums specified in this section, to the fees and expenses allowed by law, for a commission issued to examine a witness not residing in the county or in an adjoining county; and for each adjournment exceeding one, which was granted upon the application of the party against whom the judgment is rendered.

From L. 1866, c. 606, § 2; L. 1841, c. 188, § 6; Am'd by L. 1885, c. 397.

§ 3077. Costs upon demurrer.

Where judgment is rendered upon the trial of a demurrer, the costs of the trial must be included therein; otherwise costs are not allowed upon the trial of a demurrer.

New. See Co. Proc., § 64, subd. 11.

§ 3078. Taxation of costs.

Where a justice renders a judgment, he must specify, in his docket-book, the items of costs, which were allowed by him. Before any item of costs is thus allowed, other than a fee to the justice, or to a juror or witness who attended, or to a constable who has certified the amount of his fee, upon a paper filed with the justice, the party must show, by his oath, or that of his attorney, to the satisfaction of the justice, that the item was actually and legally paid or incurred.

New.

§ 3079. Increased costs.

Increased costs must be awarded in favor of the defendant, in an action in a justice's court, in a case, and increased at the rate, specified in section 3258 of this act.

New.

§ 3080. Costs on judgment for one or more defendants.

In an action against two or more defendants, not united in interest, who make separate defences by separate answers, if the plaintiff fails to recover judgment against all, the justice must award costs to those who have judgment in their favor.

From 2 R. S. 616 (Part 3, c. 10, tit. 1), § 18.

§ 3081. Costs wrongfully collected may be recovered back.

Where a justice includes in a judgment a greater amount of costs than is allowed by law, or an improper item of costs or fees, and the same is collected; the person from whom it was collected may, notwithstanding the judgment, recover from the justice who has received it, the amount thereof, with interest.

From 2 R. S. 266 (Part 3, c. 2, tit. 4), § 230.

TITLE X.

Action or special proceeding, relating to an animal straying upon the highway.

Sec. 3082. Action against person suffering animals to stray.
3083. Penalties to be recovered.
3084. Certain officers to seize animals straying.
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3103. Id.; stay of proceedings.
3104. Appeal from final order.
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3108. Certain actions cannot be maintained.
3109. Where several animals are trespassing, damages are entire. Proceedings in such cases.
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3112. When one action, etc., supersedes any other.
3113. Right of officer when private person fails to prosecute.
3114. Person having a special property deemed owner.
3115. Agent may act for his principal.

§ 3082. Action against person suffering animals to stray.

Any person, who suffers or permits one or more cattle, horses, colts, asses, mules, swine, sheep, or goats, to run at large, or to be herded or pastured, in a public street, highway, park, or place, elsewhere than in a city, incurs thereby the penalty or penalties specified in the next section; and any resident of the town, or the officer to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act, or the overseer or superintendent of the poor of the town or district, in which one or more of those animals are found so running at large, herded, or pastured, may maintain an action against him, in a justice's court, held in that town or district, to recover the penalty or penalties so incurred. Where the action is brought by a private person, the justice must pay the proceeds of an execution, issued upon a judgment therein in favor of the plaintiff, after deducting the costs, to the officer, who might have brought the action, as prescribed in this section, to be applied by him to the support of the poor within his town or district.

From L. 1862, c. 459, § 1; L. 1872, c. 778.

§ 3083. Penalties to be recovered.

If the plaintiff recovers judgment, in an action brought as prescribed in the last section, the justice must award to him the

following sums, by way of penalties, besides the costs of the action:

1. For each horse, colt, ass, mule, swine, bull, ox, cow, or calf, five dollars.

2. For each sheep or goat, one dollar.

The entire amount of the penalties may be recovered, in one action, although it exceeds the sum, for which a justice can render a judgment in an ordinary action.

Id.

§ 3084. Certain officers to seize animals straying.

Where one or more cattle, horses, colts, asses, mules, swine, sheep, or goats are found running at large, or being herded or pastured, in a public street, highway, park, or place, elsewhere than in a city, the overseer of highways of the road district, or, if they are so found within an incorporated village, the street commissioner thereof, having personal knowledge or being notified of the fact, must immediately seize the animal or animals, and keep it or them in his possession, until disposed of as prescribed in the following sections of this title.

Id.

§ 3085. When private person may seize such animals.

Any person may seize one or more animals specified in the last section, then running at large, or being herded or pastured, in a public street, highway, park, or place, elsewhere than in a city, bordering upon real property owned or occupied by him; or then trespassing upon real property so owned or occupied, having entered thereupon from such a public street, highway, park, or place. The person making the seizure, must keep the animal or animals seized in his possession, until disposed of as prescribed in the following sections of this title.

From L. 1862, c. 459, § 2; L. 1867, c. 814.

§ 3086. Officer or person seizing to present petition.

An officer or other person, who seizes an animal or animals, as prescribed in either of the last two sections, must immediately file, with a justice of the peace of the town in which the seizure was made, a written petition, verified by his oath; setting forth the facts, which bring the case within either of those sections; briefly describing the animal or animals seized; stating either the name of the owner, or that his name is not known to the petitioner, and cannot be ascertained by him with reasonable diligence; and praying for a final order, directing the sale of the animal or animals seized, and the application of the proceeds thereof, as prescribed in this title. Where the petition alleges, that any animal or animals seized, were then trespassing upon real property owned or occupied by the petitioner, it must state the amount of the damages, if any, which the petitioner has sustained thereby. In that case, the decision of the justice, or, where the issues are tried by a jury, the verdict, must fix the amount of the damages.

From L. 1862, c. 459, § 3; L. 1867, c. 814.

§ 3087. Precept thereupon.

Upon the presentation of the petition, the justice must issue a precept under his hand: directed to the owner, if his name is stated in the petition, or, if it is not so stated, directed generally to all persons having any interest in the animal or animals seized;

briefly reciting the substance of the petition; describing the animal or animals seized, and requiring the person or persons, to whom the precept is directed, to show cause before the justice at a time and place specified therein, not less than ten nor more than twenty days, after the issuing of the precept, why the prayer of the petition should not be granted.
Id.

§ 3088. Id.; how served.

The precept must be served upon the person, to whom it is directed by his name, within the same time, and in like manner as a summons is required to be served, as prescribed in section 2910 of this act. Where it is directed generally to all persons, having an interest in the animal or animals seized, it may be served by a constable of the town, or by an elector thereof, specially authorized so to do by a written indorsement upon the precept, under the hand of the justice, by posting a copy thereof in at least six public and conspicuous places in the town where the seizure was made; one of which places must be the nearest district school house, or, if the seizure was made within an incorporated village, having schools in charge of a board of education, a building in which such a school is kept. Each copy must be so posted, within two days after the precept is issued. Where the precept is directed to a person by his name, and proof is made by affidavit, to the satisfaction of the justice, that it cannot, with reasonable diligence, be personally served upon that person, within the county, at least six days before the return day thereof, the justice may, by a written order, direct that service thereof be made, by posting copies thereof, at least five days before the return day, as prescribed in this section; in which case, service thereof may be made accordingly.
Id.

§ 3089. Proof of service of precept.

At the place where the precept is returnable, and at the expiration of the time specified in section 2893 of this act, the petitioner must, unless the precept is directed to a person by his name, and he appears, furnish proof of the service of the precept, as prescribed in the last section. If it was served by a constable, either personally or by posting, his written return upon the precept is sufficient proof of the facts relating to the service, as stated therein. If it was served by a private person, proof of service must be made by affidavit.
Id.

§ 3090. Answer; trial.

The owner, or a person having an interest in any animal seized, may appear upon the return of the precept, and thereby make himself a party to the special proceeding. The person so appearing may, upon the return of the precept, file a written answer, subscribed by him or his attorney, and verified by the oath of the person subscribing it, denying, absolutely or upon information and belief, one or more material allegations contained in the petition. His answer must also set forth his interest in the animal or animals seized. The subsequent proceedings must be the same as in an action in a justice's court, wherein an issue of fact has been joined, except as otherwise specially prescribed in this title.
Id.

§ 3091. Decision in favor of petitioner; warrant to sell; execution thereof.

If no person appears and answers, or if the decision of the justice, or the verdict of the jury, where the issues were tried by a jury, is in favor of the petitioner, the justice must make a final order, directing the sale of the animal or animals seized, and the application of the proceeds thereof, as prescribed in this title. Thereupon the justice must issue a warrant, under his hand, directed generally to any constable of the county, commanding him to sell the animal or animals seized, at public auction, for the best price which he can obtain therefor; and to make return thereof to the justice, at a time and place therein specified, not less than ten nor more than twenty days thereafter. The sale must be made upon the like notice, and in like manner, as a sale of property, by virtue of an execution issued by a justice of the peace; and the constable must make return, as required by the warrant, and must pay the proceeds of the sale to the justice, deducting therefrom his fees, at the rate allowed by law for the collection of such an execution.

Id.

§ 3092. Application of proceeds of sale.

The justice must apply the proceeds of the sale as follows:

1. He must pay the costs of the petitioner, as taxed by the justice, at the same rates as the costs of an action brought before him, including the justice's fees in such an action; and also the fees for the service of the precept, either personally or by posting, at the rate allowed by law for personal service of a summons by a constable.

2. Out of the remainder of the proceeds, he may retain, to his own use, a fee of one dollar, for each animal sold.

3. Out of the remainder of the proceeds, he must pay to the officer, or other person making the seizure, the following fees, for the seizure of each animal seized and sold, to wit: one dollar for each horse, colt, ass, or mule; fifty cents for each bull, ox, cow, or calf; and twenty-five cents for each goat, sheep, or swine; together with a reasonable compensation, fixed by him, for the care and keeping of each animal, from the time of the seizure to the time of the sale; and, also, where any animal sold was seized, while trespassing upon real property owned or occupied by the petitioner, the damages sustained by the petitioner in consequence thereof, as ascertained by the decision of the justice, or the verdict of the jury, upon which the final order was made.

4. Out of the remainder of the proceeds, he must pay to the officer, to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act, the following penalties, to wit: five dollars for each horse, colt, ass, mule, bull, ox, cow, calf, or swine, seized and sold; and one dollar for each sheep or goat, seized and sold; which penalties must be received by the officer, for the benefit of the poor of his town or district.

5. If any surplus remains, he must pay the same to the person or persons entitled thereto, as prescribed in the following sections of this title.

Id.

§ 3093. Disposition of surplus.

Any person may, within ten days after the return of the warrant, file, with the justice, a written claim to the surplus of the proceeds of the sale, or to any part thereof. On the eleventh day after the return, or, if it is a Sunday or a public holiday,

on the first day thereafter, which is neither Sunday nor a public holiday, the justice must proceed to inquire into the claims so filed; and, for the purpose of determining them, he must hear the allegations and proofs of each claimant; and he may issue subpoenas, as upon the trial of an action. He may, upon the application of any claimant, and for good cause shown, adjourn the hearing, from time to time, but not more than thirty days in all. After hearing the allegations and proofs of all the claimants, he must decide the claims, and enter an order accordingly. If no claim is filed; or if the right to the surplus money, or any part thereof, is not established, to the satisfaction of the justice, as prescribed in this section; any person, whose claim was not determined upon the hearing, may file a claim thereto, at any time before the expiration of a year from the return of the warrant; and, thereupon, the justice must proceed, as prescribed in this section with respect to a claim filed within the ten days.

Id.

§ 3094. Id.; when no claim made within a year.

If, at the expiration of one year after the return of the warrant, any portion of the surplus remains, a claim to which has not been established to the satisfaction of the justice, pursuant to the provisions of the last section, the justice must pay it, for the benefit of the poor, to the officer to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act; and, thereupon, all persons are forever barred from any claim thereto. But if a claim, filed as prescribed in the last section, remains undetermined at the expiration of the year, the justice must determine it within ten days thereafter; and, for that purpose, he must retain the surplus in his hands until the determination.

Id.

§ 3095. Order upon claim for surplus; appeal therefrom.

An appeal from an order determining a claim, as prescribed in the last two sections, may be taken to the county court, by a claimant, within ten days after the making of the order, as from a judgment of a justice in an action to recover a sum equal to the claim; and the proceedings thereupon are the same, except that an undertaking is not necessary for any purpose. Upon such an appeal, each other claimant, whose interest is affected by the order appealed from, must be made a respondent. If there is no such claimant, the officer entitled to the surplus must be made respondent; but costs cannot be awarded against him, unless he appears upon the appeal; in which case, the costs are in the discretion of the appellate court. Where an appeal, taken as prescribed in this section, is perfected, the county judge may, in his discretion, make an order extending the time, within which payment of the surplus must be made, as prescribed in the last section, and staying payment accordingly. Unless such an order is made, and a copy thereof is served upon the justice, payment must be made as prescribed in the last section, notwithstanding the appeal; and upon proof of the payment, the appeal must be dismissed. Where an appeal is taken to the supreme court, from the determination of the county court, the county judge, or a justice of the supreme court may make a like order, and with like effect.

Rem.

§ 3096. Proceedings upon decision in favor of person answering.

If the decision of the justice, or the verdict of the jury, where the issues are tried by a jury, is in favor of the person answering, it must fix the value of each animal seized. If the justice or the jury find that the seizure was malicious, and without probable cause, the decision or verdict must assess the damages sustained by the person answering, by means of the seizure and detention. The justice must thereupon make a final order, awarding to the person so answering, the return of the animal or animals so seized, or the value thereof if a return cannot be had; together with his costs, at the rates allowed by law in an action brought before him to recover a chattel; and, also, twice the sum assessed as his damages, if any. Thereupon a warrant must be issued by the justice to a constable, to the same effect, as an execution issued, in an action to recover a chattel, upon a judgment in favor of the defendant, where the chattel has not been delivered to him; and each provision of this chapter, relating to a judgment and an execution in such a case, applies to a final order made, and a warrant issued thereupon, as prescribed in this section.

From L. 1867, c. 314, § 7.

§ 3097. Demand of possession before trial. Proceedings thereupon.

At any time after the precept is issued, and before the commencement of the trial, the owner of any animal seized may file with the justice a written demand of the possession thereof. Thereupon he is entitled to the possession, upon complying with the following terms:

1. He must pay to the justice, for the use of the petitioner, the costs of the proceedings, to the time of filing the demand, as prescribed in subdivision first of section 3092 of this act, and, also, the sums payable on account of each animal, whereof possession is so demanded, as prescribed in subdivision third of the same section; which sums must be fixed by the justice, after hearing the allegations and proofs of the parties.

2. He must also pay to the justice, a fee of one dollar for each animal, whereof possession is so demanded.

3. If the petitioner is an officer, to whom a fine or penalty is to be paid for the benefit of the poor, as prescribed in section 2875 of this act, the claimant must also pay to the justice, for the petitioner's use, the sum specified therein on account of each animal, whereof possession is so demanded.

4. The claimant must also prove, to the satisfaction of the justice, by affidavit or other competent evidence, that he is the owner of each animal, whereof possession is so demanded. Each person who has appeared must have notice of, and may oppose, the claim.

From Id., § 4.

§ 3098. Id., when animal wilfully set at large by third person.

But where, in a case specified in the last section, the person filing a demand, presents therewith to the justice sufficient proof, by affidavit or otherwise, that the running at large, herding, pasturing, or trespassing, by reason whereof the animal or animals, of which he demands possession, were seized, was caused by the wilful act, intended to effect that object, of a person other than the owner; and also makes the proof specified in sub-

division fourth of that section; he is entitled to possession, suant to his demand, upon paying to the petitioner, or to justice for his use, a reasonable sum, to be fixed by the jus after hearing the allegations and proofs of the parties, as c pensation for the care and keeping of the animal or anim whereof possession is so demanded, and without paying any o sum, specified in the last section.

From L. 1869, c. 424, § 5.

§ 3099. Action by owner in such a case.

The owner of an animal, seized in consequence of a wilful specified in the last section, may recover, in an action aga the person who committed it, all damages sustained by him consequence thereof, including the sum paid in order to rec possession of the animal, as prescribed in the last section; in addition thereto, the sum of twenty dollars for each ani seized.

Id.

§ 3100. Action by petitioner and by officer.

Where the possession of an animal has been delivered, as scribed in the last section but one, an action may also be m tained, by the petitioner in the special proceeding before justice, against the person who committed the wilful act recover, in addition to all other damages sustained by the pl tiff in consequence of the wilful act, all sums, to which plaintiff would have been entitled out of the proceeds of the s as prescribed in section 3092 of this act, other than the c pensation paid for the care and keeping of the animal. In like case, if the petitioner is a private person, the officer, to wl a fine or penalty is to be paid for the benefit of the poor, as scribed in section 2875 of this act, may maintain an action aga the person, who committed the wilful act, to recover the penal to which the plaintiff would have been entitled, out of the ceeds of the sale, as prescribed in that subdivision. Neithe the actions specified in this or the last section is affected by pendency of, or the recovery of judgment in, either of the oth

Id.

§ 3101. Demand of possession after final order and fore sale.

A person, entitled to demand the possession of an animal, prescribed in section 3027 of this act, who did not appear u the return of the precept, or upon the trial, may file, with justice, a written demand of the possession, at any time after final order, and not less than three days before the time pointed for the sale; and, thereupon, he is entitled to the pos sion, upon complying with the following terms:

1. He must furnish, by affidavit or other competent evide a sufficient excuse, to the satisfaction of the justice, for failure to appear.

2. He must, in all respects, comply with the provisions of tion 3097 of this act; except that it is necessary for him to only one-half of the justice's fee, as prescribed in subdivi second of that section; and one-half of the fees payable to petitioner, for the seizure of each animal, as prescribed in division third of section 3092 of this act.

From L. 1867, c. 814, § 4.

§ 3102. Order upon demand of possession; appeal therefrom.

Where a demand for the return of the possession of an animal is filed, as prescribed in either of the last five sections, the justice must, at the request of either party thereto, make, and enter in his minutes, an order determining the same. An appeal from such an order may be taken to the county court, by the person making the demand, or by either party to the special proceeding, at any time before the final order in the special proceeding is made; and each person or party so entitled to appeal, must be made a respondent upon an appeal taken by one of the others. The appeal must be taken in like manner, as an appeal from a judgment of the justice in an action to recover a chattel; and the proceedings thereupon are the same, except as otherwise prescribed in the next section.

New.

§ 3103. Id.; stay of proceedings.

An appeal from an order, specified in the last section, is not effectual for any purpose, unless the appellant procures from the county judge, an order directing a stay of the proceedings upon the petition, and a stay of the execution of the order appealed from, and files it with the justice, within the time allowed for the appeal. The order may be granted or refused, in the discretion of the county judge, or granted upon such terms, as to security or otherwise, as he thinks proper; and it may be vacated or modified, either absolutely, or unless further security is given, in his discretion.

New.

§ 3104. Appeal from final order.

Within ten days after a final order upon a petition is made, as prescribed in this title, an appeal therefrom may be taken by the petitioner, or by the person answering, in like manner as an appeal from a judgment of the justice in an action to recover a sum of money, equal to the value of the animal or animals, and the proceedings thereupon are the same, except as otherwise prescribed in the next section.

From L. 1867, c. 814, § 6.

§ 3105. Id.; by claimant; stay of proceedings and delivery of possession.

An appeal from a final order, taken, as prescribed in the last section, by the person answering, is not effectual for any purpose, unless the appellant files, with the notice of appeal, an order of the county judge, or, if he is absent from the county, of a justice of the supreme court, reciting that the appeal has been perfected, and that security has been given thereupon, as prescribed in this section, and directing a stay of proceedings upon the final order appealed from, and that the possession of the animal or animals seized be delivered to the appellant. The order can be made only where an undertaking is given by the appellant, as required for the purpose of perfecting an appeal from a judgment, and staying the execution thereof; and also an undertaking, in the same or another instrument, to the effect that, if the final order appealed from is affirmed, or if the appeal is dismissed, the appellant will pay all sums which the justice awards against him, upon the hearing, after the determination of the appeal, as prescribed in the next section, not exceeding a sum specified therein; which must be, at least, twice the amount

of all the sums, which might be deducted from the proceed the sale, as prescribed in section 3092 of this act. The must be fixed, and the undertaking must be approved, by judge who grants the order. Upon filing the order with justice, the appellant is forthwith entitled to the possession of animal or animals seized.

Id.

§ 3106. Proceedings upon affirmance.

If the final order appealed from is affirmed, upon an ap taken by the person answering, the county court must appoi time and place, at which the justice must fix the sums pay by the appellant, pursuant to his undertaking. The justice adjourn the hearing to another place, and to another time, exceeding three days after the time so appointed. The jus must fix the sums so payable, as if a warrant for the sale the animals seized had been returned, and the proceeds the paid to him by the constable, as prescribed in section 3092 this act. The undertaking upon the appeal enures to the ben of each officer, to whom any sum is payable, as prescribed in t section; and, with respect to any of those sums, the responden a trustee for the officer entitled thereto.

Id.

§ 3107. Limitation of action for seizing animals.

Where an animal is seized, upon the ground that it was r ning at large, or was being herded or pastured, or was trespassi contrary to the provisions of this title; and the officer or ot person making the seizure, immediately files his petition, and gently prosecutes the same, as prescribed in this title; an act to recover the animal so seized, or to recover damages for seizure, or for any act subsequent thereto, must be commen within one year after the cause of action accrues.

From L. 1897, c. 814, § 7.

§ 3108. Certain actions cannot be maintained.

A person, to whom the precept was directed by his name, who was personally served therewith, or a person who has peared and answered in the special proceeding, or demanded return of any animal seized, cannot maintain an action agai the officer or other person seizing an animal, or a person act by his command, or in his aid, in a case specified in the section. But, except as specified in this section, the owner of animal seized or detained, under color of any provision of t title, may maintain an action to recover the animal, or its va or damages for the seizure or detention, or for any unlawful subsequent thereto, if, in fact, the animal was not, at the ti of the seizure, running at large, or being herded or pastured, trespassing, as the case may be, as specified in the foregoing p visions of this title.

New.

§ 3109. Where several animals are trespassing, damag are entire. Proceedings in such cases.

For the purpose of determining the damages sustained by petitioner, where two or more animals are found simultaneou trespassing upon real property, owned or occupied by him, the damage done by all the animals seized, is to be regarded done by them jointly; and the petitioner's remedy therefor entire, and must be enforced against all the animals, and

proceeds of the sale thereof. Where different persons, who are known, own different animals seized, the precept must be directed to all of them by their names. If one or more of the owners are known, and the others are unknown, and cannot be ascertained with reasonable diligence, the precept must be directed to each known owner, by his name, and, also generally to all persons having an interest in those animals, the owners of which are unknown. In a case specified in this section, a demand of the possession of an animal seized cannot be made, as prescribed in section 3097 or 3101 of this act, unless it is made with respect to all the animals seized, and by persons entitled to the possession of all of them. But a separate demand may be made, as prescribed in section 3098 of this act, by each owner of one or more animals seized; in which case, if possession is delivered to him, as prescribed in that section, the petitioner's remedy for his damages is the same, with respect to the animal or animals, of which possession is not so delivered, and against the proceeds of the sale thereof, as if those, whereof possession is so delivered, had not been trespassing upon the property.

New.

§ 3110. Proceedings in other cases, where there are different owners.

Where the petitioner does not allege, that the animals seized were trespassing upon real property owned or occupied by him, and different persons own different animals seized, a separate special proceeding may be instituted, as prescribed in this title, against each owner, or against any two or more owners, with respect to the animals owned by him or them. Or the proceedings may be taken against all the owners jointly; in which case, each person to whom the precept is directed by his name, and each person having an interest in an animal seized, has the same right to demand the possession of the animal owned by him, and the same right to answer separately, as if the special proceeding was against him separately; and the final order may be in favor of one or more of the persons so answering, with respect to the animal or animals owned by him or them, and for his or their costs; and against the remainder of the persons answering, or to whom the precept was directed, or for the sale of the remainder of the animals, in like manner, as if the former persons had not answered, or had not been named in the precept. But the person, first making a demand of the possession of any animal seized, must pay all the costs to the time of the demand; and a person, subsequently making a demand, is excused from the payment of any costs, except those which have accrued since the former demand.

New.

§ 3111. Surplus where there are different owners.

Where proceedings are taken jointly against different persons, who own different animals seized, as prescribed in either of the last two sections, the surplus, remaining in the justice's hands, must be distributed between them, in proportion to the value of the animals owned by each, to be determined by the justice. Any owner may claim separately his proportion of the surplus; and sections 3093 and 3094 of this act apply to a claim made, and to the disposition of the surplus arising, as prescribed in this section.

New.

§ 3112. When one action, etc., supersedes any other.

Where two or more persons, or an officer and a private person, are authorized, by this title, to bring an action, or to seize an animal, and take the proceedings prescribed in this title for the disposition thereof, the commencement of an action, or the seizure of the animal, by either of them, supersedes the right of any of the others to bring such an action, or to make such a seizure, with respect to the animal seized, or in question in the action. But the justice may, in his discretion, allow an officer or other person, who is interested in the recovery, or in the application of the proceeds of the sale, to appear in the action or special proceeding, for the purpose of protecting his interest, and to take such part in the proceedings therein as the justice thinks proper.

New.

§ 3113. Rights of officer when private person fails to prosecute.

Where a seizure is made by a private person, as prescribed in this title, and the possession of an animal seized is abandoned by him, without filing a petition; or where an action, brought by a private person, as prescribed in this title, is settled or discontinued by the plaintiff; the officer, to whom a penalty is payable, as prescribed in section 3083 of this act, or in subdivision fourth of section 3092 of this act, may, unless he has assented to the abandonment, settlement, or discontinuance, maintain an action against the owner of the animal in question, to recover the penalty so payable to him; and, upon proof of the facts, which would have entitled the plaintiff in the former action, or the petitioner in the special proceeding, to recover, he is entitled to judgment accordingly.

New.

§ 3114. Person having a special property deemed owner.

When a person is, at the time of the seizure, entitled to the possession of an animal, as against the general owner thereof, by virtue of a special property therein, he is deemed, for all the purposes of this title, the owner thereof.

New.

§ 3115. Agent may act for his principal.

The duly authorized agent of the owner or person entitled to the possession of an animal, as specified in the last section, may, in his own name, answer, make any demand, or take any other proceeding, which the owner or person so entitled may take, as prescribed in this title.

New.

TITLE XI.

Provisions specially relating to courts of justices of the peace in the city of Brooklyn.

Sec. 3116-3120. [Repealed.]
3121. Interpreter for police court, and for first, second, and third districts.
3122. Id.; for fourth and fifth districts.
3123. Id.; for sixth district.
3124. Common council may appoint additional interpreters.
3125. Common council to designate attendants, etc.
3126-3132. [Repealed.]
3133. Application of other provisions. Holding court open.

§§ 3116-3120. [Repealed by the Municipal Court Act, L. 1902, c. 580 (in effect Sept. 1, 1902).]

§ 3121. Interpreter for police court, and for first, second, and third districts.

There is an interpreter for the police court of the city of Brooklyn, and the justices' courts of the first, second, and third districts of that city, who is appointed, and may be removed at pleasure, by the justices of those courts, or a majority of them. He is entitled to an annual salary, fixed and to be paid as prescribed by law.

From L. 1870, c. 607.

§ 3122. Id.; for fourth and fifth districts.

There is an interpreter for the justices' courts of the fourth and fifth districts of the city of Brooklyn, who is appointed, and may be removed at pleasure, by the justices of the peace of those districts. He is entitled to an annual salary, fixed and to be paid as prescribed by law.

From L. 1871, c. 331.

§ 3123. Id.; for sixth district.

There is an interpreter for the justice's court of the sixth district of the city of Brooklyn, who is appointed by the justice of the peace of that district, subject to confirmation by the common council, and may be removed by that justice at his pleasure. He is entitled to an annual salary, fixed and to be paid as prescribed by law.

From L. 1873, c. 780, § 2.

§ 3124. Common council may appoint additional interpreters.

The common council of the city of Brooklyn may, where it deems it necessary, upon the request of a justice, appoint one or more interpreters for justices' courts in that city, in addition to those provided for in the last three sections; fix their salaries; and prescribe the court or courts which they must attend. An officer, so appointed, may be removed by the common council, for cause.

From L. 1875, c. 623.

§ 3125. Common council to designate attendants, etc.

The common council of the city of Brooklyn may designate one or more policemen, or constables, to attend each of the justices' courts in that city. The common council may, by ordinance or otherwise, fix and define their duties in and about those courts, and may allow them such compensation, in lieu of all fees and perquisites, as it deems proper.

From L. 1850, c. 102, § 17; L. 1855, c. 514, § 2.

§§ 3126-3132. [Repealed by the Municipal Court Act, L. 1902, c. 580 (in effect Sept. 1, 1902).]

§ 3133. Application of other provisions. Holding court open.

Each justice of the peace of the city of Brooklyn is a justice of the peace of Kings county; and each provision of this act, relating to the proceedings before a justice of the peace of a town, applies to the proceedings before a justice of the peace of that city, except as otherwise specially prescribed in this title. Each of those justices must hold his court open, from nine o'clock in the morning, until three o'clock in the afternoon.

From L. 1849, c. 125, §§ 35, 36; L. 1850, c. 102, § 18; L. 1871, c. 492, § 8; L. 1873, c. 868, § 16.

TITLE XII.

Miscellaneous provisions.

Sec. 3134. Mode of application of certain provisions of this act.
3135. General requisites of mandates.
3136. Reward to constable forbidden.
3137. Justice or constable not to buy claim, etc.
3138. Penalty.
3139. Violation of preceding sections a defence to action.
3140, 3141. Docket-book to be kept by justice; entries therein.
3142. Index to docket-book.
3143. Papers to be filed.
3144. Deposit of books and papers with town or city clerk.
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3147. Delivery; how compelled.
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3149. Justice to furnish copies of papers.
3150. Transfer of action when justice's term expires, etc.
3151. Id.; when justice is a witness.
3152. Proceedings upon transfer.
3153. Penalty for not paying over money.
3154. Action on judgment of justice.
3155. Id.; proof of judgment, etc.
3156. Execution of mandate by private person.
3157. Constable to execute mandates in person.
3158. Sheriff to act where execution of mandate is resisted.

§ 3134. Mode of application of certain provisions of this act.

Where a provision of this act, not contained in this chapter, is made applicable to proceedings before a justice of the peace, the application is subject to the qualification, that it does not include any thing, which is repugnant to any special provision of law, regulating the jurisdiction or powers of a justice of the peace, or the proceedings before him. Where a provision, thus made applicable, relates to the filing of a paper in a court, or with a clerk, the paper must, in an action or special proceeding before a justice of the peace, be filed with the justice, unless he has a clerk appointed pursuant to law; and where it confers a power upon a court or a judge, the provision, making it applicable to proceedings taken under this chapter, is to be construed, as conferring a like power upon the justice, before whom the action or special proceeding is brought.

New.

§ 3135. General requisites of mandates.

A mandate, issued by a justice of the peace, must be signed by him, and may be without seal. It must be entirely filled up, at the time when it is delivered to an officer to be executed, so as to have no blank, either in the date thereof or otherwise; except that there may be a blank in a subpoena for the name of any or all of the witnesses. A mandate, issued and delivered to an officer to be executed, contrary to this section, is void.

From 2 R. S. 267 (Part 3, c. 2, tit. 4), §§ 232, 233.

§ 3136. Reward to constable forbidden.

A constable shall not ask or receive any money or other valuable thing from any person, as a consideration, reward, or inducement for omitting or delaying to arrest a person, or to take him to jail, or to sell property, by virtue of an execution, or to execute any other duty, pertaining to his office; or any money or

valuable thing, other than the fees expressly allowed to him by law, for executing any duty pertaining to his office.

From Id., § 234.

§ 3137. Justice or constable not to buy claim, etc.

A justice of the peace or constable shall not, directly or indirectly, buy, or be interested in buying, a bond, note, or other demand or cause of action, for the purpose of bringing an action, or instituting a special proceeding before a justice, founded thereupon; nor shall a justice or a constable, either before or after an action or a special proceeding is commenced, lend or advance, or agree to lend or advance, or procure to be lent or advanced, any money or other valuable thing to any person, in consideration of, or as a reward for, or an inducement to, the placing, or having placed in his hands, a debt or other demand or cause of action, for prosecution or collection.

From Id., § 235.

§ 3138. Penalty.

A justice of the peace or constable, who violates a provision of the last three sections, is guilty of a misdemeanor; and shall be punished accordingly. A conviction also operates as a forfeiture of his office.

From Id., § 236.

§ 3139. Violation of preceding sections a defence to action.

It is a defence to an action, brought before a justice of the peace, that the demand, upon which it is founded, was bought and sold, or received for prosecution, contrary to the foregoing provisions of this title. In an action wherein such a defence is interposed, if the plaintiff, after being duly subpoenaed as a witness, fails to attend pursuant to the subpoena; or if, upon the trial, or upon his examination as a witness by virtue of a commission, he refuses to answer any question pertinent to show a violation of either of those provisions; the justice, besides punishing him, in a proper case, for his failure or refusal, must dismiss his complaint. The testimony, in such an action, of the plaintiff, or any other witness, is not evidence, in a criminal prosecution against him, for violating either of those provisions.

From Id., §§ 237-242.

§ 3140. [Am'd, 1899.] Docket-book to be kept by justice: entries therein.

A justice of the peace must keep a docket-book, in which he must enter:

1. The title of every action or special proceeding commenced before him.

2. The time when the summons, or the mandate for the commencement of the special proceeding, was issued; with a statement of the nature of the mandate, and a memorandum of each order of arrest, warrant of attachment, or requisition to replevy, granted by him.

3. The time when the parties appeared before him, either without process, or upon the return of the summons, or of the mandate for the commencement of the special proceeding.

4. A concise statement of the substance of each oral pleading, or a memorandum of the filing of each written pleading.

5. Each adjournment; stating upon whose application, and to what time and place, it was made.

6. The issuing of a venire; stating upon whose application it was issued, and the time and place of the return thereof.

7. The time when a trial was had; and, if it was by a jury, the names of all the persons returned as having been notified to attend as jurors; stating who did not attend; who attended; and who were sworn.

8. The name of each witness sworn upon the trial; stating at whose request he was sworn; each objection made to the competency of a witness; and the decision thereupon.

9. The verdict of the jury, and the time of receiving it; or, if the jury disagreed and were discharged, a statement of that fact.

10. A concise statement of the substance of each order, made by him in the course of the action or special proceeding.

11. The judgment or final order; and the time of entering it.

12. The execution; the time of issuing it; the kind of execution; the name of the officer to whom it was delivered; and each renewal with the date thereof.

13. The return of each execution; the time of the return; and a statement of any money paid to the justice thereupon, and when and by whom it was paid.

14. Each transcript of the judgment, given by him to be filed in the county clerk's office, and the time when it was given.

15. The appeal, if any; and the time of service of the notice of appeal.

16. **[Added, 1899.]** Such entries shall be made in a book which must be furnished to him by the clerk of the town in which he resides and to be designated as "justices' civil docket" and to be the property of, and a charge against, such town.

From Id., § 243. Am'd by L. 1899, c. 221 (in effect Sept. 1, 1899).

§ 3141. The same.

Each of the entries, specified in the last section, must be made under the title of the action or special proceeding to which it relates; and, in addition thereto, the justice may enter in like manner any other proceeding, had before him in the action or special proceeding, which he thinks proper to enter. A docket-book, kept by a justice, must be kept open, during the hours, when a sheriff's office is required by law to be kept open, for search and examination by any person, upon his reasonable request and to a reasonable extent.

From 2 R. S. 269, § 244.

§ 3142. Index to docket-book.

A justice of the peace must keep an alphabetical index to all the judgments, entered by him in his docket-book; and he must insert therein the names of all the parties to each judgment, and the page of the book, where the judgment is entered.

From Id., 270, § 251.

§ 3143. Papers to be filed.

A justice of the peace must carefully file and preserve each affidavit or other paper, delivered to him to be filed in an action or special proceeding.

From Id., § 250.

§ 3144. Deposit of books and papers with town or city clerk.

If a justice of the peace, either before or after the expiration of his term of office, removes from the town or city wherein he was elected, he must forthwith deposit, with the clerk of the

town or city, his docket-book, and all other books and papers, in his custody, relating to an action or a special proceeding, which has been heard by him, or commenced before him. A justice, who is removed from office, must make a like deposit, within ten days after receiving notice of his removal, or afterwards, upon the demand of the clerk of the town or city. But the omission of the justice to make the deposit, does not affect the validity of any book or paper, so required to be deposited, or of any proceeding to which it relates.

From Id., §§ 252, 253.

§ 3145. Certificate in docket-book deposited.

A justice of the peace must make, in each docket-book deposited by him, as prescribed in the last section, a certificate under his hand, to the effect that each judgment or order, entered therein, was duly rendered or made, as therein stated; and that the sum, appearing by the book to be due thereupon, has not been paid, to his knowledge.

From Id., § 254.

§ 3146. [Am'd, 1905, 1916.] Town or city clerk to demand books, etc., upon death, etc., of justice.

If a justice of the peace dies, or his office becomes otherwise vacant, the town or city clerk must demand and receive all books and papers, which belonged to the justice in his official capacity, from any person having them in his possession, and such clerk may make and issue a transcript of a judgment so rendered by such a justice of the peace and appearing upon the docket of such justice of the peace so on file in his office, and issue an execution upon any such judgment which has not been docketed in the office of the county clerk, upon receiving his fees for the same, which shall be the same now allowed a justice of the peace for issuing a transcript or transcripts, as the case may be, and such transcript or execution so issued by such clerk shall have the same force and effect as though the same had been issued by such justice of the peace during his term of office.

From Id., 271, § 255. Am'd by L. 1905, c. 436; L. 1916, c. 448 (in effect Sept. 1, 1916).

§ 3147. Delivery; how compelled.

If any book or paper, required to be deposited with the town or city clerk, as prescribed in this title, is withheld, the like proceedings may be had, at the instance of the town or city clerk, to compel the deposit thereof, as are prescribed by law, where an officer refuses or neglects to deliver a book or paper in his custody as such officer, to his successor in office.

From Id., § 256.

§ 3148. Entries to be evidence.

An entry made, as prescribed by law, in the docket-book kept by a justice of the peace, and deposited with the town or city clerk, as prescribed in this title, is presumptive evidence of the matters of fact stated therein; but the presumption may be repelled by proof.

From Id., § 257.

§ 3149. Justice to furnish copies of papers.

A justice of the peace must furnish, upon request and payment of his fees, to any person interested in a judgment or order entered by him, a transcript of the judgment or order, together with a copy of

all the entries in his docket-book, relating to the cause; a copy of his minutes of the evidence in the cause, or the substance of the testimony, if he has not taken minutes; and a copy of any paper on file in the cause; or such portions thereof as are required.

From L. 1841, c. 141, § 1.

§ 3150. Transfer of action when justice's term expires, etc.

If the term of office of a justice of the peace is about to expire, or he is about to remove from the town or city, before judgment is rendered in an action, or a final order is made in a special proceeding, pending before him, he must previously make a written order, reciting the fact, and directing the action or special proceeding to be continued before another justice of the same town or city, named in the order.

New.

§ 3151. Id.; when justice is a witness.

If, before an issue of fact is joined in an action or special proceeding, the defendant, or, where he has not been arrested, his attorney, presents to the justice satisfactory proof, by affidavit, that the justice, before whom the action or special proceeding is pending, is a material witness for the defendant, without whose testimony he cannot safely proceed to trial, setting forth therein the particular facts and circumstances, which he expects to prove by him, the justice must forthwith make a written order, directing the action or special proceeding to be continued before another justice of the same town or city, named in the order.

From 2 R. S. 229 (Part 3, c. 2, tit. 4), § 21; Id., 246, § 118; L. 1838, c. 243; L. 1875, c. 334.

§ 3152. Proceedings upon transfer.

Where an order is made, as prescribed in either of the last two sections, the constable must forthwith take it, and all other papers in the action, with the body of the defendant, if he is under arrest, before the justice named in the order. The plaintiff or petitioner must forthwith appear before that justice, who must take cognizance of the action or special proceeding, and must proceed therein as if it had been commenced before him. Costs, recovered in the action or special proceeding, include the fees allowed by law, for services performed by the constable and the justice, before the transfer, together with the fees allowed by law, for the proceedings before the justice to whom the cause is transferred.

Id.

§ 3153. Penalty for not paying over money.

A justice of the peace, who neglects or refuses, within a reasonable time after demand, to pay any money, collected by him in his official capacity, to the person entitled thereto, is guilty of a misdemeanor, and shall be punished accordingly. A conviction also operates as a forfeiture of his office.

From 2 R. S. 271, § 259.

§ 3154. Action on judgment of justice.

In an action upon a judgment of a justice of the peace, brought

in the county wherein it was rendered, within five years after the rendition thereof, against a defendant upon whom the summons was personally served, no costs can be recovered, except where the justice, who rendered the judgment, is dead, or out of office, or otherwise incapable of acting; or has removed from the county; or where one of the parties has died; or where the docket of the judgment has been lost or destroyed.

From Co. Proc., § 71, last clause.

§ 3155. Id.; proof of judgment, etc.

In an action brought upon a judgment of a justice of the peace, who is dead, or out of office, or otherwise incapable of acting; or has removed from the county; or cannot be found therein; the original docket-book of the justice is presumptive evidence of any matter entered therein, as prescribed by law; but the presumption may be repelled by proof. If the docket-book is lost or destroyed, or if it cannot be produced, after reasonable effort to obtain it, the like proof may be given, respecting the recovery of the judgment, as upon any other question of fact.

From 2 R. S. 271, 272, §§ 265, 267.

§ 3156. Execution of mandate by private person.

A justice of the peace, who issues any mandate, authorized by this chapter, except a venire, may, at the request of the party, whenever he deems it expedient so to do, empower, by a written authority indorsed upon the mandate, any proper person of full age, not a party to the action, to serve, or otherwise execute it. For that purpose the person so empowered has all the power and authority, and is subject to all the obligations and liabilities, of a constable; and his return is evidence in like manner as a constable's. But a person so empowered is not entitled to any fee or reward for his services.

From Id., 273, §§ 271, 272.

§ 3157. Constable to execute mandates in person.

A constable, to whom a mandate is directed and delivered as prescribed in this chapter, must execute it in person, pursuant to the tenor thereof. He cannot act by deputy in such a case.

From Id., § 273.

§ 3158. [Am'd, 1909.] Sheriff to act where execution of mandate is resisted.

If a constable, to whom a mandate, issued by a justice of the peace, is directed and delivered, finds, or has reason to apprehend, that resistance will be made to the execution thereof, he may deliver it to the sheriff of the county, with a written certificate, stating the facts, and requiring the sheriff to execute it. Thereupon the sheriff must execute the mandate; and he is subject to all the liabilities attaching to a constable in executing it. Sections 400 and 401 of the Judiciary Law apply to a mandate delivered to a sheriff, as prescribed in this section.

New. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1909).

CHAPTER XX.

Provisions Relating to Certain Courts in Cities, and the Proceedings Therein.

TITLE I.— The City Court of the City of New-York.
TITLE II.— The Mayor's Court of the City of Hudson, and the Recorders' Courts of the Cities of Utica and Oswego.
TITLE III.— The City Court of Yonkers.
TITLE IV.— The District Courts of the City of New-York, and the Justices' Courts of the Cities of Albany and Troy.
TITLE V.— The Municipal Court of the City of Rochester.

TITLE I.

The city court of the city of New-York.

Article 1. Provisions generally applicable to proceedings in the court.
2. Provisions exclusively applicable to the proceedings, other than appeals, in an ordinary action.
3. Provisions exclusively applicable to the proceedings, other than appeals, in certain marine causes.
4. Appeals to and from the general term of the court.

ARTICLE FIRST.

Provisions generally applicable to proceedings in the court.

Sec. 3159. Provisions, applying generally to courts of record, subject to certain qualifications.
3160. Certain sections inapplicable to this court; who a non-resident.
3161. Time for service of notices.
3162. Service of notice of trial; filing of note of issue.
3163. When court may relieve from imprisonment.
3164. Money; how paid into the court.

§ 3159. [Am'd, 1907.] Provisions, applying generally to courts of record, subject to certain qualifications.

Each of the foregoing provisions of this act, which is made, by chapter twenty-two of this act, applicable to the city court of the city of New York, or generally to courts of record, is subject to the qualifications and exceptions expressed or plainly implied in this title.

New. Am'd by L. 1907, c. 707 (in effect July 22, 1907).

§ 3160. [Am'd, 1896, 1902.] Certain sections not to apply to New York city court; who a non-resident.

Sections 438 and 603, sections 611 to 619, both inclusive, and sections 636, 827 and 1015 of this act do not apply to an action or a special proceeding brought in the city court of the city of New York, or before a justice thereof, or to any proceeding therein. Sections 3268 and 3269 of this act do not apply to an action in the court, prosecuted as prescribed in article third of this title; or where an undertaking has been given as prescribed in section 3165 of this act. A plaintiff, in an action brought in the court, who has an office for the regular transaction of business in person, within the city of New York, is deemed a resident of that city, within the meaning of sections 3268 and 3269 of this act.

[1] See § 2, subd. 9, foot-note, ante.

2. The provisions of section 1013 of the code of civil procedure are hereby made applicable to and binding upon the city court of the city of New York.

New. Am'd by L. 1896, c. 954; L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3161. [Am'd, 1902.] Time for service of notices in New York city court.

The time for personal service of certain notices, in an action brought in the court, is as follows:

1. Notice of justification of the sureties, in an undertaking given by the plaintiff, as security for the defendant's costs, not more than two days.

2. Notice of an application for judgment in a case specified in section 537 of this act; notice of a motion to strike out a pleading, in a case specified in section 538 of this act; notice of an application for judgment upon the defendant's default, or of the execution of a reference, or writ of inquiry, or of an assessment thereupon, as prescribed in section 1219 of this act; not less than two days.

3. Notice of the justification of bail, not less than two, nor more than ten days.

4. Notice of a motion, other than a motion specified in subdivision second of this section, not less than four days; but the court or a justice thereof may, upon an affidavit showing grounds therefor, prescribe a shorter time, by an order to show cause.

5. Notice of trial of an issue of fact, or of an issue of law; notice of any hearing, the time for serving which is not expressly prescribed in either of the foregoing subdivisions of this section, or elsewhere in this title; not less than five days.

6. Notice of taxation of costs, not less than two days; except where all the attorneys, serving and served with the notice, reside or have their offices in the city of New York, in which case, one day's notice is sufficient.

From L. 1872, c. 629, §§ 5, 14; L. 1874, c. 545, § 2; L. 1875, c. 479, §§ 17, 50, and § 51, subd. 10. Am'd by L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3162. [Am'd, 1902.] Service of notice of trial; filing of note of issue.

Notice of trial of an issue triable at a term of the court may be given for any day of the term. A note of issue must be filed at least two days before the day, or the commencement of the term, for which the notice of the trial is given; and it must, in addition to the matter specified in section 977 of this act, state the day or the term, for which the notice has been given. But this and the last section do not apply to a case where special provision is otherwise made in article third of this title.

From L. 1874, c. 545, § 2. Am'd by L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3163. When court may relieve from imprisonment.

Where it satisfactorily appears that a party, who is actually confined in jail, by virtue of an order of arrest, or an execution against the person, issued in an action brought in the court, is physically unable to endure the confinement, and that he cannot procure bail, or the necessary sureties in a bond for the jail liberties, as the case requires, the court, or a justice thereof, may, in its or his discretion, by order, direct the sheriff to release him from custody. The sheriff must obey such an order. After such a release from an execution against the person, another execution, against the person of the judgment debtor, cannot be issued upon the judgment; but the judgment creditor may enforce the judgment against property, as if the execution, from which the judg-

ment debtor was released, had been returned without his being taken.

From L. 1875, c. 479, § 10.

§ 3164. Money; how paid into the court.

Money paid into the court, pursuant to any provision of this act, must, unless the court otherwise directs, be paid directly to the chamberlain of the city of New-York, to the credit of the cause in which it is paid.

New.

§ 3164a. [Added, 1906.] Fees of clerk.

The clerk of the city court of the city of New York is entitled to receive for the use of the city of New York, for the services performed by him the following fees and none other: For filing a note of issue for the general or equity calendar, three dollars; for entering final judgment in an action, including the filing of the judgment roll, fifty cents; and ten cents in addition for each folio exceeding ten, contained in said judgment. For filing and entering an order directing the change of name, one dollar for each name so changed. For entering any other order or an interlocutory judgment, ten cents for each folio exceeding five. For a certified or other copy of an order, record, or other paper entered or filed in his office, five cents for each folio. For filing and entering a certificate of satisfaction of a judgment twenty-five cents and for certifying a copy thereof twelve cents. For filing and entering an assignment of a judgment twenty-five cents, and for certifying a copy thereof twelve cents. For filing and entering a release of a judgment twenty-five cents, and for certifying a copy thereof twelve cents. For certifying a transcript of the docket of a judgment twelve cents. For an extract of the minutes of a trial ten cents. For attesting the correctness of the copy of any paper or record on file in his office, ten cents for each folio. For a certificate other than herein described, twenty-five cents. For making and certifying a search for any paper or record, one dollar. For comparing and certifying the printed papers on appeal from an order or judgment taken as prescribed in article fourth of title first of chapter twenty of this act, one cent per folio thereof. But where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provisions of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fees therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts and shall be used or filed with the same force and effect as if certified by a clerk of the court.

Added by L. 1906, c. 273 (in effect April 19, 1906), which further provides that "all acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

ARTICLE SECOND.

Provisions exclusively applicable to the proceedings, other than appeals, in an ordinary action.

Sec. 3165. Summons.
3166. Time for service of pleadings, etc.
3167. Enforcement of certain judgments in favor of working women.
3168. Time for non-acceptance and justification of bail, etc.
3169. Proof necessary to obtain warrant of attachment.
3170. Service of summons without the city, or by publication.
3171. Commission to take testimony.
3172. Court may refer question arising upon a motion.
3173. Time for filing decision upon a trial by the court. Id.; when sufficient.
3174. Counterclaims.
3175. Perishable property may be sold.
3176. Portion of verdict, etc., may be remitted.

§ 3165. Summons.

The summons, in an action brought in the court, must state that the time, within which the defendant must serve a copy of his answer, is six days after the service thereof, exclusive of the day of service; except in one of the following cases:

1. A justice of the court may, upon satisfactory proof, by affidavit, that either the plaintiff or the defendant resides without the city[1] of New-York; or, where there are two or more plaintiffs, or two or more defendants, that all the plaintiffs or all the defendants reside without that city, direct, by an order, that the defendant be summoned to answer within a shorter time, specified therein, not less than two days after the service of the summons, exclusive of the day of service; whereupon the summons must correspond to the order. The order must be indorsed upon or annexed to the summons; and a copy thereof must be delivered with a copy of the summons. The justice may, in his discretion, as a condition of granting the order, require the plaintiff to give an undertaking, with one or more sureties, to the effect that the plaintiff will pay any judgment which may be rendered against him in the action, not exceeding a sum, specified in the undertaking, which must be at least two hundred dollars.

2. Where an order, directing service of the summons without the city of New-York, or by publication, is granted, the summons must state that the time, within which the defendant must serve a copy of his answer, is ten days after service thereof, exclusive of the day of service. If a summons, requiring the defendant to answer within a shorter time, has been issued, as prescribed in this section, before an order specified in this subdivision is granted, the justice granting such an order may direct that the summons be amended accordingly; and thereupon the summons published, or served without that city, pursuant to the order, must correctly state the time.

From L. 1872, c. 629, § 5; L. 1874, c. 545, § 1.

§ 3166. Time for service of pleadings, etc.

The time, within which a defendant in a case specified in section 479 of this act must demand a copy of the complaint, and the time within which the plaintiff must serve the same, after a demand thereof, as prescribed in that section, and the time, within which a copy of a pleading, subsequent to the complaint, must be served, after the service of a copy of the preceding pleading, is

[1] As to the meaning of "city of New York" in this section, see § 288, foot-note, ante.

the same number of days, as stated in the summons, within which the defendant is required to serve a copy of his answer, after service of the summons. But, except as otherwise prescribed in section 3185 of this act, a defendant, arrested before answer, has ten days after the arrest, within which to demand a copy of the complaint or to serve a copy of his answer, as the case requires; and judgment must be stayed accordingly.

From L. 1872, c. 629, § 5; L. 1874, c. 545, § 1.

§ 3167. [Repealed by L. 1907, c. 707 (in effect July 22, 1907).]

§ 3168. Time for non-acceptance and justification of bail, etc.

The time for taking certain proceedings, in an action brought in the court, is as follows:

1. Service of notice of non-acceptance of bail, within five days after the delivery, to the plaintiff's attorney, of certified copies of the order of arrest, return, and undertaking, as prescribed in section 577 of this act.

2. Service of notice of justification of the bail, within five days after service of the notice specified in subdivision first of this section.

3. Service of notice of exception to the sureties, in an undertaking given by the plaintiff, as security for the defendant's costs, within two days after service, upon the defendant's attorney, of a written notice of the filing thereof; and service of notice of the justification of the same, or new sureties, within two days after service of the notice of exception.

From L. 1875, c. 479, §§ 16, 17; Id., § 51, subd. 9.

§ 3169. [Am'd, 1899.] Proof necessary to obtain warrant of attachment.

In order to entitle the plaintiff to a warrant of attachment against property, he must show by affidavit, to the satisfaction of the justice granting it, that a sufficient cause of action exists against the defendant, to recover damages for one or more causes specified in section 635 of this act, to an amount stated in the affidavit, which, if the action is to recover damages for breach of contract, must be stated over and above all counterclaims known to the plaintiff; and also that the case is within one of the following subdivisions:

1. That the defendant is a foreign corporation, or being a natural person is not a resident of the State.

2. That the defendant, being an adult and a resident of the borough of Manhattan in the city of New York, has departed from the State, with intent to defraud his creditors, or to avoid service of the summons, or keeps himself concealed therein, with like intent; or that, after proper and diligent effort to ascertain the place of the sojourn of such a resident adult defendant, the same cannot be ascertained.

3. That the defendant, being an adult, has removed, or is about to remove, property from the State, with intent to defraud his creditors, or that he has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete property, with the like intent.

4. That the defendant, being an adult and a resident of that borough has been continuously without the United States more than six months next before the granting of the warrant, and has not made a designation of a person upon whom to serve a summons in his behalf, as prescribed in section 430 of this act; or a designation so made no longer remains in force.

See L. 1831, c. 300, §§ 33, 34, 47; L. 1872, c. 629. Am'd by L. 1899, c. 298 (in effect Sept. 1, 1899).

§ 3170. Service of summons without the city, or by publication.

An order, directing the service of a summons, either without the city[1] of New-York, or by publication, may be granted by the court, or by a justice thereof; but only in a case, where a warrant of attachment has been issued, as prescribed in the last section, and personal service of the summons cannot be made, with due diligence, within that city. The plaintiff, when he applies for such an order, must show by affidavit, to the satisfaction of the court or justice, that the case is within this section. Where an order is granted, as prescribed in this section, service of the summons without that city may be made, as directed in the order, either within or without the State. Sections 440 to 445, both inclusive, and sections 638, 707, and 708 of this act apply to the service or publication, pursuant to such an order, and to the proceedings relating to the same, and subsequent thereto; substituting the words, "the city of New-York", in place of the words, "the State", wherever the latter words occur. If the defendant is a resident of the city of New-York, the order must also direct that a copy of the summons, complaint, and order be left at his residence, specifying it, with a person of suitable age and discretion, if, upon reasonable application, admittance can be obtained, and such a person found who will receive it; or, if admittance cannot be so obtained, nor such a person found, by affixing the same to the outer door of the residence so specified.

From L. 1874, c. 545, § 3.

§ 3171. Commission to take testimony.

The application, to the court, of article second of title third of chapter ninth of this act, is subject to the following qualifications:

1. The words, "the city and county of New-York, or either of the counties of Richmond, Kings, Queens, or Westchester", must be regarded as substituted, in place of the words, "the State", wherever those words are used in that article, with respect to the locality of a witness.

2. Interrogatories, framed pursuant to that article, can be settled only by a justice of the court.

3. A commission, or order to take depositions, issued or granted, pursuant to that article, may be executed either within or without the State.

New.

§ 3172. Court may refer question arising upon a motion.

The court may, of its own motion, or upon the application of either party, without the consent of the other, by order, direct a reference, to determine and report upon a question of fact, arising upon a motion, in any stage of an action.

From L. 1875, c. 479, § 55.

[1] As to the meaning of "city of New York" in this section, see § 396, foot-note, ante.

§ 3173. Time for filing decision upon a trial by the court. Id.; when sufficient.

The time within which the decision of the court must be filed, in a case specified in section 1010 of this act, is ten days after the cause is finally submitted. The decision of the court, in a case specified in section 1022 of this act, is sufficient if it directs the judgment to be entered thereupon; but, if so required by a party appealing, the justice by whom the decision was made, must, within ten days after the appeal is perfected, and notice thereof and of the requirement is given to him, make, and file with the clerk, a special decision, stating separately the facts found, and the conclusions of law.

From L. 1872, c. 629, § 4.

§ 3174. Counterclaims.

A counterclaim, specified in subdivision second of section 501 of this act, cannot be interposed, in an action brought in the court, unless it is of such a nature, that the court has jurisdiction of an action founded thereupon; except that, in an action brought by an executor or administrator, any counterclaim may be interposed, which could be interposed, in a like action, brought in the supreme court. A counterclaim may be interposed, in an action brought in the court, without respect to the amount thereof; and judgment thereupon, in favor of the defendant, may be rendered for any sum.

New.

§ 3175. Perishable property may be sold.

Where perishable property has been levied upon, by virtue of an execution or a warrant of attachment, the court may, upon the application of the officer making the levy, by order, direct the sale thereof, at such a time, and upon such a notice, as it deems proper; and thereupon the property must be sold accordingly.

From L. 1874, c. 545, § 6.

§ 3176. Portion of verdict, etc., may be remitted.

A party to whom a sum is awarded, upon a trial, an assessment of damages, or the execution of a reference or writ of inquiry, may remit any portion thereof, and take judgment for the residue.

From L. 1857, c. 344, § 49.

ARTICLE THIRD.

Provisions exclusively applicable to the proceedings, other than appeals, in certain marine causes.

Sec. 3177. Arrest in certain marine causes. Court may regulate by general rules.
3178. Id.; contents of order of arrest.
3179. Id.; proceedings on arrest.
3180, 3181. Id.; bail or deposit before return.
3182. Id.; bail or deposit after return.
3183. Id.; when and how defendant to remain in custody.
3184. Id.; return of summons, etc.
3185. Id.; proceedings after return.
3186. Id.; trial.
3187. Ordinary action may be brought for like cause.

§ 3177. Arrest in certain marine causes. Court may regulate by general rules.

In an action specified in subdivision second of section 317 of this act, the plaintiff may apply for an order of arrest, to accompany the summons, in the form and to the effect specified in the next section. If such an order is granted, the proceedings in the action must be conducted as prescribed in this article. The justices of the court, or a majority of them, may, from time to time, by one or more general rules, attested by the hands of the justices making the same, and filed with the clerk, regulate the manner in which an application for such an order may be made, and the cases in which an undertaking may be dispensed with. Until regulations are so established, the justice to whom the application is made, may, in his discretion, require or dispense with an undertaking thereupon.

From L. 1872, c. 629, § 6.

§ 3178. Id.; contents of order of arrest.

The order of arrest, granted as prescribed in the last section, must require the sheriff to arrest the defendant, and to bring him forthwith before the court, at the chambers thereof; or if, when he is arrested, the court is not in session at chambers, to hold him to bail, in a sum specified in the order, for his personal attendance at the opening of the court, on the next day thereafter, when it is in session at the chambers thereof. The order must also direct that the defendant be summoned to answer the complaint in the action forthwith. Thereupon the summons must conform to the order.

From 2 R. L. of 1813, pp. 383-389; L. 1872, c. 629, § 5.

§ 3179. Id.; proceedings on arrest.

The sheriff, upon arresting the defendant, by virtue of such an order, must, at the same time, serve upon him the summons, and also a copy of the order of arrest, and of the papers upon which it was granted. He must forthwith bring the defendant before the court, at the chambers thereof, if the court is then in session at chambers; otherwise, unless bail is given, as prescribed in the next section, he must take the defendant to the jail of the city and county of New-York, for the confinement of prisoners in civil causes. The keeper thereof must confine the defendant therein. On the next day thereafter, when the court is in session at chambers, the sheriff must take the defendant from the jail, and bring him before the court.

Id.

§ 3180. Id.; bail or deposit before return.

The defendant may give bail, by delivering to the sheriff a written undertaking to the plaintiff, in the sum specified in the order of arrest, executed by one or more sureties, to the effect that the defendant will attend in person at the opening of the court, at the chambers thereof, on the next day thereafter when it is there in session; or he may deposit with the sheriff the sum specified in the order of arrest. In either case, the sheriff must forthwith release him from custody.

Id.

§ 3181. The same.

Where bail is given, as prescribed in the last section, the officer taking the acknowledgment of the undertaking, must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offering to become bail, concerning their property and their circumstances. The defendant may give bail, or make the deposit, immediately upon his arrest, at any hour of the day or night; and he must have reasonable opportunity to seek for and to procure bail, before being committed to jail. Where a deposit is made, the money deposited must, before the expiration of the next day thereafter, not being Sunday or a public holiday, be paid, by the sheriff, into court, to the credit of the action, as prescribed in section 3164 of this act.

Id.

§ 3182. Id.; bail or deposit after return.

At any time after the return of the sheriff, and before final judgment, a justice of the court may admit a defendant in custody to bail, or allow him to make a deposit; and may direct his release, upon his giving bail or making the deposit accordingly. The sum to be deposited, or the sum specified in the undertaking of the bail, must be fixed, and the sureties in the undertaking must be approved, by the justice; who must be satisfied, by their examination, or by other proof, respecting their sufficiency. The undertaking must be to the effect that the defendant will, at all times, render himself amenable to any mandate which may be issued, to enforce a final judgment against him in the action. Article fourth of title first of chapter seventh of this act, applies, where bail is given as prescribed in this or the last section.

Id.

§ 3183. Id.; when and how defendant to remain in custody.

Unless bail is given, or a deposit is made, as prescribed in the last three sections, the defendant must remain in the jail by virtue of the order of arrest, until final judgment in the action; and, if the judgment is against the defendant, until the return of an execution against property, issued thereupon. But the court must direct him to be brought into court, at the time of the trial; and it may, in its discretion, direct him to be brought into court at any other time. In either case, he must be taken from the jail, and brought into court accordingly.

Id.

§ 3184. Id.; return of summons, etc.

The sheriff, after serving the summons and executing the order of arrest, must make a full return of his proceedings thereupon, to the court at chambers. The return must be made forth-

with, unless the court is not then in session at chambers; in which case, it must be made immediately after the opening of the court, on the first day thereafter, when it is there in session. If the defendant has given bail, the undertaking of the bail must be returned, to be delivered to the plaintiff when the court so directs.

Id.

§ 3185. Id.; proceedings after return.

Unless both parties sooner appear, the court must wait one hour after the return; or, if the defendant has given bail, one hour after the opening of the court. As soon after the parties appear, or after the expiration of the hour, as the business upon which the court is then engaged will permit, the court must take up the cause. If the plaintiff does not then appear, a judgment dismissing the complaint, with costs, must be rendered. If the defendant does not then attend in person, the plaintiff must then make his complaint, and the defendant's default must be entered. If the plaintiff appears and the defendant attends in person, the pleadings must then be made, and issue must be joined. The pleadings may be oral or written; if they are oral, the clerk must enter the substance thereof in the minutes. If either party desires a trial by a jury, he must demand the same, at the time of the joinder of issue; otherwise the issue must be tried by the court, without a jury.

Id.

§ 3186. Id.; trial.

Where a trial by jury is duly demanded, the court at chambers must direct the issue to be tried, at a trial term, upon such notice as it deems proper, or without notice; it may also direct that the action have a preference upon the day calendar, either generally or for a particular day; and it may give such direction as it deems proper, with respect to filing a note of issue. Where a trial by jury is not duly demanded, or where the defendant is in default, the evidence must then, or at such subsequent time, either at chambers or at a trial term or special term, as the court at chambers appoints, be given; and thereupon final judgment must be rendered. But the issue must be appointed to be tried, within six days after the joinder thereof, unless both parties assent to a longer time; or a trial by jury is demanded, and there is no term of the court, at which it can be had, within that time. The trial cannot be adjourned, without the consent of both parties, beyond three calendar months from the joinder of issue.

Id.

§ 3187. Ordinary action may be brought for like cause.

This article does not prevent the plaintiff from commencing, and conducting in the ordinary manner, an action, for a cause specified in subdivision second of section 317 of this act.

New.

ARTICLE FOURTH.

Appeals.

Sec. 3188. Appeal from a judgment.
3189. Id.; from an order.
3190. Time to appeal and proceedings thereupon.
3191. Appeal to the appellate division of the supreme court; in what cases.
3192. Id.; proceedings regulated.
3193. Id.; within what time.
3194. Id.; determination upon appeal, how enforced. Id.; where new trial was properly granted.
3194a. Appeals from the city court of the city of New York.
3195. [Repealed.]

§ 3188. [Am'd, 1895, 1902.] Appeal from a judgment.

An appeal, to the supreme court may be taken from a final or interlocutory judgment rendered in the city court of the city of New York in a case where an appeal may be taken to the appellate division of the supreme court from a final or interlocutory judgment rendered in the supreme court, as prescribed in section 1346 and section 1349 of this act.

From L. 1858, c. 617, § 5; L. 1872, c. 629, § 11. Am'd by L. 1895, c. 946; L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3189. [Am'd, 1895, 1902.] Id.; from an order.

An appeal to the supreme court may also be taken from an interlocutory judgment rendered, or an order made at chambers, or at a special term or a trial term of said city court, or from an order made by a judge thereof out of court, in a case where an appeal may be taken to the appellate division of the supreme court from an interlocutory judgment rendered, or an order made, in like manner, as prescribed in sections 1347, 1348, 1349 of this act. Upon such an appeal the supreme court shall have full power to review any exercise of discretion by the court or judge below.

From L. 1872, c. 629, § 10. Am'd by L. 1895, c. 946; L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3190. [Am'd, 1902.] Time to appeal and proceedings thereupon.

An appeal, authorized by either of the last two sections, must be taken within ten days after service of a copy of the judgment or order appealed from, and a written notice of the date of the entry thereof. In every other respect, titles first, third and fourth of chapter twelfth of this act, so far as the same are applicable thereto, apply to and govern an appeal, taken as prescribed in either of the last two sections.

From L. 1872, c. 629, §§ 9, 10. Am'd by L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3191. [Am'd, 1882, 1895, 1902.] Appeal to the appellate division of the supreme court; in what cases.

An appeal to the appellate division of the supreme court in the first judicial department may be taken from the judgment or order entered upon the determination of an appeal taken as prescribed in section 3188 and 3189 of this act, provided such appeal be allowed by order made at the term at which such appeal was determined or at the term next after judgment is entered upon such determination and provided further that, where such appeal is from an order granting a new trial upon a case or exceptions, the appellant must, with his application for leave to appeal, file an assent on his part that, if the order is affirmed, judgment absolute may be rendered against him.

From Co. Proc., § 352; L. 1874, c. 545, § 9. Am'd by L. 1882, c. 399; L. 1895, c. 946; L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3192. [Am'd, 1902.] Practice and proceedings on appeal to appellate division of supreme court.

Titles first, third and fourth of chapter twelve of this act, so far as the same are applicable thereto, apply to and govern an appeal, taken as prescribed in the last section, except as otherwise expressly prescribed in the next two sections.

New. Am'd by L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3193. [Am'd, 1895, 1902.] Id.; within what time taken.

An appeal, authorized by section 3191 of this act, must be taken within twenty days after the service of a copy of the order allowing such appeal and a written notice of the date of the entry thereof.

From L. 1874, c. 545, § 9. Am'd by L. 1895, c. 946; L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3194. [Am'd, 1902.] Id.; determination upon appeal, how enforced. Id.; where new trial was properly granted.

The judgment or order of the appellate court must be remitted to the court below, to be enforced according to law. Upon an appeal from an order granting a new trial, on a case or exceptions, if the appellate court determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and thereupon an assessment of damages, or any other proceedings, requisite to render the judgment effectual, may be had in the city court of the city of New York.

From L. 1875, c. 479, § 43, subds. 2, 3. Am'd by L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3194a. [Added, 1904.] Appeals from the city court of the city of New York.

Where, on an appeal from a judgment or order taken as prescribed in article fourth of title first of chapter twenty of this act, a party shall present to the clerk a printed copy of the judgment roll or order appealed from, it shall be the duty of the clerk, as required, to compare and certify the same, for which service the clerk must receive, for the use of the city of New York a fee at the rate of one cent per folio. Where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provisions of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fees therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts and shall be used or filed with the same force and effect as if certified by a clerk of the court.

Added by L. 1904, c. 430 (in effect Sept. 1, 1904).

§ 3195. [Repealed by L. 1895, c. 946 (in effect Jan. 1, 1896).]

TITLE II.

The mayor's court of the city of Hudson, and the recorders' courts of the cities of Utica and Oswego.

Sec. 3196. Civil jurisdiction prescribed.
3197. Certain pending actions, etc., transferred to supreme court.
3198. Id.; certain papers, etc., to be transmitted to county clerk.
3199. Power of supreme court, in actions, etc., so transferred.
3200. Proceedings in case of judge's disability.
3201. Service of subpoenas.
3202. Effect of this title limited.

§ 3196. Civil jurisdiction prescribed.

The civil jurisdiction of the mayor's court of the city of Hudson, the recorder's court of the city of Utica, and the recorder's court of the city of Oswego, extends only to an action whereof jurisdiction is expressly conferred upon the court, by a provision of a statute incorporating, or otherwise specially relating to the government of, the city wherein the court is located.

See Co. Proc., § 33.

§ 3197. Certain pending actions, etc., transferred to supreme court.

Every civil action, now pending in either of those courts, other than an action specified in the last section, is hereby transferred to the supreme court; and the subsequent proceedings therein, before and after the judgment, must be the same, as if the action had been commenced in the supreme court.

New.

§ 3198. Id.; certain papers, etc., to be transmitted to county clerk.

All judgment-rolls, and other records, and all books and papers, relating exclusively to civil actions, other than an action specified in the last section but one, now remaining in either of those courts, must be delivered by the clerk thereof, or, if there is no clerk, by the judge or other officer, having the custody thereof, to the clerk of the county in which the court is located, to be preserved among the records of his office. The expense of so doing is a county charge.

New.

§ 3199. Power of supreme court, in actions, etc., so transferred.

The supreme court may review, enforce, vacate, or amend a final judgment heretofore rendered by either of those courts, in a civil action, other than an action specified in section 3196 of this act, with like power and effect, as the court in which it was commenced might have so done, if this act had not been passed.

New.

§ 3200. Proceedings in case of judge's disability.

The county court of the county in which either of those courts is located, may, by an order, remove to itself an action of which either of those courts has jurisdiction, as prescribed in section 3196 of this act, upon proof, by affidavit, that the judge thereof is, for any cause, incapable of acting, either generally or in the particular action. Sections 344, 345, and 346 of this act apply to such an order of removal, and to the proceedings subsequent thereto. The proceedings subsequent to the order are the same,

as in an action brought in the county court, except that costs must be awarded, as if the action had remained in the court from which it was removed.

New.

§ 3201. Service of subpoenas.

A subpoena, issued out of either of those courts, may be served upon a witness, at any place within the State. A warrant to apprehend a witness, for a failure to obey such a subpoena, may be directed to the sheriff of the county where the court is located, and executed by him within any county of the State. The sheriff is subject to the same liability, for a failure to serve or return it, as if it was issued out of the supreme court.

New.

§ 3202. Effect of this title limited.

This title does not affect any provision of law conferring upon a judge, or upon the judges, of either of those courts, jurisdiction, power or authority, in an action brought in another court, or in a special proceeding.

New.

TITLE III.

The city court of Yonkers.

Sec. 3203. Jurisdiction in civil actions.
3204. Last section qualified.
3205. Summons, where served.
3206. This title does not affect jurisdiction of the court, etc., in special proceedings.

§ 3203. Jurisdiction in civil actions.

The jurisdiction of the city court of Yonkers[1] extends to the following civil actions only:

1. An action against a natural person, or against a foreign or domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking, withholding, or detention thereof.

2. An action to foreclose or enforce a lien, upon real property in the city of Yonkers, created, as prescribed by statute, in favor of a person who has performed labor, or furnished materials to be used, in erecting, altering, or repairing a building, building lot, or appurtenance thereto, including fences, sidewalks, paving, wells, fountains, fish-ponds, ornamental and fruit trees, and every other improvement to a building or building lot.

3. An action to foreclose or enforce a lien, for a sum not exceeding one thousand dollars, exclusive of interest, upon one or more chattels.

From L. 1878, c. 186, § 1; L. 1875, c. 233, § 1.

§ 3204. [Am'd, 1888.] Last section qualified.

The jurisdiction conferred by the last section is subject to the following limitations and regulations:

1. In an action wherein the complaint demands judgment for a sum of money only, the sum, for which judgment is rendered in favor of the plaintiff, cannot exceed one thousand dollars, exclusive of interest, and costs as taxed: except where it is brought upon a bond or undertaking, given in an action or special proceeding in the same court, or before the city judge. Where the action is brought upon a bond or other contract, the judgment must be for the sum actually due, without regard to a penalty therein contained; and where the money is payable in instalments, successive actions may be brought, for the instalments, as they become due.

2. In an action to recover one or more chattels, a judgment cannot be rendered, in favor of the plaintiff, for a chattel or chattels, the aggregate value of which exceeds one thousand dollars.

3. The court has not jurisdiction of an action against an executor or administrator, in his representative capacity.

4. The court has not jurisdiction of any action, unless one of the parties thereto resides in the city of Yonkers, or in a town of Westchester county, adjoining that city: or a warrant of attachment is granted to accompany the summons, and levied upon property of the defendant, within that city; or the action is brought to recover one or more statutory penalties, by the city of Yonkers, or one of its officers or boards of commissioners. Such warrant of attachment must be granted and subsequent

[1] For additional provisions in regard to the jurisdiction and procedure of this court, see L. 1893, c. 416; L. 1900, c. 487; L. 1902, c. 18.

proceedings taken, in accordance with the provisions and requirements herein relating to attachments in courts of justices of the peace.

From L. 1878, c. 188, § 2. Am'd by L. 1888, c. 494.

§ 3205. Summons, where served.

The summons, in an action brought in the court, may be served at any place within the county of Westchester, but not elsewhere.

From Id., § 3.

§ 3206. This title does not affect jurisdiction of the court, etc., in special proceedings.

This title does not affect any provision of law, conferring upon the court, or upon the city judge of Yonkers, jurisdiction, power, or authority, in a special proceeding; or conferring upon the city judge of Yonkers power or authority, in an action brought in another court.

New.

TITLE IV.

The district courts of the city of New York, and the justices' courts of the cities of Albany and Troy.

Article 1. Provisions generally applicable to all the courts specified in this title.
2. Provisions exclusively applicable to the district courts of the city of New-York.
3. Provisions exclusively applicable to the justices' courts of Albany and Troy.

ARTICLE FIRST.

Provisions generally applicable to all the courts specified in this title.

Sec. 3207. Service of complaint with summons; proceedings thereupon.
3208. Id.; and proof of service.
3209. Action to be commenced by service of summons.
3210. Order of arrest; warrant of attachment; requisition to replevy.
3211. The last section qualified.
3212. Proceedings where title to real property is in question.
3213. Appeals.
3214. Effect of this act, upon jurisdiction and proceedings.

§ 3207. Service of complaint with summons; proceedings thereupon.*

Section 3126[1] of this act applies to an action to recover upon or for breach of a contract, express or implied, brought in a district court of the city of New-York,[2] in the justices' court of the city of Albany,[3] or in the justices' court of the city of Troy.[4]

From L. 1857, c. 344, § 15; L. 1873, c. 182, §§ 1, 2.

§ 3208. Id.; and proof of service.

In an action brought in either of those courts, the summons, and, in a proper case, a copy of the complaint, may be served by any person not a party to the action; except that, where the action is brought in a district court of the city of New York, a person, other than a constable or a marshal, serving the same, must be first empowered to do so, either by the justice, or by the attorney to the corporation, as now prescribed by law. Proof of service thereof, by such a person, must be made by his affidavit; which must state the particular place, time, and manner of service, and that the affiant knew the person so served, to be the person mentioned and described in the summons, as defendant therein.

From L. 1873, c. 182, §§ 1, 3; L. 1857, c. 344, § 15; L. 1862, c. 484, § 14; L. 1864, c. 569, § 2; L. 1866, c. 758; L. 1879, c. 102.

§ 3209. Action to be commenced by service of summons.

An action, brought in either of those courts, at any time after this chapter takes effect, must be commenced by the voluntary appearance of, and joinder of issue by, the parties, or by the service of a summons.

New.

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* The Municipal Court Act (L. 1902, c. 580, § 303) provides that "sections 3207 to 3214, inclusive, of the Code of Civil Procedure, do not apply to actions or proceedings in this court, except as specially provided in this Act."

[1] Section 3126 has been repealed. Its substantial provisions are now found in §§ 145, 147 of the Municipal Court Act of New York City (see the end of this volume).

[2] Now included in the "Municipal Court of New York City." See § 3, footnote, ante. As to the qualifications of justices of this court, see the Charter of New York City, L. 1901, c. 466, § 1353.

[3] Name now changed to "City Court of Albany," by L. 1884, c. 122. As to the jurisdiction and procedure of this court, see L. 1898, c. 312; L. 1899, c. 590.

[4] Name now changed to "City Court of Troy," by L. 1900, c. 259. This statute also defines the jurisdiction and procedure of this court.

§ 3210. [Am'd, 1884.] Order of arrest; warrant of attachment; requisition to replevy.

Articles third, fourth, and fifth of title second of chapter nineteenth of this act apply to an action brought in either of those courts, except as otherwise prescribed in the next section. And except, also, that where the warrant of attachment, or requisition to replevy, is issued out of a district court of the city of New York, against a non-resident defendant, the said warrant, or requisition, must require the marshal to attach or replevy the property, on or before a day therein specified, which must be not less than two nor more than four days before the return day of the summons.

New. Am'd by L. 1884, c. 409.

§ 3211. The last section qualified.

The provisions of the last section are subject to the following qualifications:

1. Nothing contained in either of the articles, so made applicable, applies to an order of arrest, in an action brought in a district court of the city of New-York, or affects any provision of this title, relating to the jurisdiction of either of the courts specified in this title.

2. An order of arrest, in an action brought in the justices' court of Albany, or the justices' court of Troy, or a warrant of attachment, or a requisition to replevy, in either of those courts, or in a district court of the city of New-York, must be granted by, and directed to, and executed by, the officer empowered, by the statutes remaining in force after this chapter takes effect, to grant or execute, as the case requires, in the same court, a warrant to arrest, a warrant of attachment, or a requisition in an action to recover a chattel.

3. The manner of applying for, granting, and executing an order of arrest, a warrant of attachment, or a requisition to replevy, and the proceedings thereupon, and with respect thereto, as prescribed in the articles so made applicable, are subject to the statutes, remaining unrepealed after this chapter takes effect, specially applicable to those courts, or to either or any of them, prescribing the duties of the justices, or of the clerks thereof, or regulating the mode of transacting business in an action brought therein.

New.

§ 3212. Proceedings where title to real property is in question.

Sections 2951 to 2958 of this act, both inclusive, apply to an action, brought in either of those courts; except that, where the action is brought in a district court of the city of New-York, the surety upon the defendant's undertaking is liable, in the case specified in section 2952, to any amount, for which judgment might have been rendered by the district court, if the answer and undertaking had not been delivered.

New.

§ 3213. [Am'd, 1883, 1895.] Appeals.

An appeal from a judgment, rendered in a district court of the city of New York, may be taken to the supreme court, in the cases, and in the manner prescribed in articles first and second of title eight of chapter nineteenth of this act. Such appeal shall be heard in such manner and by such justice or justices as the appellate division of the supreme court in the first depart-

ment shall direct. The appellate court may reverse, affirm or modify the judgment appealed from, and where a judgment is reversed, may order a new trial in the district court. Where a judgment is modified, or where a new trial is ordered, costs shall be in the discretion of the appellate court. An appeal from the judgment rendered in the justices' court of the city of Albany, or the justices' court of the city of Troy, may be taken in a case where an appeal may be taken to a county court from a judgment rendered by a justice of the peace as prescribed by title eight of that chapter, and in no other case. Such an appeal must be taken to the county court of the county wherein the court is located.

New. Am'd by L. 1883, c. 231; L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3214. Effect of this act, upon jurisdiction and proceedings.

Except as otherwise specially prescribed in this title, this act does not affect any statutory provision remaining unrepealed after this chapter takes effect, relating to the jurisdiction and powers of either of those courts; the appointment, qualification, tenure of office, powers, or duties of the justices, or of the clerk, or any other officer thereof; or the proceedings therein; except that a provision of this or any other statute, whereby a proceeding in an action, brought in either of those courts, or a special proceeding, brought therein, or before a justice thereof, is assimilated, either expressly, or by reference to another provision of law, to a proceeding, in an action or a special proceeding before a justice of the peace, is deemed to refer to the corresponding proceeding, as prescribed in chapter nineteenth of this act.

New. See statutes cited under § 3206.

ARTICLE SECOND.

Provisions exclusively applicable to the district courts of the city of New-York.

Sec. 3215-3217. [Repealed.]
3218. Order of arrest. Proceedings thereupon.
3219-3222. [Repealed.]

§§ 3215-3217. [Repealed by the Municipal Court Act, L. 1902, c. 580 (in effect Sept. 1, 1902).]

§ 3218. Order of arrest. Proceedings thereupon.

An order of arrest must direct that the summons accompanying it be made returnable, immediately upon the arrest of the defendant; and it must specify a sum, in which the defendant may be let to bail. Sections 3179 to 3181, both inclusive, section 3182, except the last sentence thereof, and section 3183 of this act, apply to an order of arrest, granted in an action in either of those courts; and to the proceedings upon, and relating to, the execution thereof. In all other respects, the statutory provisions remaining unrepealed after this chapter takes effect, which apply to and regulate the application for a warrant to arrest a defendant, the granting and execution thereof, and the proceedings subsequent thereto, apply to and regulate the application for an order of arrest, the granting and execution thereof, and the proceedings subsequent thereto.

From Id., §§ 17-19.

§§ 3219-3222. [Repealed by the Municipal Court Act, L. 1902, c. 580 (in effect Sept. 1, 1902).]

ARTICLE THIRD.

Provisions exclusively applicable to the justices' courts of Albany and Troy.

Sec. 3223. Jurisdiction in civil actions.
3224. Id.; upon judgment by confession.
3225. Docketing judgments; execution thereupon.
3225a. Application of certain sections.

§ 3223. Jurisdiction in civil actions.

The justices' court of the city of Albany,[1] and the justices' court of the city of Troy,[1] have jurisdiction, each within the city where the court is located, of an action, of which a justice of the peace has jurisdiction, as prescribed in sections 1787, 2861, 2862, and 2863 of this act; and also of an action to recover a penalty, given by the charter, or a by-law or an ordinance of the common council of that city, where the plaintiff demands judgment for a sum, not exceeding two hundred dollars. Neither of those courts has jurisdiction of any other civil action; but this section does not affect the jurisdiction conferred, by the statutory provisions remaining in force after this chapter takes effect, upon either of those courts, in a special proceeding.

From Co. Proc., § 67; L. 1866, c. 189, § 1; L. 1834, c. 271, § 3; L. 1870, c. 598, tit. 2, § 11; L. 1872, c. 129, § 11; L. 1876, c. 18, § 14.

§ 3224. Id.; upon judgment by confession.

The jurisdiction of each of those courts extends also to the taking and entry of a judgment, upon the confession of a defendant, as prescribed in title sixth of chapter nineteenth of this act, where the sum confessed does not exceed five hundred dollars.

New.

§ 3225. Docketing judgments; execution thereupon.

The provisions of sections 3017 to 3022 of this act, both inclusive, apply to a judgment rendered in either of those courts, and to the proceedings subsequent thereto, and in the action wherein the judgment was rendered; except that the transcript, filed in the clerk's office of the county wherein the court is located, must be furnished by the clerk of the court, in which the judgment was rendered.

New.

§ 3225a. [Added, 1897.] Application of certain sections.

The provisions of sections 2990 to 3009 of this act, both inclusive, apply to the justices' court of the city of Troy, except that the city clerk of the city of Troy shall fulfil all the duties therein required of the town clerk.

Added by L. 1897, c. 604 (in effect Sept. 1, 1897).

[1] See § 3207, foot-note, ante.

TITLE V.

The municipal court of the city of Rochester.

Sec. 3226. Provisions of chapter 19 generally applicable to the court and judges.
3227. Appeals.

§ 3226. [Am'd, 1907.] Provisions of chapter 19 generally applicable to the court and judges.

The provisions of chapter nineteenth of this act, excluding section 3063, excluding article three of title eight, and excluding titles tenth and eleventh thereof, apply to the municipal court of the city of Rochester, and to the judges thereof; except so far as they are inconsistent with the next section, or with the charter of the city of Rochester or with any other statute applying to said court or the judges thereof as now existing or hereafter amended. For the purpose of applying the same, the court is deemed a justice's court; each judge thereof is deemed a justice of the peace; and the city of Rochester is deemed a town of Monroe county.

From L. 1876, c. 196; L. 1877, c. 192; L. 1878, c. 415, § 8; L. 1879, c. 230; L. 1907, c. 754 (in effect Jan. 1, 1908).

§ 3227. [Am'd, 1907, 1908.] Appeals.

Appeals may be taken to the county court of Monroe county from judgments and orders of the municipal court of the city of Rochester and from orders of the judges thereof as provided in articles one and two of title eight of chapter nineteenth of this act, and the provisions thereof, except section 3063, apply to such appeals, except as herein expressly modified. The appeal must be heard on the return or a certified or stipulated copy thereof, and may be brought on for hearing in the county court in the same manner and on the same notice as motions are or may be brought on for hearing in said court, or may be put on the calendar of said court as provided in section 3062 of this act. An appellant may apply to the county court to open a default as provided in section 3064 of this act, which application may be heard without the return unless otherwise ordered by the court; and an appellant may apply upon affidavits and the return to said court for a new trial or hearing upon the ground of newly discovered evidence; the court in either case may stay any or all proceedings under the judgment or order appealed from upon such terms as it deems proper, and may grant a new trial or hearing as hereinafter provided upon such terms as it deems proper. The county court and other appellate courts on such appeals must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits, and may affirm or reverse, wholly or partly, or modify, the judgment or order appealed from for errors of law or of fact or because the judgment is excessive or insufficient or contrary to the evidence or contrary to law, and may, if necessary or proper, grant a new trial or hearing in the municipal court of the city of Rochester or before a judge thereof, as may be proper, at a time designated by it, and thereupon the municipal court or judge must proceed, and adjournments may be granted, a jury trial demanded, and all other proceedings taken as if the action or proceeding had been commenced anew. A copy of the judgment or order granting a new trial or hearing must be served by the party entering it on the opposite party or his attorney at least two days before the time set for the new trial or hearing. When a new trial or hearing is granted the appellate court may in its discretion award costs of the appeal to either party absolutely or to abide the event.

Added by L. 1907, c. 754. Am'd by L. 1908, c. 309 (in effect Sept. 1, 1908).

CHAPTER XXI.

Costs and Fees.

TITLE I.—Awarding and Enforcing Payment of Costs.
TITLE II.—Fixing the Amount of Costs.
TITLE III.—Security for Costs.
TITLE IV.—General Provisions Relating to Fees.
TITLE V.—Sums Allowed as Fees.

TITLE I.

Awarding and enforcing the payment of costs.

Article 1. General regulations respecting the awarding of costs.
2. Regulations respecting the awarding of costs in particular cases.
3. Miscellaneous provisions.

ARTICLE FIRST.

General regulations respecting the awarding of costs.

Sec. 3228. When plaintiff entitled to costs of course.
3229. When defendant entitled to costs of course. Rule as to two or more defendants.
3230. When costs are discretionary.
3231. Costs, where several actions are brought on same instrument, etc.
3232. Interlocutory costs upon issue of law.
3233. Id.; how collected.
3234. Costs, where there are several issues of fact.
3235. Id.; after discontinuance upon answer of title.
3236. Costs of a motion.
3237. The foregoing sections limited.
3238. Costs upon appeal from final judgment.
3239. Id.; upon appeal from interlocutory judgment or order.
3240. Id.; in a special proceeding.

§ 3228. [Am'd, 1896, 1904, 1910, 1914, 1916.] When plaintiff entitled to costs of course.

The plaintiff is entitled to costs of course, upon the rendering of a final judgment in his favor, in either of the following actions:

1. An action, triable by a jury, to recover real property, or an interest in real property; or in which a claim of title to real property arises upon the pleadings, or is certified to have come in question upon the trial.

2. An action to recover a chattel. But if the value of the chattel, or of all the chattels, recovered by the plaintiff, as fixed, together with the damages, if any, awarded to him, is less than fifty dollars, the amount of his costs cannot exceed the amount of the value and the damages.

3. An action specified in subdivision first, third, fourth or fifth of section 2863 of this act. But if, in an action to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction, or malicious prosecution; or a fine or penalty in which the people of the state are a party, the plaintiff recovers less than fifty dollars damages, the amount of his costs cannot exceed the damages.

4. An action, other than one of those specified in the foregoing subdivisions of this section, in which the complaint demands judgment for a sum of money only. But the plaintiff is not entitled to costs, under this subdivision, unless he recovers the sum of fifty dollars or more.

5. [Am'd, 1910, 1914, 1916.] In all actions hereafter brought in the supreme court, triable in the county of New York, which could have been brought, except for the amount claimed therein, in the city court of the city of New York, and in which the defendant shall have been served with process within the county of New York, the plaintiff shall recover no costs or disbursements unless he shall recover $1000 or more. In all ac-

tions hereafter brought in the supreme court, triable in the cou Kings, which could have been brought, except for the amount cl therein, in the county court of Kings county, and in which the defe shall have been served with process within the county of Kings, the tiff shall recover no costs or disbursements unless he shall recover $ more. In all actions hereafter originally brought in the supreme triable in the county of Albany, and in which the defendant is a resid the county of Albany, which could have been brought, except fc amount claimed therein, in the county court of the county of Alban plaintiff shall recover no costs or disbursements unless he shall recove or more. In all actions hereafter originally brought in the supreme triable in the county of Rensselaer, and in which the defendant is a re of the county of Rensselaer, which could have been brought, except f amount claimed therein, in the county court of the county of Rens the plaintiff shall recover no costs or disbursements unless he sh cover $500 or more. In all actions hereafter brought in the supreme triable in the counties of Bronx and Queens, and in which the defe is a resident of the county where the action is brought, which could been brought, except for the amount claimed therein, in the county of the counties of Bronx and Queens, the plaintiff shall recover no or disbursements unless he shall recover $500 or more. In all a hereafter brought, triable in the supreme court or county court county contained wholly within a city of the first class, or in th court of the city of New York, which could have been brought, e for the amount claimed therein, in the municipal court of the c New York, and in which the defendant shall have been served with ess within the city of New York, the plaintiff shall recover no co disbursements unless he shall recover $250 or more. The fact th any action a plaintiff is not entitled to costs under the provisions c subdivision shall not entitle the defendant to costs under the nex lowing section.

From Co. Proc., § 304. Am'd by L. 1898, c. 110; L. 1904, c. 557; L. 1910, L. 1914, c. 80; L. 1916, c. 50 (in effect Sept. 1, 1916).

§ 3229. When defendant entitled to costs of course. Ru to two or more defendants.

The defendant is entitled to costs, of course, upon the re ing of final judgment, in an action specified in the last se unless the plaintiff is entitled to costs, as therein presc But where, in such an action against two or more defend the plaintiff is entitled to costs against one or more, bu against all of them, none of the defendants are entitled to of course. In that case, costs may be awarded, in the disc of the court, to any defendant, against whom the plaintiff i entitled to costs, where he did not unite in an answer, and not united in interest, with a defendant, against whom the tiff is entitled to costs.

From Co. Proc., §§ 305, 306.

§ 3230. [Am'd, 1900.] When costs are discretionary.

Except as prescribed in the last two sections, the court upon the rendering of a final judgment, in its discretion, a costs to any party in such sum not exceeding the total an authorized by statute as to the court shall seem just.

From Id., § 306. Am'd by L. 1900, c. 181 (in effect Oct. 1, 1900).

§ 3231. [Am'd, 1895.] Costs, where several actions brought on same instrument, etc.

Where two or more actions are brought, in a case specifi section 454 of this act, or otherwise for the same cause of a

against persons who might have been joined as defendants in one action, costs, other than disbursements, cannot be recovered, upon the final judgment, by the plaintiff, in more than one action, which shall be at his election. But this prohibition does not apply to a case where the plaintiff joins as defendants, in each action brought, all the persons liable, not previously sued, who can, with reasonable diligence, be found within the State: or, if the action is brought in the city court of the city of New-York, or a county court, within the city or county, as the case may be, where the court is located.

From Co. Proc., § 304; see 2 R. S. 615 (Part 3, c. 10, tit. 1), § 15. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3232. Interlocutory costs upon issue of law.

Where an issue of law and an issue of fact are joined, between the same parties to the same action, and the issue of fact remains undisposed of, when an interlocutory judgment is rendered upon the issue of law; the interlocutory judgment may, in the discretion of the court, deny costs to either party, or award costs to the prevailing party, either absolutely, or to abide the event of the trial of the issue of fact.

From 2 R. S. 617 (Part 3, c. 10, tit. 1), § 28.

§ 3233. Id.; how collected.

Section 779 of this act applies to interlocutory costs, awarded as prescribed in the last section, as if they were costs of a motion.

Id.

§ 3234. Costs, where there are several issues of fact.

In an action specified in section 3228 of this act, wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers upon one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case, the plaintiff only is entitled to costs. Costs, to which a party is so entitled, must be included in the final judgment, by adding them to, or offsetting them against, the sum awarded to the prevailing party; or otherwise, as the case requires. But this section does not entitle a plaintiff to costs, in a case specified in subdivision fourth of section 3228 of this act, where he is not entitled to costs, as prescribed in that subdivision.

From Id., § 26.

§ 3235. Id.; after discontinuance upon answer of title.

Where an action, brought before a justice of the peace, or in a district court of the city of New-York, or a justice's court of a city, has been discontinued, as prescribed by law, upon the delivery of an answer, showing that title to real property will come in question; and a new action, for the same cause, has been commenced in the proper court; the party in whose favor final judgment is rendered in the new action, is entitled to costs; except that, where final judgment is rendered therein, in favor of the defendant, upon the trial of an issue of fact, the plaintiff is entitled to costs, unless it is certified, that the title to real property came in question on the trial.

From Co. Proc., § 61.

§ 3236. Costs of a motion.

Costs upon a motion in an action, where the costs thereof are not specially regulated in this act, or upon a reference made pursuant to sections 623, 624, 827, or 1015 of this act, may be awarded, either absolutely or to abide the event of the action, or of the reference, to any party, in the discretion of the court or judge.

From Id., § 315.

§ 3237. The foregoing sections limited.

The foregoing sections of this article do not affect the recovery of costs upon an appeal.

New.

§ 3238. Costs upon appeal from final judgment.

Upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows:

1. In an action specified in section 3228 of this act, the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal, of the judgment appealed from; except that, where a new trial is directed, costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court.

2. In every other action, and also where the final judgment appealed from is affirmed in part, and reversed in part, costs may be awarded in like manner, in the discretion of the court.

From Co. Proc., § 306.

§ 3239. Id.; upon appeal from interlocutory judgment or order.

Upon an appeal from an interlocutory judgment or an order, in an action, costs are in the discretion of the court, and may be awarded absolutely, or to abide the event, except as follows:

1. Where the appeal is taken from an order, granting or refusing a new trial, and the decision upon the appeal refuses a new trial, the respondent is entitled, of course, to the costs of the appeal.

2. Where an appeal is taken from an order, refusing a new trial, and an appeal is also taken from the judgment rendered upon the trial, neither party is entitled to the costs of the appeal from the order.

From Co. Proc., §§ 306, 315.

§ 3240. [Am'd, 1881.] Id.; in a special proceeding.

Costs in a special proceeding, instituted in a court of record, or upon an appeal in a special proceeding, taken to a court of record, where the costs thereof are not specially regulated in this act, may be awarded to any party, in the discretion of the court, at the rates allowed for similar services, in an action brought in the same court, or an appeal from a judgment taken to the same court, and in like manner.

From L. 1854, c. 270, § 3. Am'd by L. 1881, c. 122.

ARTICLE SECOND.

Regulations respecting the awarding of costs in particular cases.

Sec. 3241. Costs against the State; how paid.
3242. Costs where action brought by people, on relation of private person.
3243. Id.; for the benefit of a county, etc.
3244. Costs, against a school officer.
3245. Id.; against a municipal corporation.
3246. Id.; by or against an executor, etc.
3247. Costs in case of transfer, etc., of cause of action.

§ 3241. Costs against the State; how paid.

Where costs are awarded against the people of the State in an action or a special proceeding brought, by a public officer, pursuant to any provision of law, and the proceedings have not been stayed, by appeal or otherwise; the comptroller must draw his warrant upon the treasurer, for the payment of the costs, out of any money in the treasury, appropriated for that purpose, upon the production to him of an exemplified copy of the judgment, or order awarding the costs, and, where the amount is not fixed thereby, of a taxed bill of costs; accompanied, in either case, with a certificate of the attorney-general, to the effect that the action or special proceeding was brought pursuant to law. The fees of the clerk, for the exemplified copy, must be certified thereupon by him, and included in the warrant.

From 2 R. S. 553 (Part 3, c. 8, tit. 17), § 14.

§ 3242. Costs where action brought by people, on relation of private person.

Where an action is brought, in the name of the people of the State, upon the relation of a private corporation or individual, as prescribed in section 1986 of this act, a judgment, awarding costs to the defendant, must award them, against the relator, in the first instance; and against the people, only in case an execution, issued thereupon against the property of the relator, is returned unsatisfied.

From Co. Proc., § 319.

§ 3243. Id.; for the benefit of a county, etc.

In an action or a special proceeding, brought in the name of the people of the State, to recover money or property, or to establish a right or claim, for the benefit of a county, city, town, or village, costs shall not be awarded against the people; but, where they are awarded to the defendant, they must be awarded against the body for whose benefit the action or special proceeding was brought.

From Id., § 320.

§ 3244. Costs, against a school officer.

Costs cannot be awarded to the plaintiff, in an action against a school officer, or a supervisor, on account of an act performed by him, by virtue of, or under color of his office; or on account of a refusal or an omission to perform a duty enjoined upon him by law; where his act, refusal, or omission might have been the subject of an appeal to the state superintendent of public instruction, and where it is certified that it appeared, upon the trial, that the defendant acted in good faith. But this section does not apply to an action for a penalty; or to an action or a special proceeding, to enforce a decision of the superintendent.

From L. 1864, c. 555, tit. 13, § 6.

§ 3245. [Am'd, 1899.] Id.; against a municipal corporation.

Costs cannot be awarded to the plaintiff, in an action against a municipal corporation, in which the complaint demands a judgment for a sum of money only, unless the claim, on which the action is founded, was, before the commencement of the action, presented to the board of such corporation having the power to audit the same, or to its chief fiscal officer, at least ten days before the commencement of said action.

From L. 1859, c. 262, § 2. Am'd by L. 1899, c. 609 (in effect Sept. 1, 1899).

§ 3246. Id.; by or against an executor, etc.

In an action, brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue or to be sued, costs must be awarded, as in an action by or against a person, prosecuting or defending in his own right, except as otherwise prescribed in sections 1835 and 1836 of this act; but they are exclusively chargeable upon, and collectible from the estate, fund, or person represented, unless the court directs them to be paid, by the party personally, for mismanagement or bad faith in the prosecution or defence of the action.

From Co. Proc., § 317.

§ 3247. Costs in case of transfer, etc., of cause of action.

Where an action is brought, in the name of another, by a transferee of the cause of action, or by any other person, who is beneficially interested therein; or where, after the commencement of an action, the cause of action becomes, by transfer or otherwise, the property of a person, not a party to the action; the transferee, or other person so interested, is liable for costs, in the like cases, and to the same extent, as if he was the plaintiff; and, where costs are awarded against the plaintiff, the court may, by order, direct the person so liable to pay them. Except in a case, where he could not have been lawfully directed to pay costs, personally, if he had been a party, as prescribed in the last section, his disobedience to the order is a contempt of court. But this section does not apply to a case, where the person so beneficially interested, is the attorney or counsel for the plaintiff, if his only beneficial interest consists of a right to a portion of the sum or property recovered, as compensation for his services in the action.

From Id., § 321; 2 R. S. 619 (Part 3, c. 10, tit. 1), § 44.

ARTICLE THIRD.

Miscellaneous provisions.

Sec. 3248. Certificate entitling party to costs or increased costs.
3249. Costs against infant plaintiff; collectible of guardian ad litem.
3250. This title not to affect special provisions of law.

§ 3248. Certificate entitling party to costs or increased costs.

Where, upon the trial of an action, the title to real property comes in question, or any fact appears, whereby either party becomes entitled to costs, or to the increased costs specified in section 3258 of this act, the judge presiding at the trial, or the referee, must, upon the application of the party to be benefited thereby, either before or after the verdict, report, or decision is rendered, make a certificate, stating the fact. Such a certificate is the only competent evidence, as to the matter, before the taxing officer.

From 2 R. S. 553 (Part 3, c. 10, tit. 5), § 8.

§ 3249. Costs against infant plaintiff; collectible of guardian ad litem.

Where costs are awarded against an infant plaintiff, they may be collected, by execution or otherwise, from his guardian ad litem, in like manner as if the latter was the plaintiff.

From Co. Proc., § 316.

§ 3250. This title not to affect special provisions of law

This title does not affect any provision contained elsewhere in this act, or in any other statute, remaining unrepealed after this chapter takes effect; whereby the award of costs is specially regulated, in a particular case, otherwise than as prescribed in this title.

New.

TITLE II.

Fixing the amount of costs.

Article 1. Sums allowed as costs; disbursements.
2. Taxation of costs.

ARTICLE FIRST.

Sums allowed as costs; disbursements.

Sec. 3251. Amount of costs generally.
3252. Additional allowance to plaintiff in foreclosure, partition, etc.
3253. Additional allowance to either party in difficult cases, etc.
3254. Allowances under the foregoing sections limited.
3255. Costs upon adjournment of trial.
3256. Disbursements to be included in bill of costs.
3257. Increased damages not to carry increased costs.
3258. When defendant entitled to increased costs.
3259. Increased disbursements not allowed.
3260. Costs upon a settlement.
3261. This article not to affect special provisions of law.

§ 3251. [Am'd, 1895, 1896, 1901, 1902.] Amount of costs generally.

Costs, awarded to a party to an action, must be at the following rates:

1. To the plaintiff:

For all proceedings, before notice of trial, in an action specified in section 420 of this act, fifteen dollars; in every other action, twenty-five dollars.

For each additional defendant served with the summons, not exceeding ten, two dollars; and for each necessary defendant, in excess of that number, served with the summons, one dollar.

For procuring the appointment of a guardian or guardian ad litem, for one or more infant defendants, ten dollars.

For procuring an order directing the service of the summons by publication thereof, or personally, without the State, on one or more defendants, ten dollars.

For procuring an injunction order or an order of arrest, ten dollars.

2. To the defendant:

For all proceedings, before notice of trial, except as otherwise prescribed in this article, ten dollars.

3. To either party:

For all proceedings, after notice of trial, and before trial, except as otherwise prescribed in this article, fifteen dollars.

For taking the deposition of a witness or of a party, as prescribed in section 870, section 871, or section 893 of this act, ten dollars.

For drawing interrogatories, to be annexed to a commission, or to letters rogatory, issued as prescribed in sections 888, 912, 913, and 3171 of this act, ten dollars.

For the trial of an issue of law, twenty dollars.

For the trial of an issue of fact, or the assessment of damages pursuant to section 194 of this act, thirty dollars; and, where the trial necessarily occupies more than two days, ten dollars in addition thereto.

For making and serving a case, twenty dollars; and, when the case necessarily contains more than fifty folios, ten dollars in addition thereto.

For making and serving amendments to a case, twenty dollars.

Upon a motion for a new trial, upon a case, or an application for judgment upon a special verdict, the same sums as upon an appeal, as prescribed in subdivision fourth of this section.

Upon any other motion, or upon a reference specified in section 3236 of this act, to each party to whom costs are awarded, a sum fixed by the court or judge, not exceeding ten dollars, besides necessary disbursements for printing and referee's fees.

Where a new trial is had, pursuant to an order granting the same, or an assessment of damages, pursuant to section 194 of this act, is had, for all proceedings after the granting of, and before the new trial, or an assessment of damages, pursuant to section 194 of this act, twenty-five dollars.

For one term of the city court of the city of New York, at which the case is necessarily on the calendar, and for each trial term or special term, of the supreme court, or a county court, not exceeding five, at which the cause is necessarily on the calendar, excluding the term at which it is tried, or otherwise finally disposed of, ten dollars.

4. To either party, upon an appeal to the supreme court from an inferior court, excepting upon an appeal to the supreme court from the city court of the city of New York; or upon an appeal to the appellate division of the supreme court, or to the supreme court from the city court of the city of New-York, taken from an interlocutory or final judgment, or from an order granting or refusing a new trial, rendered or made at a trial term of the supreme court or of the city court of the city of New-York; or upon an application to the appellate division of the supreme court for a new trial, or for judgment upon a verdict, rendered subject to the opinion of the court, or where exceptions are ordered to be heard, in the first instance, at a term of the appellate division of the supreme court;

Before argument, twenty dollars.

For argument, forty dollars.

For each term of the appellate division, not exceeding five, of the supreme court, at which the cause is necessarily on the calendar, excluding the term at which it is argued, or otherwise finally disposed of; ten dollars. In all appeals taken under section 3189 costs awarded to the successful party shall not exceed ten dollars in addition to the taxable disbursements.

5. To either party, upon an appeal to the court of appeals:

Before argument, thirty dollars.

For argument, sixty dollars.

For each term, not exceeding ten, at which the cause is on the calendar, excluding the term at which it is argued, or otherwise finally disposed of, ten dollars.

Where a judgment is affirmed by the court of appeals, the court may, in its discretion, also award damages, by way of costs, for the delay, not exceeding ten per centum upon the amount of the judgment; or, where it was rendered upon an appeal, upon the amount of the original judgment.

From Co. Proc., § 307; L. 1875, c. 479. Am'd by L. 1895, c. 946; L. 1896, c. 226; L. 1901, c. 527; L. 1902, c. 515 (in effect Sept. 1, 1902).

§ 3252. Additional allowance to plaintiff in foreclosure, partition, etc.

Where the action is brought to foreclose a mortgage upon real property; or for the partition of real property; or to procure an adjudication upon a will or other instrument in writing; or to compel the determination of a claim to real property; or where, in any action, a warrant of attachment against property has been issued; the plaintiff, if a final judgment is rendered in his favor, and he recovers costs, is entitled to recover, in addition to the costs prescribed in the last section, the following percentages, to be estimated upon the amount found to be due upon the mortgage; or the value of the property partitioned, affected

by the adjudication upon the will or other instrument, or the claim to which is determined; or the value of the property attached, not exceeding the sum recovered, or claimed; as the case may be:

Upon a sum, not exceeding two hundred dollars, ten per centum

Upon an additional sum, not exceeding four hundred dollars, five per centum.

Upon an additional sum, not exceeding one thousand dollars, two per centum.

Where such an action is settled before judgment, the plaintiff is entitled to a percentage upon the amount paid or secured upon the settlement, at one-half of those rates. In an action to foreclose a mortgage upon real property, where a part of the mortgage debt is not due, if the final judgment directs the sale of the whole property, as prescribed in section 1637 of this act, the percentages, specified in this section, must be computed upon the whole sum, unpaid upon the mortgage. But if it directs the sale of a part only, as prescribed in section 1636 of this act, they must be computed upon the sum actually due; and if the court thereafter grants an order, directing the sale of the remainder, or a part thereof, the percentages must be computed upon the amount then due: but the aggregate of the percentages shall not exceed the sum, which would have been allowed, if the entire sum secured by the mortgage had been due, when final judgment was rendered.

From Co. Proc., §§ 308, 309.

§ 3253. [Am'd, 1896, 1898, 1899, 1903, 1909.] Additional allowance to either party in difficult cases, etc.

In an action brought to foreclose a mortgage upon real property, or for the partition of real property, or in a difficult and extraordinary case (where a defense has been interposed in an action), or, except in the first and second judicial districts, in a special proceeding by certiorari to review an assessment under article thirteen of the Tax Law, and the acts amending the same, the court may also, in its discretion, award to any party a further sum, as follows:

1. In an action to foreclose a mortgage, a sum not exceeding two and one-half per centum upon the sum due, or claimed to be due upon the mortgage, nor the aggregate sum of two hundred dollars.

2. In any action, or special proceeding, specified in this section, where a defense has been interposed, or in an action for the partition of real property, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved.

From Id., § 309; L. 1876, c. 431. Am'd by L. 1896, c. 571; L. 1898, c. 61; L. 1899, c. 299; L. 1903, c. 316; L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 3254. Allowances under the foregoing sections limited.

But all the sums awarded to the plaintiff, as prescribed in section 3252 of this act, or to a party or two or more parties on the same side, as prescribed in the last sentence of section 3251 of this act, and in subdivision second of the last section, cannot exceed, in the aggregate, two thousand dollars.

From Co. Proc., § 309; L. 1876, c. 431.

§ 3255. [Am'd, 1895.] Costs upon adjournment of trial.

Where an application is made to a court or a referee, to adjourn a trial, the payment to the adverse party of a sum not

exceeding ten dollars, or, in the city court of the city of New-York, a sum not exceeding five dollars, besides the fees of his witnesses, and other taxable disbursements, already made or incurred, which are rendered ineffectual by the adjournment, may be required, as a condition of granting the adjournment.

From Co. Proc., § 314; L. 1853, c. 617, § 4. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3256. [Am'd, 1892, 1895.] Disbursements to be included in bill of costs.

A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements as follows: The legal fees of witnesses and of referees and other officers; the reasonable compensation of commissioners taking depositions; the legal fees for publication where publication is directed pursuant to law; the legal fees paid for a certified copy of a deposition, or other paper, recorded or filed in any public office, necessarily used or obtained for use on the trial; copies of opinions and charges of judges; the reasonable expenses of printing the papers for a hearing, when required by a rule of the court; prospective charges for the expenses of entering and docketing the judgment; and the sheriff's fees for receiving and returning one execution thereon, including the search for property and such other reasonable and necessary expenses, as are taxable, according to the course and practice of the court, or by express provision of law. Searches affecting property situate in any county in which the office of county clerk or register is a salaried one, when made and certified to by title insurance, abstract or searching companies, organized and doing business under the laws of this State, may be used in all actions or special proceedings in which official searches may be used, in place of and with the same legal effect as such official searches, and the expenses of searches so made by said companies shall be taxable at rates not exceeding the cost of similar official searches.

From Co. Proc., § 311; 2 R. S. 651 (Part 3, c. 10, tit. 4), §§ 10, 14. Am'd by L. 1892, c. 185 and c. 592; L. 1895, c. 331.

§ 3257. Increased damages not to carry increased costs.

A plaintiff, who recovers double or other increased damages, does not thereby become entitled to more than single costs; except where it is otherwise specially prescribed by law.

From 2 R. S. 616 (Part 3, c. 10, tit. 1), § 23.

§ 3258. When defendant entitled to increased costs.

In either of the following cases, a defendant, in whose favor a final judgment is rendered, in an action wherein the complaint demands judgment for a sum of money only, or to recover a chattel; or a final order is made, in a special proceeding instituted by a State writ, is entitled to recover the costs, prescribed in section 3251 of this act, and, in addition thereto, one-half thereof:

1. Where the defendant is or was a public officer, appointed or elected under the authority of the State, or a person specially appointed, according to law, to perform the duties of such an officer; and the action or special proceeding was brought by reason of an act, done by him by virtue of his office, or an alleged omission by him, to do an act, which it was his official duty to perform.

2. Where the action was brought against the defendant, by reason of an act done, by the command of such an officer or

person, or in his aid or assistance, touching the duties of the office or appointment.

3. Where the action was brought against the defendant, for taking a distress, making a sale, or doing any other act, by or under color of authority of a statute of the State.

But this section does not apply, where an officer, or other person, specified herein, unites in his answer with a person not entitled to such additional costs.

From Id., § 24.

§ 3259. Increased disbursements not allowed.

The increase, specified in the last section, does not extend to the disbursements; and an officer, witness, or juror, is not entitled to any other fee in the action, except the single fee allowed by law for his services.

From Id., § 25.

§ 3260. Costs upon a settlement.

Where an action, specified in section 3228 of this act, is settled before judgment, no greater sum shall be demanded as costs, than at the rates prescribed by section 3251 of this act.

From Co. Proc., § 322.

§ 3261. This article not to affect special provisions of law.

This article does not affect any provision contained elsewhere in this act, or in any other statute remaining unrepealed after this act takes effect, whereby the amount of costs is specially fixed, in a particular case, otherwise than as prescribed in this article.

New.

ARTICLE SECOND.

Taxation of costs.

Sec. 3262. Costs; how taxed. Allowances, etc.; how computed.
3263. Notice of taxation.
3264. Retaxation.
3265. Review of taxation.
3266. Duty of taxing officer.
3267. Affidavit respecting disbursements.

§ 3262. Costs; how taxed. Allowances, etc.; how computed.

Costs must be taxed by the clerk, upon the application of the party entitled thereto; except that the court may direct, that interlocutory costs, or costs in a special proceeding, be taxed by a judge. The clerk must insert, in the judgment or final order, the amount of the costs, as taxed. In a case where the costs are in the discretion of the court, the report or decision, or the direction of the court for final judgment, upon a default, or after a jury trial, must specify which party or parties are entitled to costs; but the amount of the costs must be ascertained by taxation. The allowance, specified in section 3252 of this act, must be computed by the clerk upon the taxation; but the value of property, required to be ascertained for that purpose, must be ascertained by the court, unless it has been fixed by the decision or report, or by the verdict of the jury, upon which the final judgment is entered; except that, in case of actual partition, it must be determined by the commissioners.

From Co. Proc., § 311.

§ 3263. Notice of taxation.

Costs may be taxed, upon notice to the attorney for each adverse party, who has appeared, and is interested in reducing the amount thereof. Notice of taxation must be served, not less than five days before the taxation; unless the attorneys, serving and served with the notice, all reside, or have their offices, in the city or town, where the costs are to be taxed; in which case, a notice of two days is sufficient. A copy of the bill of costs, specifying the items, with the disbursements stated in detail, must be served with the notice of taxation.

Id.

§ 3264. Retaxation.

Costs may also be taxed without notice. But where they are so taxed, notice of retaxation thereof must immediately afterwards be given as prescribed in the last section, by the party at whose instance they were taxed; in default whereof, the court must, upon the application of a party entitled to notice, direct a retaxation, with costs of the motion, to be paid by the party in default. The court may, in its discretion, upon the application of a party interested, direct a retaxation of costs at any time. Any sum, deducted upon a retaxation, must be credited upon the execution, or other mandate issued to enforce the judgment.

New.

§ 3265. Review of taxation.

A taxation or a retaxation may be reviewed by the court, upon a motion for a new taxation. The order, made upon such a motion, may allow or disallow any item, objected to before the taxing officer, in which case it has the effect of a new taxation;

or it may direct a new taxation before the proper officer, specifying the grounds or the proof, upon which the item may be allowed or disallowed by him.

New.

§ 3266. Duty of taxing officer.

An officer, authorized to tax costs in an action or a special proceeding, must, whether the taxation is opposed, or not, examine the bills presented to him for taxation; must satisfy himself that all the items allowed by him are correct and legal; and must strike out all charges for fees, other than the prospective charges expressly allowed by law, where it does not appear that the services, for which they are charged, were necessarily performed.

From 2 R. S. 653 (Part 3, c. 10, tit. 5), § 5.

§ 3267. Affidavit respecting disbursements.

A charge, for the attendance of a witness, cannot be allowed without an affidavit, stating the number of days of his actual attendance; and, if travel fees are charged, the distance for which they are allowed. A charge, for a copy of a document or paper, cannot be allowed, without an affidavit, stating that it was actually and necessarily used, or was necessarily obtained for use. An item of disbursements, in a bill of costs, cannot be allowed, in any case, unless it is verified by affidavit, and appears to have been necessarily incurred, and to be reasonable in amount.

From Id., § 7; Co. Proc., § 311.

TITLE III.

Security for costs.

Sec. 3268. When defendant may require security for costs.
3269. Id.; after action commenced.
3270. The last two sections qualified.
3271. Id.; in actions by and against executors, etc.
3272. Order to give security.
3273. Requisites of undertaking.
3274. Notice of exception; id., of justification.
3275. Justification of sureties. Allowance of undertaking.
3276. Order to give additional security. Proceedings.
3277. Effect of failure to obey order to give security.
3278. Liability of attorney for costs in certain actions.
3279. This title applies to special proceedings.

§ 3268. [Am'd, 1891, 1904, 1910.] When defendant may require security for costs.

The defendant, in an action brought in a court of record, may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either

1. A person residing without the state; or, if the action is brought in a county court, except in the counties of Albany, Kings, Queens, Rensselaer and Richmond, or in the city court of the city[1] of New York, the city court of Yonkers, or the city court of Albany, residing without the city or county, as the case may be, wherein the court is located; or

2. A foreign corporation; or

3. A person imprisoned under execution for a crime; or

4. The official assignee of a person so imprisoned; the official assignee or official trustee of a debtor; or an assignee in bankruptcy; where the action is brought upon a cause of action, arising before the assignment, the appointment of the trustee, or the adjudication in bankruptcy.

From 2 R. S. 620 (Part 3, c. 10, tit. 2), § 1. Am'd by L. 1891, c. 170; L. 1904, c. 524; L. 1910, c. 118 (in effect Sept. 1, 1910).

§ 3269. Id.; after action commenced.

The defendant, in a like action, may require security for costs to be given, where, after the commencement of the action, the plaintiff either

1. Ceases to be a resident of the State: or, where the action is brought in either of the local courts specified in subdivision first of the last section, ceases to be a resident of the city or county, as the case may be, wherein the court is located: or

2. Is adjudicated a bankrupt, or discharged from his debts, or exonerated from imprisonment, pursuant to a law of the State, or of the United States; or

3. Is sentenced to the State prison, for a term less than for life.

From 2 R. S. 620, § 2.

§ 3270. The last two sections qualified.

In a case specified in either of the last two sections, if there are two or more plaintiffs, the defendant cannot require security

[1] As to the meaning of "city of New York" in this connection, see § 338, foot-note, ante.

for costs to be given, unless he is entitled to require it of all the plaintiffs.

From Id., §§ 1, 2.

§ 3271. Id.; in actions by and against executors, etc.

In an action brought by or against an executor or administrator, in his representative capacity, or the trustee of an express trust, or a person expressly authorized by statute to sue, or to be sued; or by an official assignee, the assignee of a receiver, or the committee of a person judicially declared to be incompetent to manage his affairs; the court may, in its discretion, require the plaintiff to give security for costs.

From Co. Proc., § 317; L. 1874, c. 446, tit. 2, § 5.

§ 3272. [Am'd, 1915.] Order to give security.

Where security for costs is required to be given, the court in which the action is pending, or, except in a case specified in the last section, a judge thereof, upon due proof, at any time, by affidavit, of the facts, must make an order requiring the plaintiff, within a time specified, either to pay into court, the sum of two hundred and fifty dollars, to be applied to the payment of the costs, if any, awarded against him, or, at his election, to file with the clerk an undertaking, and to serve a written notice of the payment or of the filing upon the defendant's attorney; and staying all other proceedings, on the part of the plaintiff, except to review or vacate the order, until the payment or filing, and notice thereof, and also, if an undertaking is given, the allowance of the same.

From 2 R. S. 620, §§ 3-6; L. 1875, c. 16 and c. 305. Am'd by L. 1915, c. 635 (in effect Sept. 1, 1915).

§ 3273. Requisites of undertaking.

The undertaking, specified in the last section, must be executed to the defendant by one or more sureties, and must be to the effect that they will pay, upon demand, to the defendant, all costs which may be awarded to him in the action, not exceeding a sum, specified in the undertaking, which must be at least two hundred and fifty dollars.

From 2 R. S. 620, § 4; L. 1875, c. 305.

§ 3274. Notice of exception; Id. of justification.

Within ten days after service of the notice of filing the undertaking, the defendant may serve upon the plaintiff's attorney a notice that he excepts to the sureties therein. Within ten days after service of such a notice, the plaintiff must serve, upon the defendant's attorney, a notice of the justification of the same or new sureties before a judge of the court, or a county judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter, and the place to be within the county where the action is triable.

From 2 R. S. 620, §§ 5, 6; L. 1875, c. 16.

§ 3275. Justification of sureties. Allowance of undertaking.

Section 580 of this act applies to the justification of the sureties. Where the judge finds the sureties sufficient, he must annex the written examination, if any, to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk. Where the defendant fails duly to except to the sureties, the undertaking is deemed allowed, and must be indorsed and filed in like manner.

Id.

§ 3276. [Am'd, 1891.] Order to give additional security. Proceedings.

At any time after the allowance of an undertaking, given pursuant to such an order, or as prescribed in section 3278 of this act, or after notice of the payment into court, made pursuant to such an order, the court, or a judge thereof, upon satisfactory proof, by affidavit, that the sum specified in the undertaking, or the amount of such payment, is insufficient; or that one or more of the sureties have died, or become insolvent, or that his or their circumstances have become so precarious that there is reason to apprehend that the undertaking is insufficient for the security of the defendant; must make an order, requiring the plaintiff to give an additional undertaking, or make an additional payment into court. The last four sections apply to such an order, and to the undertaking given, or payment made, pursuant thereto.

From 2 R. S. 620, § 4; L. 1875, c. 305. Am'd by L. 1891, c. 161.

§ 3277. Effect of failure to obey order to give security.

Where the plaintiff fails to comply with an order, made as prescribed in this title, or to procure the allowance of an undertaking given pursuant to such an order, the defendant is entitled to a judgment dismissing the complaint, and in his favor for costs. The defendant may apply therefor, as upon a motion.

From 2 R. S. 620, § 4; L. 1875, c. 305.

§ 3278. Liability of attorney, for costs in certain actions.

Where a defendant is entitled to require security for costs, as prescribed in section 3268 of this act, the plaintiff's attorney is liable for the defendant's costs, to an amount not exceeding one hundred dollars, until security is given, as prescribed in this title. The plaintiff's attorney may relieve himself from that liability, although the defendant may not require security for costs to be given, by filing and procuring the allowance of an undertaking, as if an order had been made as prescribed in section 3272 of this act.

From 2 R. S. 620, 621, §§ 7, 8.

§ 3279. This title applies to special proceedings.

The foregoing sections of this title apply to a special proceeding instituted in a court of record, in like manner as to an action; for which purpose, the prosecuting party, other than the people, or, where the special proceeding is instituted in the name of the people upon the relation of a private corporation or individual, the relator, is deemed a plaintiff, and the adverse party, a defendant.

New.

TITLE IV.

General provisions relating to fees.

Sec. 3280. Taking fees not prescribed by law, prohibited.
3281. Id.; for services not rendered, except, etc.
3282. Penalty for extortion.
3283. Clerk of court of appeals to account for and pay over fees.
3284. [Repealed.]
3285. Certain county clerks and registers must account for fees.
3286. General provisions as to fees, etc., to be accounted for.
3287. Fees of certain officers to be taxed upon demand.
3288. Parties, attorneys, etc., when not allowed fees.
3289. No fee for administering certain official oaths.
3290. Certain searches to be gratuitous.
3291. Officer, etc., may charge fee paid for oath, postage, etc.
3292. Id.; his fees, etc., to be paid before required to transmit paper.
3293. Provision where printers in county refuse to publish.
3294. Affidavit of refusal to publish, etc.
3295. Comptroller to audit certain charges.

§ 3280. [Omitted; see Table, p. iii.] Taking fees not prescribed by law, prohibited.

Each clerk of a court must perform all the duties required of him, in the course and practice of the court, without fee or reward, except as expressly prescribed by law. Each public officer, upon whom a duty is expressly imposed by law, must execute the same without fee or reward, except where a fee or other compensation therefor is expressly allowed by law. An officer or other person, to whom a fee or other compensation is allowed by law, for any service, shall not charge or receive a greater fee or reward, for that service, than is so allowed.

From L. 1840, c. 386, § 6; 2 R. S. 650 (Part 3, c. 10, tit. 4), § 5.

§ 3281. [Omitted; see Table, p. iii.] Id.; for services not rendered, except, etc.

An officer, or other person, shall not demand or receive any fee or compensation, allowed to him by law for any service, unless the service was actually rendered by him; except that an officer may demand in advance his fee, where he is, by law, expressly directed or permitted to require payment thereof, before rendering the service.

From 2 R. S. 650, § 6.

§ 3282. [Omitted; see Table, p. iii.] Penalty for extortion.

An officer or other person, who violates either of the provisions contained in the last two sections, is liable, in addition to the punishment prescribed by law for the criminal offence, to an action in behalf of the person aggrieved, in which the plaintiff is entitled to treble damages.

From Id., § 7.

§ 3283. [Omitted; see Table, p. iii.] Clerk of court of appeals to account for and pay over fees.

The clerk of the court of appeals must, within ten days after the first day of January, and after the first day of July, in each year, render to the comptroller an accurate account, under oath, of all fees received by him for his official services, since the last account was rendered; and must pay the same into the treasury of the State.

From L. 1847, c. 277, § 7.

§ 3284. [Repealed by L. 1895, c. 946 (in effect Jan. 1. 1896.)]

§ 3285. [Omitted; see Table, p. iii.] Certain county clerks and registers must account for fees.

Except as otherwise specially prescribed by law, each county clerk or register, who receives a salary, must account for, under oath, and pay to the treasurer of his county, in the manner prescribed by law, all fees, perquisites, and emoluments, received by him, for his official services.

From L. 1847, c. 432, § 1; L. 1861, c. 14.

§ 3286. [Omitted; see Table, p. iii.] General provision as to fees, etc., to be accounted for.

Where a public officer is required, by law, to keep an account of, or to pay over, the fees or other moneys, received by him for official services, he must include therein all sums, received by him, to which he was entitled, by reason of any act, performed by him in his official capacity; whether the act did or did not pertain to his office, or to the business thereof.

From L. 1847, c. 277, § 11.

§ 3287. [Am'd, 1895.] Fees of certain officers to be taxed upon demand.

Each county clerk or register of deeds, who claims any fees by virtue of his office; and each sheriff or coroner, who, upon the collection of an execution, or the settlement, either before or after judgment, of an action or a special proceeding, claims any fees, which have not been taxed; must, upon the written demand of the person liable to pay the same, cause them to be taxed within the county, upon notice to the person making the demand, by a justice of the supreme court, or the county judge. After such a demand is made, the officer cannot collect his fees, until they have been so taxed.

From 2 R. S. 652 (Part 3, c. 10, tit. 5), §§ 1, 2; L. 1844, c. 127, §§ 2, 3. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3288. Parties, attorneys, etc., when not allowed fees.

A party to an action or a special proceeding is not entitled to a fee, for attending as a witness therein, in his own behalf, or in behalf of a party who pleads jointly, or is united in interest, with him; and an attorney or counsel, in an action or a special proceeding, is not entitled to a fee, for attending as a witness therein, in behalf of his client.

From 2 R. S. 651, § 15.

§ 3289. [Omitted; see Table, p. iii.] No fee for administering certain official oaths.

An officer is not entitled to a fee, for administering the oath of office to a member of the legislature, to any military officer, to an inspector of election, clerk of the poll, or any town officer; or to more than ten cents, for administering an official oath to any other officer.

From Id., § 17.

§ 3290. [Omitted; see Table, p. iii.] Certain searches to be gratuitous.

Each of the following officers, to wit: the secretary of State the comptroller, the treasurer, the attorney-general, and the State engineer and surveyor, may require search to be made, in the office of either of the others, or of a county clerk, or of the clerk of a court of record, for any record, document, or paper, where he deems it necessary for the discharge of his official duties, and

a copy thereof or extracts therefrom, to be made and officially certified or exemplified, without the payment of any fee or charge.

From 2 R. S. 650, § 3.

§ 3291. [Omitted; see Table, p. iii.] Officer, etc., may charge fee paid for oath, postage, etc.

Where an officer or other person is required, in the course of a duty imposed upon him by law, to take an oath, to acknowledge an instrument, to cause an instrument to be filed or recorded, or to transmit a paper to another officer, he is entitled, in addition to the fees, or other compensation for the service, prescribed by law, to the fees necessarily paid by him, to the officer who administered the oath, or took the acknowledgment, or filed or recorded the instrument; and to the expense of transmitting the paper, including postage, where the transmission is lawfully made through the post-office.

New.

§ 3292. Id.; his fees, etc., to be paid before required to transmit paper.

Each provision of this act, requiring a judge, clerk, or other officer to transmit a paper to another officer, for the benefit of a party, is to be construed as requiring the transmission only at the request of the person so to be benefited, and upon payment by him of the fees allowed by law for the paper transmitted, or any copy or certificate connected therewith, and the expenses specified in the last section.

New. See L. 1876, c. 449, § 12.

§ 3293. Provision where printers in county refuse to publish.

If the proprietor of each newspaper, published in a city or county, in which any notice, order, citation, or other paper is required by law to be published, refuses to publish the same, for the fees prescribed by law for the publication, it may be published in the newspaper, printed at Albany, in which legal notices are required by law to be published. If it is required by law to be published in that newspaper, and also in another newspaper published in a city or county, and the proprietor of each newspaper in that city or county refuses to publish it for the fees so prescribed, it may be published in the newspaper, published nearest to the place, where a person is required to appear, or where an act is to be done, pursuant thereto, the proprietor of which will publish the same, for those fees. Publication, made as prescribed in this section, is as valid, as if it was made in the city or county, where the publication thereof is so required by law.

From 2 R. S. 648, §§ 46, 47.

§ 3294. Affidavit of refusal to publish, etc.

Where publication is made, as prescribed in the last section, elsewhere than in the city or county where it is otherwise required by law to be made, the affidavit of publication must either be accompanied with an affidavit, or contain a statement, to the effect that an application to publish the advertisement was, before such publication, made to the proprietor of each newspaper published in the city or county; that the amount of the legal fees for such publication was at the same time tendered;

and that the application was refused. Such an affidavit is presumptive evidence of the facts stated therein.

From Id., § 49.

§ 3295. [Omitted; see Table, p. iii.] Comptroller to audit certain charges.

Where the fees or other charges of an officer are chargeable to the State, they must be audited by the comptroller, and paid on his warrant, except as otherwise specially prescribed by law.

From 2 R. S. 651, § 16.

TITLE V.

Sums allowed as fees.

Sec. 3296. Referee's fees generally.
3297. Id.; upon sales of real property.
3298. Fees for oaths and acknowledgments.
3299. Surveyors' and commissioners' fees, in action for partition or dower, etc.
3300. Fees of the clerk of the court of appeals.
3301. Clerk's fees in civil actions generally.
3302. The last section qualified.
3303. Clerk's fees upon naturalization.
3304. Fees of county clerks generally.
3305. Certain provisions not affected by the last section.
3305a. Fees for certifying prepared copies.
3306. Fees of register and other clerks.
3306a. Fees of county clerk for entries of moneys deposited with county treasurer.
3307. Sheriff's fees.
3308. The last section qualified.
3309. Id.; how collected.
3310. Coroner's fees.
3311. Stenographer's fees.
3312. Compensation of deputy sheriffs and constables attending courts.
3313. Fees of trial jurors.
3314. Supervisors may make allowance to grand and trial jurors.
3315. Id.; extra pay upon protracted trials.
3316. Jurors' fees in special proceedings.
3317. Fees of printers.
3318. Witnesses' fees generally.
3319. Id.; on deposition to be used in another state.
3320. Receiver's commissions.
3321. Fees of county treasurer, and chamberlain of New York.
3322. Fees of a justice of the peace.
3323. Constable's fees.
3324. Id.; affidavit upon claim for travel fees.
3325. Justice's court, fees upon a commission.
3326. Id.; jurors' fees.
3327. Id.; witnesses' fees.
3328. Id.; fees to be paid before services rendered.
3329. Id.; by whom fees to be paid.
3330. Certain special provisions excepted from this title.
3331. Provision as to change in fees.
3331a. Presentation of claims by jurors and disposition of unclaimed fees.
3332. This title applies to civil cases only.

§ 3296. [Am'd, 1896.] Referee's fees generally.

A referee, in an action or a special proceeding brought in a court of record, or in a special proceeding, taken as prescribed in title twelve of chapter seventeen of this act, is entitled to ten dollars for each day spent in the business of the reference; unless at or before the commencement of the trial or hearing, a different rate of compensation is fixed, by the consent of the parties, other than those in default for failure to appear or plead, manifested by an entry in the

minutes of the referee, or otherwise in writing, or a smaller compensation is fixed by the court or judge in the order appointing him.

From Co. Proc., § 313. Am'd by L. 1896, c. 90 (in effect March 11, 1896).

§ 3297. [Am'd 1891, 1895.] Id.; upon sales of real property.

The fees of a referee appointed to sell real property pursuant to a judgment in an action, are the same as those allowed to the sheriff, and he is allowed the same disbursements as the sheriff. Where a referee is required to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured, distributed or applied, allowed by law to an executor or administrator for receiving and paying out money. But commissions shall not be allowed to him upon a sum hidden by a party, and applied upon that party's demand, as fixed by the judgment, without being paid to the referee, except to the amount of ten dollars. And a referee's compensation, including commissions, cannot, where the sale is under a judgment in an action to foreclose a mortgage, exceed fifty dollars, unless the property sold for ten thousand dollars or upwards, in which event the referee may receive such additional compensation as to the court may seem proper, or in any other cause [1] five hundred dollars.

From L. 1869, c. 569, § 4; L. 1874, c. 192; Co. Proc., § 309; L. 1876, c. 481, § 11. Am'd by L. 1891, c. 132; L. 1895, c. 241.

§ 3298. Fees for oaths and acknowledgments.

Any officer, authorized to perform the services specified in this section, and to receive fees therefor, is entitled to the following fees:

1. For administering an oath or affirmation, and certifying the same when required, except where another fee is specially prescribed by statute, twelve cents.

2. For taking and certifying the acknowledgment or proof of the execution of a written instrument; by one person, twenty-five cents; and by each additional person, twelve cents; for swearing each witness thereto, six cents.

From 2 R. S. 637, § 28; L. 1847, c. 339; L. 1849, c. 238, § 2.

§ 3299. Surveyors' and commissioners' fees in action for partition or dower, etc.

A surveyor, employed as prescribed by law, in an action for partition or dower, or to determine dower, is entitled to five dollars for each day, actually and necessarily occupied in surveying, laying out, marking, or mapping land therein. Each assistant so employed, is entitled to two dollars for each day, actually and necessarily occupied in serving under the surveyor's direction. Each commissioner, appointed as prescribed by law, to make partition or admeasure dower, is entitled to five dollars for each day's actual and necessary service.

From 2 R. S. 643, §§ 34, 35.

[1] This word "cause" is apparently a mistake for "case."

§ 3300. Fees of the clerk of the court of appeals.

The clerk of the court of appeals is entitled, for the services specified in this section, to the following fees:

For filing a notice of appeal to that court, and all the papers transmitted therewith, fifty cents.

For filing any other paper, ten cents.

For drawing an order, twenty cents for each folio.

For entering an order, twenty cents; and for each folio more than two, ten cents.

For drawing a judgment, twenty-five cents; and for each folio more than two, ten cents.

For entering a judgment, twenty-five cents; and for each folio more than two, ten cents.

For a certified copy of an order, record, or other paper, entered or filed in his office, ten cents for each folio.

For engrossing a remittitur, ten cents for each folio.

For a certificate, other than that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

For sealing any paper, when required, fifty cents.

See 2 R. S. 622, § 2.

§ 3301. [Am'd, 1882, 1890.] Clerk's fees in civil actions generally.

Except as otherwise prescribed in the annexed [1] section, each clerk of a court of record, is entitled, for his services in an action or a special proceeding, brought in or transferred to the court of which he is clerk, to the following fees:

Upon the trial of the action, or the hearing, upon the merits, of the special proceeding, from the party bringing it on, one dollar.

For entering final judgment in the action, or entering a final order in the special proceeding, including the filing of the judgment-roll, and a copy of the judgment to insert therein, fifty cents; and ten cents in addition for each folio exceeding ten, contained in the order for judgment.

For entering any other order or an interlocutory judgment, ten cents for each folio, exceeding five.

For a certified or other copy of an order, record, or other paper, entered or filed in his office, five cents for each folio.

Where, on an appeal from a judgment or order, a party shall present to the clerk a printed copy of the judgment-roll or order appealed from, it shall be the duty of the clerk, as required, to compare and certify the same, for which service he shall be entitled to be paid at the rate of one cent per folio.

For a certified transcript of the docket of a judgment, twelve cents.

For filing a transcript and docketing or re-docketing a judgment thereupon, six cents.

He is not entitled to any fee, or other compensation, for any other service, in an action or a special proceeding in the court, except that where he is also county clerk, he may charge fees as prescribed in section 3304 of this act, subject to the limitations therein contained.

Where the attorneys for all the parties interested, other than

[1] This word "annexed" is apparently a mistake for "next."

parties in default or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provision of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same or entitled to any fee therefor.

And the paper so proved by stipulation shall be received by the clerks of all the courts, and by the courts, and shall be used or filed with the same force and effect as if certified by a clerk of the court.

From Co. Proc., § 312. Am'd by L. 1882, c. 399; L. 1890, c. 312.

§ 3302. [Am'd, 1895.] The last section qualified.

The last section does not apply to the clerk of a surrogate's court, of the city court of the city of New York, of the city court of Yonkers, of the justices' court of the city of Albany, or of a mayor's or recorder's court.

New. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3303. [Omitted; see Table, p. lii.] Clerk's fees upon naturalization.

The clerk of any court, which has jurisdiction to naturalize an alien, is entitled, for the services specified in this section, to the following fees:

For all services, upon the filing of a declaration of intention by an alien to become a citizen, including the oath or affirmation, the recording of the same, and a certificate thereof delivered to the alien, twenty cents.

For all services, upon the admission of the alien to be a citizen, including the recording of the papers, and a certified copy of the record, which must be delivered to any person requiring it, fifty cents.

From L. 1844, c. 127, § 1.

§ 3304. [Am'd, 1896.] Fees of county clerks generally.

A county clerk is entitled, for the services specified in this section, except where another fee is allowed therefor by special statutory provision, to the following fees, to be paid in advance:

For searching and certifying the title to, and incumbrances upon real property, for each year for which the search is made, for each name, and each kind of conveyance or lien, five cents.

For a copy of an order, record, or other paper, entered or filed in his office, eight cents for each folio.

For filing a transcript, and making an entry as prescribed in section 1258 of this act, twelve cents.

For issuing an execution upon a judgment, a transcript whereof, or of the docket of which, has been filed in his office, fifty cents, to be paid by the party at whose request the execution is issued, and to be collected by the sheriff in addition to the sum due upon the judgment.

For recording and indexing a notice of the pendency of an action, filed in his office, ten cents for each folio contained in the notice.

For cancelling such a notice, or a notice filed in his office, as prescribed in section 649 of this act, twenty-five cents.

For recording any instrument, which must or may legally be recorded by him, ten cents for each folio.

For filing a certificate of satisfaction, or other satisfaction-piece of a mortgage, and entering the satisfaction, twenty-five cents.

For affixing and indexing a notice of foreclosure of a mortgage, as prescribed in section 2390 of this act, twenty-five cents.

For entering a minute that a mortgage has been foreclosed, ten cents.

For filing and entering a satisfaction of an assignment of a judgment, twelve cents.

For filing and entering the bond of a collector or other officer authorized to receive taxes, twelve cents.

For searching for such a bond, six cents.

For entering satisfaction thereof, twelve cents.

For sealing any paper, when required, twelve cents.

For filing and docketing notice of a mechanic's lien, ten cents.

For filing and entering specifications and all other papers relating to a lien against a vessel, twenty-five cents.

For filing any paper required by law to be filed in his office, other than as expressly provided for in this section, six cents.

For filing any paper deposited with him for safe keeping, six cents; and for searching for such a paper, when required, three cents for each paper necessarily opened and examined.

For a certificate, other than that a paper, for the copying of which he is entitled to a fee, is a copy, twenty-five cents.

For inquiring into, determining, and certifying the sufficiency of the sureties of a sheriff, fifty cents.

For attending upon the canvassing of notes, given at an election, two dollars.

For drawing the necessary certificates of the result of the canvass, eighteen cents for each folio; and for the necessary copies thereof, nine cents for each folio.

For notifying the governor that any person has taken an oath of office, ten cents and the necessary postage.

For notifying the governor that any person has neglected to take an oath of office, or to file or renew any security, within the time prescribed by law, or of a vacancy in an office in his county, ten cents and the necessary postage.

For notifying any person of his appointment to office, twenty-five cents, and the expenses, actually and necessarily incurred in giving the notice, which the comptroller deems reasonable.

For entering, in the minutes of the county court, a license to keep a ferry, and for a copy thereof, one dollar.

For taking and entering a recognizance, from any person authorized to keep a ferry, twenty-five cents.

But a county clerk is not entitled to any fee, under this section, for a copy of, or for filing or certifying, any paper, in a civil action or special proceeding, in a court of which he is ex-officio clerk.

From 2 R. S. 638, § 30; L. 1864, c. 53, § 4; 2 R. S. 545, § 3; L. 1873, c. 489, § 4 Am'd by L. 1896, c. 572 (in effect May 12, 1896.)

§ 3305. Certain provisions not affected by the last section.

The last section does not affect any special statutory provision, remaining unrepealed after this title takes effect, whereby a fee,

different from the fee therein allowed, is allowed to the clerk of the city and county of New York, or of the county of Kings, for a service therein specified.

From L. 1853, c. 142, §§ 1, 2; L. 1874, c. 304; L. 1868, c. 720; L. 1871, c. 734.

§ 3305a. [Added, 1914.] Fees for certifying prepared copies.

Whenever there shall be presented to any public officer for certification or exemplification, a previously prepared legibly typewritten or printed copy of any document, paper, book or record in such officer's custody, the fees in such case, for certification or exemplification, shall be at the rate of three cents for each folio; but the minimum total charge for certification or exemplification in all cases shall be twenty-five cents.

Added by L. 1914, c. 345 (in effect Sept. 1, 1914).

§ 3306. [Am'd, 1915.] Fees of register and other clerks.

The register of any county, or the clerk of any court of record, is entitled, for any services specified in section 3304, which he is authorized to perform, to the fees specified therein, subject to the qualifications therein contained, unless a different fee therefor is fixed by statute.

New. Am'd by L. 1915, c. 625 (in effect May 14, 1915).

§ 3306a. [Added, 1909.] Fees of county clerk for entries of moneys deposited with county treasurer.

The county clerk shall be entitled to receive, for making the entries required of him by law of moneys deposited with the county treasurer the sum of fifty cents in each case, to be paid by the party to the action or proceeding, and taxed as a disbursement therein.

From L. 1889, c. 330, § 2; as am'd by L. 1895, c. 544, § 2. Added here by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 3307. [Am'd, 1884, 1894, 1907, 1915.] Sheriff's fees.

A sheriff is entitled, for the services specified in this section, to the following fees:

1. For serving a summons with or without either a copy of the complaint, or a notice specified in section 419 or section 423 of this act; one dollar, except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be one dollar and fifty cents; or for serving or executing an order of arrest, or any other mandate, for the service or execution of which no other fee is specially prescribed by law, except a subpœna, one dollar; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be four dollars, for each person served or as to whom it is executed; and for necessary traveling to serve or execute the same, six cents for each mile traveled, going and returning; the traveling fees to be computed from the court house of the county; or, if there are two or more court houses, from that nearest to the place of service or execution. But where two or more mandates are delivered to a sheriff, to be served upon or executed against one person, at one time, in one action or special proceeding; or where a mandate is served upon or executed against two or more persons, in one action or special proceeding, and in the course of one journey; the sheriff is entitled, in all, to six cents only, for each mile traveled.

2. For levying a warrant of attachment, against the property of a defendant, issued as prescribed in title third of chapter seventh of this act, or for executing a requisition to replevy one or more chattels, one dollar; except that in the counties of New York, Kings, Bronx, Queens and Richmond it shall be five dollars; and, also, such additional compensation, for his trouble and expenses, in taking possession of and preserving the property, as the judge, issuing the warrant, or in case of a replevin, as the court or a judge thereof allows, and the judge or court may make an order requiring the party liable therefor to pay the same to the sheriff.

For making and filing a description of real property, or an inventory of personal property attached, twenty-five cents for each folio; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be fifty cents for each folio; for each necessary copy thereof, twelve cents for each folio; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be twenty cents for each folio; together with such compensation to the appraisers, as the judge issuing the warrant allows, not exceeding two dollars to each appraiser, for each day actually employed. For advertising, during the pendency of the action, personal property attached, the same fees as are allowed to a sheriff for advertising personal property for sale, by virtue of an execution. If the action is settled, either before or after judgment, the sheriff is entitled to poundage, upon the value of the property attached, not exceeding the sum at which the settlement is made.

3. For a copy, necessarily made by him, of a summons or other mandate, or of a complaint, affidavit, or other paper served by him, where no fee therefor is specially prescribed by law, twelve cents for each folio; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be twenty cents for each folio.

4. For notifying jurors to attend a trial term of a court of record, fifty cents for each cause placed upon the calendar for trial by a jury, to be paid by the party first putting the cause on the calendar for that term. But the sheriff is not entitled to more than one dollar and fifty cents for calendar fees in one action. The clerk shall not put a cause upon the calendar, for trial by a jury, until the fee specified in this subdivision is paid to him for the use of the sheriff. And where the cause is tried at a subsequent term, without a new note of issue, as prescribed in section 977 of this act, the party moving the trial must pay to the clerk for the use of the sheriff, the calendar fee or fees remaining unpaid. No sheriff who receives an annual salary in whole or in part for his services shall be entitled to the fees provided by this subdivision, and in all counties where the sheriff receives such annual salary, the clerk shall place all causes upon the calendar for trial without the payment or collection of any fee therefor.

5. For notifying jurors drawn to attend upon a writ of inquiry, or to try the validity of a claim to personal property, seized by virtue of a warrant of attachment or an execution, or in obedience to a precept issued by commissioners appointed to inquire concerning the incompetency of a person to manage himself or his affairs, in consequence of idiocy, lunacy, or habitual drunkenness, or in any case not provided for in the last preceding subdivision of this section, including the making and return of the inquisition when required, for each juror notified, twenty-five cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be fifty cents for each juror notified. For attending a jury, when required, in such a case, two dollars; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be five dollars.

6. For receiving an execution against property, entering it in his books, searching for property, and postage on the return, when made through the post-office, fifty cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be one dollar and fifty cents. If required by the sheriff, that fee, together with his fee for returning the execution, must be paid, by the person in whose behalf the execution is issued, at the time when it is delivered to the sheriff, who is not bound to execute it unless the fee is so paid. For mileage upon an execution, for each mile, going only, ten cents; to be computed as prescribed in subdivision first of this section.

7. For collecting money by virtue of an execution, a warrant of attachment, or an attachment for the payment of money in an action or a special proceeding; or by virtue of a warrant for the collection of money, issued by the comptroller, or by a county treasurer; in any county except New York, Kings, Bronx, Queens, Richmond or Westchester, three per centum upon the sum collected, not exceeding two hundred and fifty dollars, and two per centum upon the residue of the sum collected; and in either of

the counties of New York, Kings, Bronx, Queens, and Richmond five per centum upon the first $1000 collected; two and one-half per centum on the next $9000 collected; and one per centum on all sums over and above $10,000, in the county of Westchester, two and one-half per centum upon the sum collected, not exceeding two hundred and fifty dollars, and one and one-quarter per centum upon the residue of the sum collected; and also, where an execution is stayed after a levy, by order of the court or otherwise, or where a levy is upon a live animal, or speedily perishable property, such additional compensation, for his trouble and expenses in taking care of and preserving the property, as the court or a judge thereof allows. Where a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made, and to the additional compensation, if any, provided for in this subdivision.

8. For advertising real or personal property for sale, by virtue of an execution, warrant of attachment, or other warrant specified in the last preceding subdivision, two dollars, unless it is stayed or settled before sale; and in that case, one dollar.

9. For making duplicate certificates of the sale of real property, by virtue of an execution, twenty-five cents for each folio. For drawing and executing a conveyance, upon a sale of real property, two dollars, except that in the counties of New York, Kings, Bronx, Queens and Richmond it shall be five dollars to be paid by the grantee. The sheriff is also entitled to the printer's fees, as prescribed by law, paid by him for the publication, not more than six weeks, of a notice of the sale of real property, and he may require the party directing the sale to advance the printer's fees, in which case he must repay the same out of the proceeds. Where the notice is published more than six weeks, or the sale is postponed, the expense of continuing the publication, or of publishing the notice of postponement, must be paid by the person requesting it. Where two or more executions against the property of one judgment debtor are in the hands of the sheriff, at the time when the property is first advertised, the sheriff is entitled to printer's fees upon only one execution, and he must elect upon which execution he will receive the same.

10. For returning any mandate, which he is required by law to return, twelve cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be twenty-five cents. For a certified copy of an execution, and of the return of satisfaction thereupon, delivered as prescribed in section 1266 of this act, twenty-five cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be fifty cents.

11. For posting and publishing the notice of sale, selling, and conveying real property, in pursuance of a direction contained in a judgment, the like fees, as for the same services upon the sale of real property by virtue of an execution; but where real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation cannot exceed fifty dollars.

12. For taking a bond for the liberties of the jail, one dollar. For taking any other bond, or any undertaking, which he is authorized to take, fifty cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond it shall be one dollar, and the notary's fees to any affidavit or acknowledgments. For a certified copy of such a bond or undertaking, twenty-five cents; except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be fifty cents.

13. For executing any mandate, requiring him to put a person into possession of real property, other than a warrant specified in subdivision eighteen of this section, and removing the person in possession, one dollar and fifty cents, except that in the counties of New York, Kings, Bronx, Queens and Richmond, it shall be five dollars and the same travel fees as upon the service of a summons.

14. For each person committed to or discharged from prison, in an action or a special proceeding, one dollar, to be paid by the person at whose instance he is imprisoned. For attending before an officer for the purpose of surrendering a prisoner, or receiving into custody a prisoner

surrendered, in exoneration of his bail, including all his services upon such a surrender or receipt, one dollar.

15. For attending a view, two dollars for each day, and for traveling, going and returning, eight cents for each mile.

16. For bringing up a prisoner, upon a writ of habeas corpus to inquire into the cause of detention, one dollar and fifty cents; and for traveling to and from the jail, twelve cents for each mile. For bringing up a prisoner, upon any other writ of habeas corpus, the same fees; and for attending the court, or judge thereupon, one dollar for each day. The sheriff is entitled, in addition to the sums specified in this subdivision, to his actual and necessary expenses.

17. For any services, which may be rendered by a constable, other than those specially provided for in this section, the same fees as are allowed by law to a constable for those services.

18. For executing a warrant, to remove any person from lands, belonging to the people of the State, or to Indians, such a sum as the comptroller audits, and certifies to be a reasonable compensation.

19. For giving notice of any general or special election, to all the officers, to whom he is required by law to give such a notice, one dollar for each town or ward, in addition to the expense of publishing the notices, as required by law; payable from the county treasury.

20. For notifying constables to attend a court, fifty cents for each constable notified.

21. For attending a term of a court, which he is required by law to attend, for each day, three dollars.

From L. 1871, c. 415, § 1; L. 1872, c. 26; 2 R. S. 644, § 38; L. 1850, c. 225, § 1; L. 1847, c. 280, § 77; L. 1860, c. 6, § 1; Co. Proc., §§ 243, 309; L. 1876, c. 431. Am'd by L. 1884, c. 462; L. 1894, c. 407; L. 1907, c. 253; L. 1915, c. 565 (in effect July 1, 1915), which further provides that "all other laws or sections of laws now affecting the counties of New York, Kings, Bronx, Queens and Richmond conflicting or inconsistent herewith are hereby repealed.

§ 3308. The last section qualified.

The last section, except the limitation of amount contained in subdivision eleventh thereof, does not affect any special statutory provision, remaining unrepealed after this title takes effect, relating to the fees and expenses of the sheriff of the city and county of New York, or the sheriff of the county of Kings.

Intended to exclude from the last section L. 1869, c. 569, § 2; L. 1873, c. 166, § 2; L. 1874, c. 192; L. 1876, c. 439, § 2; and L. 1879, c. 414. See L. 1890, c. 523; L. 1892, c. 418.

§ 3309. Id.; how collected.

The fees of a sheriff, upon an execution against property, other than those with respect to which it is specially prescribed by statute, either that they must be paid by a particular person, or that they may be included in the costs of the party in whose favor the execution is issued, must be collected by virtue of the execution, in the same manner as the sum therein directed to be collected.

From 2 R. S. 644, § 38; L. 1871, c. 415, § 1, subd. 4.

§ 3310. Coroner's fees.

A coroner is entitled, for the services specified in this section, to the following fees:

1. For performing any duty of a sheriff, in an action or a special proceeding, in which the sheriff is, for any cause, disqualified, the same fees to which a sheriff is entitled for the same services.

2. For confining a sheriff in a house, by virtue of a mandate, and maintaining him while there, two dollars for each day, to be paid by the sheriff, before he is entitled to be discharged.

From 2 R. S. 647, § 39; see L. 1873, c. 833.

§ 3311. [Am'd, 1887, 1891, 1895, 1915, 1916.] Stenographer's fees.

Except where otherwise agreed, or when special provision is otherwise made by statute, a stenographer is entitled, for a copy fully written out from his stenographic notes of the testimony, or any other proceeding, taken in an action, or a special proceeding in a court of record, or before a judge or justice thereof, and furnished, upon request, to a party or his attorney, to the following fees for each folio: In a trial term of the supreme court, or at a special term of the supreme court in the third, fourth, fifth, sixth, seventh or eighth judicial districts, six cents; in any other court or courts, ten cents; and for the copy of the testimony required to be made in any proceeding for the record [1] of the surrogate's court of the counties of New York, Bronx, Kings and Erie, ten cents; and the surrogate may order that the fees for such record copy be paid out of the estate to which the proceeding relates.

From Co. Proc., § 256; L. 1864, c. 46, § 2; L. 1865, c. 170, § 7; L. 1867, c. 796, § 2; L. 1866, c. 422, § 2; L. 1867, c. 271, § 2; L. 1868, c. 765, § 5; L. 1869, c. 626, § 1; L. 1871, c. 700, § 2; L. 1872, c. 139, § 1; L. 1874, c. 57, § 2. Am'd by L. 1887, c. 399; L. 1891, c. 356; L. 1895, c. 946; L. 1915, c. 198; L. 1916, c. 160 (in effect Sept. 1, 1916).

§ 3312. [Am'd, 1881, 1889, 1896, 1899, 1903, 1904, 1905, 1906, 1909, 1913.] Compensation of deputy sheriffs and constables attending courts.

A constable or a deputy sheriff is entitled, for attending a sitting of a court of record, pursuant to a notice from the sheriff, to a fee for each day's actual attendance, in any county in the state, to be fixed by the board of supervisors thereof, and mileage as allowed by law to trial jurors in courts of record. Such fees must be paid by the county treasurer, upon the production of the certificate of the clerk, stating the number of days that the constable or deputy sheriff attended. If a constable or deputy sheriff attending a sitting of a court of record pursuant to a notice from the sheriff is unable to reach his home upon the day he is excused from attendance, he shall be entitled to compensation for an additional day, and the clerk shall certify accordingly upon satisfactory proof of such fact by affidavit. But the provisions of this section shall not be applicable to the counties of Kings, New York and Erie. All other acts or sections of acts conflicting herewith are hereby repealed.

From 2 R. S. 647, § 40; L. 1860, c. 427; L. 1864, c. 371; L. 1873, c. 165. Am'd by L. 1881, c. 122; L. 1889, c. 48; L. 1896, c. 420; L. 1899, c. 525; L. 1903, c. 487; L. 1904, c. 162; L. 1905, c. 304; L. 1906, c. 117; L. 1909, c. 174; L. 1913, c. 257 (in effect Sept. 1, 1913).

§ 3313. Fees of trial jurors.

A trial juror, in an action or a special proceeding, in a court of record, is entitled, except as otherwise specially prescribed by statute in a particular court, or a particular county, to the following fees: twenty-five cents for each cause in which he is empanelled, to be paid by the party noticing the cause for trial; or, if it is noticed by more than one party, by the party whom the court directs to pay it.

From 2 R. S. 643, § 37.

§ 3314. [Am'd, 1897, 1898, 1899, 1900, 1903, 1904, 1906, 1907, 1913.] Supervisor may make allowance to grand and trial jurors.

In the counties within the city of New York the board of aldermen, and in any other county the board of supervisors, may direct that a sum, not exceeding three dollars in addition to the fees prescribed in the last section, or in any other statutory provision, be allowed to each grand juror, and each trial juror for each day's attendance at a term of a court of record, of civil or criminal jurisdiction, held within their county. If a

[1] So in the original; apparently a mistake for "records."

different rate is not otherwise established as herein provided, each juror is entitled to five cents for each mile necessarily traveled by him in going to and returning from the term; but such board of aldermen or board of supervisors may establish a lower rate. A juror is entitled to mileage for actual travel once in each calendar week during the term, except that in the counties of Queens, Rockland and Orange grand and trial jurors may be paid four cents a mile for each mile necessarily traveled in going to and returning for each day of actual travel during the term in lieu of any other mileage. The sum so established or allowed must be paid by the county treasurer upon the certificate of the clerk of the court, stating the number of days that the juror actually attended, and the number of miles traveled by him in order to attend. If a juror in attendance at a term of a court of record cannot reach his home upon the day he is excused from attendance, he shall be entitled to compensation for an additional day, and the clerk shall certify accordingly upon satisfactory proof of such fact by affidavit. The amount so paid must be raised in the same manner as other county charges are raised.

From 2 R. S. 643, § 37; L. 1866, c. 307. Am'd by L. 1897, c. 23; L. 1898, c. 393; L. 1899, c. 439; L. 1900, c. 585; L. 1903, c. 247; L. 1904, c. 161; L. 1906, cc. 77, 334; L. 1907, c. 148; L. 1913, c. 257 (in effect Sept. 1, 1913).

§ 3315. Id.; extra pay upon protracted trials.

Where the trial, by a jury, of an issue of fact, in either a civil or a criminal action or special proceeding, in a court of record, occupies more than thirty days, the court, by an order entered in the minutes, may fix and allow, to each juror, such an extra compensation as it deems reasonable, for his services thereupon; the amount of which compensation, together with the expenses, actually and necessarily incurred, for food for the jurors during the trial, is a county charge.

From L. 1875, c. 335.

§ 3316. Jurors' fees in special proceedings.

A trial juror, sworn in a special proceeding, before a judge of a court of record; or upon a writ of inquiry; or upon a trial, before a sheriff, of a claim to personal property, seized by virtue of a warrant of attachment or an execution; is entitled to twenty-five cents, to be paid by the person at whose instance the jury is empanelled.

From 2 R. S. 643, § 37.

§ 3317. [Am'd, 1900, 1914.] Fees of printers.

Except as otherwise specially prescribed by law, the proprietor of a newspaper is entitled, for publishing summons, notice, order, citation or other advertisement, required by law to be published, other than the session laws for each folio, to seventy-five cents for the first insertion, and fifty cents for each subsequent insertion. In counties containing wholly or partially cities of the first class, except in the city of New York, the proprietor of a newspaper is entitled for publishing such notices, matters and advertisements aforesaid, other than the session laws, for each folio, to one dollar for the first insertion, and seventy-five cents for each subsequent insertion. And in the city of New York to twelve cents per agate line of thirty ems for each insertion. If such notices, matters and advertisements aforesaid, other than the session laws, are printed in type other than agate, the proprietor of a newpaper shall be entitled to the number of lines such notices, matters and advertisements would occupy if set in agate thirty ems to the line. The compensation for publishing the session laws must be fixed by the board of supervisors at not more than fifty cents for each folio.

From L. 1859, c. 252; L. 1869, c. 831; L. 1874, c. 416. Am'd by L. 1900, c. 407; L. 1914, c. 185 (in effect Sept. 1, 1914).

§ 3318. Witnesses' fees generally.

A witness in an action or a special proceeding, attending before a court of record, or a judge thereof, is entitled, except where another fee is specially prescribed by law, to fifty cents for each

day's attendance; and, if he resides more than three miles from the place of attendance, to eight cents for each mile, going to the place of attendance.

From L. 1840, c. 386, § 8.

§ 3319. Id.] on deposition to be used in another state.

A witness, attending before a commissioner or an officer, authorized to take his deposition to be used without the State, in a case other than one specified in section 3327 of this act, is entitled to two dollars for each day's actual attendance, and to eight cents for each mile, going to the place of attendance.

From 2 R. S. 398, § 31; L. 1867, c. 68, § 2.

§ 3320. [Am'd, 1892, 1899, 1902, 1904, 1909, 1915.] Receiver's commissions; cost of bonds; trustee's commissions.

A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his necessary expenses, to such commissions, not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom, he is appointed allows. But if in any case the commissions of a temporary or permanent receiver, so computed, shall not amount to one hundred dollars, said court or judge may in its or his discretion, allow said receiver such a sum, not exceeding one hundred dollars, for his commissions as shall be commensurate with the services rendered by said receiver. Any receiver, assignee, guardian, trustee, committee, executor, administrator or person appointed under section 111 of the Real Property law or under section 20 of the Personal Property law required by law to give a bond as such may include, as a part of his necessary expenses, such reasonable sum, not exceeding one per centum per annum upon the amount of such bond paid his surety thereon, as such court or judge allows. Except as otherwise prescribed in regard to a testamentary trustee, a trustee of an express trust is entitled, and two or more trustees of such a trust are entitled, to be apportioned between or among them according to the services rendered by them respectively, as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out all sums of principal not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding ten thousand dollars, at the rate of two and one-half per centum. For receiving and paying out all sums of principal above eleven thousand dollars, at the rate of one per centum. And for receiving and paying out income in each year, at the like rates. In all cases a just and reasonable allowance must be made for the necessary expenses actually paid by such trustee or trustees. If the value of the principal of the trust estate or fund equals or exceeds one hundred thousand dollars, each such trustee is entitled to the full commission on principal, and on income for each year, to which a sole trustee is entitled, unless the trustees are more than three, in which case three full commissions at the rates aforesaid must be apportioned between or among them according to the services rendered by them respectively. If the instrument creating the trust provides specific compensation for the services of the trustee or trustees, no other compensation for such services shall be allowed unless the trustee or trustees shall, before receiving any compensation for such services, by a written instrument duly acknowledged, renounce such specific compensation.

From Co. Proc., § 244, subd. 4. Am'd by L. 1892, c. 465; L. 1899, c. 94; L. 1902, c. 404; L. 1904, c. 755; L. 1909, c. 65; L. 1915, c. 62? (in effect May 14, 1915)

§ 3321. Fees of county treasurer and chamberlain of New York.

A county treasurer, or, in the city and county of New York, the chamberlain, is entitled, for the services specified in this section, to the following fees:

For receiving money paid into court, one-half of one per centum, upon the sum so received.

For paying out the same, one-half of one per centum, upon the sum so paid out.

For investing money, pursuant to the direction of a court, one-half of one per centum upon the sum invested, not exceeding two hundred dollars, and one-quarter of one per centum upon the excess, over two hundred dollars.

For receiving the interest upon an investment, and paying the same to the person entitled thereto, one-half of one per centum upon the interest so received and paid.

From 2 R. S. 689, § 30; L. 1849, c. 367.

§ 3322. [Am'd, 1904, 1910.] Fees of a justice of the peace.

A justice of the peace is entitled, for the services specified in this section, to the following fees:

1. In an action brought before a justice of the peace:

For a summons, twenty-five cents.

For an order of arrest, twenty-five cents.

For a warrant of attachment, twenty-five cents.

For a requisition in an action for a chattel, twenty-five cents.

For a subpoena, including all the names inserted therein, twenty-five cents.

For the acknowledgment of a power of attorney, twenty-five cents.

For taking an affidavit, or administering an oath, ten cents.

For drawing an affidavit, application, or notice, required by statute, five cents for each folio.

For drawing a bond or an undertaking, twenty-five cents.

For hearing an application for a commission to examine one or more witnesses, fifty cents.

For an order for such a commission, and attending, settling, and certifying interrogatories, fifty cents.

For hearing an application to discharge a defendant from arrest, or to vacate or modify a warrant of attachment, or increase the plaintiff's security thereupon, fifty cents.

For an adjournment, except where it is made by the justice upon his own motion, twenty-five cents.

For a venire, twenty-five cents.

For empanelling and swearing a jury, twenty-five cents.

For hearing the plaintiff's evidence, where the defendant does not appear twenty-five cents.

For the trial of a demurrer, twenty-five cents.

For the trial of an issue of fact, where the defendant appears, one dollar and fifty cents for each day actually spent in the trial.

For receiving and entering the verdict of a jury, twenty-five cents.

For entering judgment, twenty-five cents.

For filing each paper required by statute to be filed, five cents.

For a transcript of a judgment, twenty-five cents.

For a copy of any paper for which a fee is not expressly prescribed by law, six cents for each folio.

For an execution, or the renewal of an execution, twenty-five cents.

For making a return upon an appeal from a judgment, two dollars.

For an order, directing an action or a special proceeding to be continued before another justice, twenty-five cents.

For services when associated with another justice, in any case where a fee therefor is not expressly prescribed by law, for each day actually spent, two dollars.

2. In a special proceeding, or an action not brought before a justice of the peace:

For a warrant, in a case where a fee therefor is not expressly prescribed by law, twenty-five cents.

For a warrant for the apprehension of a person charged with being the father of a bastard, fifty cents; for indorsing a warrant, issued from another county, twenty-five cents.

For services when associated with another justice, in any case where a fee therefor is not expressly prescribed by law, for each day actually spent, two dollars.

For a precept or other mandate, whereby a special proceeding is commenced, in a case where a fee therefor is not specially prescribed by law, twenty-five cents.

For a view of real property, in a case where it is required by law, fifty cents.

For a warrant of attachment to arrest a delinquent juror or witness, twenty-five cents.

For drawing, signing, and depositing with the clerk, a minute or record of conviction of such a juror or witness, or of any person for contempt, in any case where a fee therefor is not specially prescribed by law, fifty cents.

For an execution upon such a conviction before him, twenty-five cents.

For drawing, copying, and certifying a bond, an undertaking, a recognizance or other written security, and filing the same with the county clerk, or other officer with whom it must be filed, twenty-five cents.

For a warrant of commitment for any cause, twenty-five cents.

For a subpoena, including all the names inserted therein, twenty-five cents.

For a precept to notify a jury, fifty cents.

For empanelling and swearing a jury, twenty-five cents; except in proceedings to alter or lay out a highway, in which case he is entitled to two dollars.

For hearing the matter, concerning which a jury is called, seventy-five cents for each day actually spent.

For receiving and entering the verdict of the jury, and the order, if any, thereupon, twenty-five cents.

For any service for which a fee is not expressly allowed by this subdivision, and for which, if rendered in an action before a justice, a fee is allowed by the first subdivision of this section, the fee allowed in such an action for the same service.

For taking the deposition of a witness, upon an order made, or commission issued, by a court of record of the state, or a court in another state or a territory, or a foreign country, ten cents for each folio.

For making the necessary return and certificate thereto, fifty cents.

For taking an affidavit or administering an oath, ten cents.

From 2 R. S. 264, § 226; L. 1831, c. 287; L. 1857, c. 775; L. 1860, c. 181, § 13; Id., c. 493; L. 1866, c. 692; Co. Proc., § 53; L. 1841, c. 141; L. 1875, c. 394; 2 R. S. 687, § 29; L. 1861, c. 11; L. 1873, c. 146 and c. 315. Am'd by L. 1904, c. 282; L. 1910, c. 324 (in effect Sept. 1, 1910).

§ 3323. [Am'd, 1890.] Constable's fees.

A constable is entitled, for the services specified in this section, to the following fees:

1. In an action brought before a justice of the peace, or in a justices' court of a city.

For serving a summons, twenty-five cents.

For serving a summons and executing an order of arrest, one dollar.

For serving a summons and levying a warrant of attachment, one dollar.

For serving a summons and affidavit, and executing a requisition, in an action for a chattel, one dollar.

For serving an order, directing the action to be continued before a justice, other than the one before whom it is pending, and for attending before the latter, fifty cents, and fifty cents in addition if he so attends with a person in his custody.

For collecting money by virtue of an execution, for every dollar collected, to the amount of fifty dollars, five cents; for every dollar collected over fifty dollars, two and one-half cents. Where a judgment or an execution is settled after a levy, the constable is entitled to poundage upon the sum at which the settlement is made, not exceeding the value of the property levied upon.

For each mile necessarily travelled, going and returning, to serve a summons or to serve or execute any other mandate, except a venire, the distance to be computed from the place of abode of the person served, or the place where it is served, to the place where it is returnable, ten cents; but where two or more mandates in one action are served or executed upon one journey, or where a mandate is served upon or executed against two or more persons in one action, he is entitled, in all, to only ten cents for each mile necessarily travelled.

For notifying the plaintiff of the execution of an order of arrest, twenty-five cents; and for going to the plaintiff's residence, or, if he is found elsewhere, to the place where he is found, to serve such a notice, for each mile travelled, going and returning, ten cents.

For subpoenaing each witness, not exceeding four, twenty-five cents.

For notifying the jurors to attend a trial, one dollar and fifty cents.

For taking charge of a jury during their deliberations, fifty cents.

Where witnesses, not exceeding four, are subpoenaed by any person other than a constable, the fee therefor is ten cents each.

2. In a special proceeding.

For notifying jurors to attend to assess damages, in proceedings relating to highways, two dollars.

For notifying jurors to attend in any other case, unless a fee therefor is specially prescribed by law, for each person notified, ten cents; and for each mile actually and necessarily travelled, going from and returning to his place of residence, ten cents.

For serving a precept or other mandate, by which the special proceeding is commenced, twenty-five cents.

For serving a warrant, in any case where a fee therefor is not specially prescribed by law, fifty cents.

For serving an order, directing the special proceeding to be continued before a justice other than the one before whom it is pending, and for attending before the latter, with or without a person in his custody, one dollar.

For arresting and committing any person pursuant to process, one dollar.

For subpoenaing each witness, not exceeding four, twenty-five cents.

For each mile necessarily travelled, going and returning, to serve or execute a mandate, the distance to be computed from the place where it is served or executed, to the place where it is returnable, unless a different rate of travel fees upon the service or execution thereof is specially prescribed by statute, ten cents. Where two or more mandates are served or executed in one special proceeding, the limitation upon the amount of travel fees specified in the last preceding subdivision applies.

From 2 R. S. 265, § 228; L. 1866, c. 692; L. 1869, c. 820; L. 1875, c. 334; L. 1873, c. 315, § 6. Am'd by L. 1890, c. 21.

§ 3324. Id.; affidavit upon claim for travel fees.

A constable, who charges any travelling fees, must show, by affidavit, that the travel was necessary to perform the service with respect to which it is charged; that no more miles are charged for, than were actually and in good faith travelled for that purpose; that he had at the time no other official or private business upon the route so travelled; and that the travelling fees are charged upon one mandate only, which must be attached to or described in the affidavit. The justice taxing the fees must be satisfied that the miles charged for were actually and necessarily travelled, as stated in the affidavit.

From L. 1869, c. 820, § 2.

§ 3325. Justice's court, fees upon a commission.

A party recovering costs in an action before a justice of the peace, in whose behalf a commission has been issued, and who introduces in evidence a deposition taken thereunder, is entitled to recover his actual disbursements thereupon, not exceeding the following sums; commissioner's fees for taking and returning testimony, one dollar; each subpoena issued, or oath administered, by the commissioner, six cents; expense of serving each subpoena, twenty-five cents; each witness's fees for each day's attendance before the commissioner, twenty-five cents; postage for sending and returning the commission and papers annexed thereto, one dollar.

From L. 1841, c. 138, § 3.

§ 3326. Id.; jurors' fees.

Except as otherwise specially prescribed by law, a person, notified to attend as a juror, is entitled to twenty-five cents, for attending and serving, upon the trial of an action or the hearing of a special proceeding, before a justice of the peace; and to ten cents for attending to serve, where he is not sworn.

From 2 R. S. 265, § 228; L. 1866, c. 692.

§ 3327. Id.; witnesses' fees.

A witness is entitled to twenty-five cents, for each day's actual attendance, before a justice of the peace, in an action or a special proceeding, or before a commissioner appointed by a justice of the peace, or before a justice of the peace taking a deposition to be used in a court, not of record, of another state, or a territory of the United States.

From 2 R. S. 265, § 228; L. 1866, c. 692, § 10.

§ 3328. Id.; fees to be paid before services rendered.

A justice of the peace, or a constable, juror, or witness, before a justice of the peace, is not obliged to render any service specified in this title, without the pevious payment or tender of his fee therefor.

See 2 R. S. 650, § 4.

§ 3329. Id.; by whom fees to be paid.

In an action before a justice of the peace, if any services are rendered for a party, and he neglects to pay the fees allowed therefor by law, the other party may pay those fees, and the amount thereof must be taxed as part of his costs, if he recovers costs.

New.

§ 3330. Certain special provisions excepted from this title.

The allowance of a fee, by this title, does not apply to a case, where special provision is otherwise made by statute for compensation for a particular service.

New.

§ 3331. Provision as to change in fees.

Where an officer has, when this title takes effect, commenced the performance of a service, for which a fee is allowed by the statutes heretofore in force, he is entitled to the fee so allowed, for the completion of that service, and he is not entitled to the fee for the same, or a corresponding service, allowed by this title.

New.

§ 3331a. [Added, 1909.] Presentation of claims by jurors and disposition of unclaimed fees.

All jurors including those in a criminal action or special proceeding in a court or before an officer duly summoned and who served as provided for by the laws of this state and are entitled to payment therefor, must present their claims to the proper official designated by law for the payment of jurors' fees, on or before the thirty-first day of December of the year succeeding or following the year in which such services were rendered and performed, and failure to comply with this provision shall be a forfeiture of the payment for such claims or services thereafter. All notices issued requiring jurors to attend at a term of court or at a meeting of the grand jury, shall have printed thereon the foregoing provision relating to forfeiture of fees. All moneys or jurors' fees forfeited by the provisions of this section shall be transferred and applied to the fund of such county or city, from which they were paid, on or before the first day of March, in each year.

From L. 1899, c. 150, §§ 1–3. Added here by L. 1909, c. 65 (in effect Feb. 17, 1909).

§ 3332. This title applies to civil cases only.

Except as otherwise expressly prescribed therein, this title does not apply to a service rendered in a criminal action or special proceeding, in a court, or before an officer.

New.

CHAPTER XXII.

Definitions and Regulations Concerning the Construction, Effect, and Application of this Act.

TITLE I.— General Definitions, and Rules of Construction.
TITLE II.— Provisions Regulating the Effect and Application of this Act.

TITLE I.

General definitions, and rules of construction.

Sec. 3333. Definition of "action."
3334. Id.; "special proceeding."
3335. Division of actions into civil and criminal.
3336. Definition of "criminal action."
3337. Id.; "civil action."
3338. Parties to a civil action.
3339. Only one form of civil action.
3340. Rule of construction as to publication, etc., in certain cases.
3341. Id.; as to certain special provisions relating to New-York city.
3342. Id.; as to county court.
3343. Miscellaneous general definitions and rules of construction.

§ 3333. Definition of "action."

The word "action", as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

From Co. Proc., § 2.

§ 3334. Id.; "special proceeding".

Every other prosecution by a party, for either of the purposes specified in the last section, is a special proceeding.

From Id., § 3.

§ 3335. Division of actions into civil and criminal.

Actions are of two kinds:

1. Civil.
2. Criminal.

From Id., § 4.

§ 3336. Definition of "criminal action".

A criminal action is prosecuted by the people of the State, as a party, against a person charged with a public offence, for the punishment thereof.

From Id., § 5.

§ 3337. Id.; "civil action".

Every other action is a civil action.

From Id., § 6.

§ 3338. Parties to a civil action.

The party prosecuting a civil action is styled the plaintiff; the adverse party is styled the defendant.

From Id., § 70.

§ 3339. Only one form of civil action.

There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished.

From Co. Proc., § 69.

§ 3340. Rule of construction as to publication, etc., in certain cases.

Each provision of this act, requiring the publication of a summons, notice, or other paper, in one or more newspapers, or authorizing or requiring a court, or a judge, to designate one or more newspapers, in which such a publication must be made, or requiring the posting of a notice or other paper, is to be construed as not affecting any special provision of the statutes, remaining unrepealed after the former provision takes effect, prescribing one or more particular newspapers, in which such a publication must or may be made, or one or more particular places, in which notices or other legal papers must or may be posted, in a particular locality, or in a particular case.

From L. 1876, c. 449, § 9.

§ 3341. Id.; as to certain special provisions relating to New-York city.

Each provision of this act is to be construed as not affecting any special provision of the statutes, remaining unrepealed after the former provision takes effect, which is applicable exclusively to an action against the mayor, aldermen, and commonalty of the city of New-York, including the recovery, entry, and collection of a judgment in such an action.

See L. 1876, c. 449, § 10; L. 1865, c. 646, §§ 4, 5; L. 1866, c. 876, § 10; L. 1867, c. 586, § 6; L. 1868, c. 853, § 8; L. 1869, c. 876, § 14; L. 1870, c. 382, § 2; L. 1871, c. 583, § 5; L. 1872, c. 514, § 1.

§ 3342. Id.; as to county court.

Each provision of this act conferring power upon, or authorizing a proceeding to be taken at a general, special, or trial term, which is applicable to a county court, is to be construed as applying to any term of the county court, held pursuant to an appointment made as prescribed by law.

From L. 1876, c. 449, § 10.

§ 3343. [Am'd, 1900.] Miscellaneous general definitions and rules of construction.

In construing this act, the following rules must be observed, except where a contrary intent is expressly declared in the provision to be construed, or plainly apparent from the context thereof:

1. [Subd. 1 repealed by L. 1895, c. 946 (in effect Jan. 1, 1896).]

2. The word, "mandate", includes a writ, process, or other written direction, issued pursuant to law, out of a court, or made pursuant to law, by a court, or a judge, or a person acting as a judicial officer, and commanding a court, board, or other body, or an officer, or other person, named or otherwise designated therein, to do, or to refrain from doing, an act therein specified.

3. The word, "judge", includes a justice, surrogate, recorder, justice of the peace, or other judicial officer, authorized or required to act, or prohibited from acting, in or with respect to the matter or thing, referred to in the provision wherein that word is used.

4. The word, "clerk", signifies the clerk of the court, wherein the action or special proceeding is brought, or wherein, or by whose authority, the act is to be done, which is referred to in the provision in which it is used. If the action or special proceeding is brought, or the act is to be done, in or by the authority of the supreme court, it signifies the clerk of the county wherein the action or special proceeding is triable, or the act is to be done.

5. The word, "report", when used in connection with a trial, or other inquiry, or a judgment, means a referee's report; and the word, "decision", when used in the same connection, means the decision of the court upon a hearing, or the trial of an issue, before the court, without a jury.

6, 7, 8. [Repealed by Statutory Construction Law,[1] L. 1892, c. 677.]

9. A "personal injury" includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault, battery, false imprisonment, or other actionable injury to the person either of the plaintiff, or of another.

10. An "injury to property" is an actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract.

11. The word, "affidavit", includes a verified pleading in an action, or a verified petition or answer in a special proceeding.

12. A warrant of attachment against property is said to be "annulled", when the action, in which it was granted, abates or is discontinued; or a final judgment, rendered therein in favor of the plaintiff is fully paid; or a final judgment is rendered therein in favor of the defendant. But, in the case last specified, a stay of proceedings suspends the effect of the annulment, and the reversal or vacating of the judgment revives the warrant.

13. The term, "judgment creditor", signifies the person who is entitled to collect, or otherwise enforce, in his own right, a judgment for a sum of money, or directing the payment of a sum of money.

14. A "judgment creditor's action" is an action brought as prescribed in article first of title fourth of chapter fifteenth of this act, or any other action, brought by a judgment creditor to aid the collection of a judgment for a sum of money, or directing the payment of a sum of money.

15. [Repealed by Statutory Construction Law,[1] L. 1892, c. 677.]

16. A "distinct parcel" of real property is a part of the property which is or may be set off by boundary lines, as distinguished from an undivided share or interest therein.

17. [Repealed by Statutory Construction Law,[1] L. 1892, c. 677.]

18. A "domestic corporation" is a corporation created by or under the laws of the State;[1] or located in the State, and created by or under the laws of the United States, or by or pursuant to the laws, in force in the colony of New-York, before the 19th day of April, in the year 1775. Every other corporation is a "foreign corporation".

19. The terms, "trial juror", and "trial jury", are respectively equivalent to the terms, "petit juror", and "petit jury", as used in the constitution and laws of the State. The word, "notify", as used, with respect to procuring the attendance of a juror, is equivalent to the word, "summon", as used in the like connection, in the same constitution and laws.

20. The word, "action", refers to a civil action; the word "judgment", to a judgment in such an action; the term, "special

[1] See note at end of this section.

proceeding", to a civil special proceeding; the word, "order", to an order made in such an action or special proceeding; the words, "an action of ejectment", to an action to recover the immediate possession of real property.

21–24. [Repealed by Statutory Construction Law,[1] L. 1892, c. 677.]

From L. 1876, c. 449, § 2. Am'd by L. 1909, c. 65 (in effect Feb. 17, 1909).

[1] The subdivisions of this section which were repealed by the Statutory Construction Law were so stricken out because similar provisions were incorporated into that law. Thus, subdivisions 6, 7, 8 of this section defined "real and personal property" (now defined in §§ 39, 40 of the General Construction Law). Subd. 15 defined "lunacy" and "lunatic" (now defined in § 28 of the Gen. Constr'n Law). Subd. 17 defined "territory" (now defined in § 49 of the Gen. Constr'n Law). Subds. 21 to 24 defined "public holiday," the words "now," "heretofore," "hereafter" (as found in a statute), the word "folio," and also provided that an instrument required to be written or printed might be partly written and partly printed. §§ 21, 23, 24, 25, 34, 56 of the Gen. Constr'n Law contain similar definitions and provisions. See the General Construction Law in Appendix I, post.

By the General Corporation Law, art. 1, § 3, subd. 5, a domestic corporation is defined as follows: "A domestic corporation is a corporation incorporated by or under the laws of the State or colony of New York. Every corporation which is not a domestic corporation is a foreign corporation, except as provided by the Code of Civil Procedure for the purpose of construing such Code."

TITLE II.

Provisions regulating the effect and application of this act.

Sec. 3344. Short title of this act.
3345. Rule of strict construction not applicable thereto.
3346. Punishment of crimes and misdemeanors created thereby.
3347. Application of certain portions thereof, regulated and qualified.
3348. Id.; what deemed commencement of action, etc.
3349. Id.; when proceedings to be under former statutes.
3350. Effect of this act upon trial jurors and juries, in criminal causes.
3351. Id.; upon grand jurors and juries.
3352. Id.; upon proceedings taken, or rights accrued, etc., under former statutes.
3353. Id.; upon former appointment of terms.
3354. Id.; upon officers and offices.
3355. When this act deemed to have been passed, etc.
3356. When this act takes effect.

§ 3344. Short title of this act.

This act constitutes a portion of the New Revision of the Statutes. It may be styled, in any act of the legislature or proceeding in a court of justice, or wherever it is otherwise referred to, "The Code of Civil Procedure".

From L. 1876, c. 449, § 1.

§ 3345. Rule of strict construction not applicable thereto.

The rule of the common law, that a statute in derogation of the common law is strictly construed, does not apply to this act.

From Co. Proc., § 467.

§ 3346. Punishment of crimes and misdemeanors created thereby.

Where it is prescribed, in a provision of this act, that a person doing or omitting to do any act is guilty of a particular crime, or, generally, of a misdemeanor, he shall be punished therefor in the manner and to the extent, prescribed by the statutes remaining unrepealed after the provision in question takes effect, for the punishment of the crime so specified; or for the punishment of a misdemeanor, the punishment of which is not specially prescribed in the statute defining it.

New.

§ 3347. [Am'd, 1881, 1882, 1883, 1893, 1894, 1895, 1909, 1913.] Application of certain portions thereof regulated and qualified.

The application and effect of certain portions of this act are declared and regulated as follows: except that, where a particular provision, included within a chapter or a portion of a chapter, specified in a subdivision of this section, expressly designates the courts, persons, or proceedings, affected thereby, that provision is deemed excluded from the application and effect, prescribed in the subdivision:

1. In chapter second, the prisoners referred to are civil prisoners only, except that article third of title second thereof applies to all prisoners, civil or criminal.

2. In chapter third, sections 303, 304, 305, and 306 apply to trial jurors upon the trial of an indictment or other criminal cause; as prescribed in subdivision seventh of this section, with respect to the application of titles third and fourth of chapter tenth, and as specified in the next two sections.

3. In chapter fifth, sections 446, 449, 450, 454, 455, and 458 to 468, both inclusive, and in chapter 6th, section 532, apply to an action commenced, in any court of the State.

4. The remainder of chapters fifth and sixth, apply only to an action commenced in a court of record.

5. Chapter seventh, excluding articles first and second of title fourth thereof, applies only to an action, in one of the courts specified in subdivision fourth of this section, in which an application for an order of arrest, an injunction order, or a warrant of attachment against property, is made, on or after the first day of September, 1877. Articles first and second of title fourth of that chapter apply only to proceedings taken, in one of those courts, on or after that date.

6. Chapter eight applies only to the proceedings taken on or after the first day of September, 1877, in an action or special proceeding in one of the courts specified in subdivision fourth of this section; except that sections 721, 722, 724 to 727, both inclusive, and 817 to 819, both inclusive, apply to all courts of record; sections 728, 729, 730, 749, 787, 788, 810 to 816, both inclusive, and 826, to proceedings, taken on or after that day, in any court or before any officer or body; and sections 723, 764, 765, 785, 789, 790, and 825, to all courts.

7. In chapter tenth, titles first, second, and sixth, and article second of title fifth, apply only to proceedings taken, on or after the first day of September, 1877, in one of the courts specified in subdivision fourth of this section. Article third of title third and article first of title fifth, of that chapter apply only to jurors drawn for, and juries formed at, a term of a court, commencing not less than twenty days after the first day of May, 1877. Subject to that qualification, they apply to jurors selected under the statutes, remaining unrepealed after that day, and the lists and ballots prepared accordingly; until new jurors are selected, and new lists and ballots are prepared, as prescribed in those titles. The same portions of chapter tenth, excluding article third of title third, apply equally to a criminal and a civil action or special proceeding, and to a court of criminal and a court of civil jurisdiction. Article third of title third of this act and article 16 of the Judiciary Law do not affect any special provision of law, remaining unrepealed after the first day of May, 1877, whereby trial jurors are directed to be procured, for a particular court of record, from a particular locality; or whereby a county is divided into two or more jury districts, and the selecting, drawing, summoning, or attendance of jurors from the particular locality, or the different jury districts, is regulated. Each of those provisions becomes applicable to and affects the selecting, drawing, notifying, or attendance of jurors, as prescribed in those articles, in like manner as they applied to and affected the statutes previously in force, upon the same subject. So much of the provisions of articles 17 and 18 of the Judiciary Law, as relates to the remission or enforcement of a fine imposed upon a trial juror, applies to a fine imposed upon a grand juror, as prescribed in the statutes remaining unrepealed after the first day of May, 1877.

8. In chapter eleventh, articles first and second of title first, and the whole of title third, apply only to proceedings in one of the courts specified in subdivision fourth of this section, taken on or after the first day of September, 1877. But where an action has

been commenced in either of those courts, before that date, a judgment by default must be taken therein, as prescribed by the statutes in force on the thirty-first day of August, 1877.

9. Chapter twelfth does not affect the statutes remaining unrepealed after the first day of September, 1877, touching the review of proceedings in a criminal cause.

10. Chapter thirteenth applies only to an execution issued, on or after the first day of September, 1877, out of a court of record, other than an execution issued out of such a court, and directed, pursuant to law, to a constable or marshal; and to sales and other proceedings, by virtue of an execution directed to a sheriff, and delivered to him, after that date. Sections 1413 and 1414, and sections 1417 to 1427, both inclusive, apply only to a case where such an execution is issued out of one of the courts specified in subdivision fourth of this section; or where a warrant of attachment against property is granted on or after that date, in an action brought in one of those courts. Title third of that chapter applies only to an execution, issued upon a judgment rendered in one of those courts.

11. [Am'd, 1893.] So much of chapters fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth, as regulates the proceedings to be taken in an action or special proceeding, and the effect thereof, applies only to an action or a special proceeding commenced on or after the first day of September, 1880. And all appeals taken from any order, sentence, decree or determination of a surrogate's court made or entered in such court on or after the first day of September, 1880, in any matter or proceeding pending or undetermined in such court on the first day of September, 1880, and all appeals to the court of appeals from any order or judgment of the supreme court affirming, reversing or modifying any such order, sentence, decree or determination of a surrogate's court shall be taken and perfected, heard and decided in conformity to the laws and practice regulating appeals from orders, sentences and decrees of surrogate's court, and the hearing and decision thereof, in force in this State on the thirtieth day of April, 1877, and all appeals from any order, sentence, decree or determination of such court brought in conformity thereto since the first day of September, 1880, are hereby declared to be valid and effectual, except that sections 1670 to 1685, both inclusive, apply also to the proceedings therein specified, taken, after that date, in an action theretofore commenced, or upon a judgment theretofore rendered, and section 1674 applies to a notice of pendency of action theretofore or thereafter filed; sections 1881 to 1892, both inclusive, do not apply to an action upon any bond therein specified, where an order, allowing any person to prosecute the bond in the name of the people, has been duly made before that date and is then in force, in which case future actions upon the same bond are regulated by the laws in force on the day before that date, notwithstanding the repeal thereof; sections 2253 to 2265, both inclusive, apply also where a final determination has been made before the first day of September, 1880, in proceedings taken under any statute superseded by the title containing those sections, and to the process issued thereupon; sections 2320 to 2344, both inclusive, apply also to proceedings taken before that date, under any statute superseded by the title containing them, whether a committee has or has not been appointed; section 2537 applies also to every payment or deposit therein specified made on or after

the first day of September, 1880; section 2756, except the words "upon the hearing before the surrogate" applies to actions heretofore or thereafter commenced pursuant to article second of title three of chapter fifteen; and sections 2798 to 2801, both inclusive, apply also to a case, where a decree for the sale or other disposition of the real property of a decedent, has been duly made, before that date, in a surrogate's court.

12. So much of chapters nineteenth and twentieth, as relates to the jurisdiction of the several courts therein specified, applies only to an action or special proceeding commenced on or after the first day of September, 1880.

13. In chapter twenty-first, titles first, second, and third apply only to an action in one of the courts specified in subdivision fourth of this section.

14. [**Added, 1894.**] The disqualification of jurors, as provided in section 1166 of this act, shall apply to all courts.

From L. 1876, c. 449, § 5; L. 1878, c. 323. Am'd by L. 1881, c. 681; L. 1882, c. 399; L. 1883, c. 229; L. 1893, c. 642; L. 1894, c. 725; L. 1895, c. 946; L. 1913, c. 485 (in effect Sept. 1, 1913).

§ 3348. Id.; what deemed commencement of action, etc.

Where a provision of this act is made applicable by the last section, to an action or a special proceeding commenced on or after a day therein specified, if, before that date, a summons in an action, or a citation issued from a surrogate's court, has been served upon one or more, but not upon all, of the persons to be served; or an order for the service of a summons as prescribed in article second of title first of chapter fifth of this act has been made; or, in a special proceeding, elsewhere than in a surrogate's court, the petition or other paper, upon which the first order, process, or other mandate may be made or issued, has not been presented, the action or special proceeding is not deemed to have been commenced within the meaning of that section.

See L. 1876, c. 449, § 5, subd. 4.

§ 3349. Id.; when proceedings to be under former statutes.

Where any provision of this act is made applicable to future proceedings in an action or special proceeding, the proceedings therein, until the provision in question becomes applicable, are governed by, and must be conducted according to the laws in force on the day before the provision takes effect, except as otherwise prescribed in subdivision seventh of the last section but one.

New.

§ 3350. Effect of this act, upon trial jurors and juries, in criminal causes.

A jury, for the trial of an indictment or other criminal cause, at a term of a court of record, commencing on or after the twenty-first day of May, 1877, must be procured from the trial jurors selected, drawn, and notified, as prescribed in this act, for the term of the court at which it is triable, including the talesmen or additional jurors, procured as prescribed therein; and the same must be tried by the jury so formed. But the statutes remaining unrepealed after the first day of September, 1877, relating to challenges or disqualifications of petit jurors in a criminal cause, or prescribing the cases where talesmen or additional petit jurors must be summoned in a criminal cause, remain unaffected by this

act, and are applicable to the proceedings taken as prescribed in this act, and to the trial jurors therein specified.

See L. 1876, c. 449, § 5, subd. 7.

§ 3351. Id.; upon grand jurors and juries.

This act does not affect any provision of the statutes, remaining unrepealed after the first day of September, 1877, relating to grand jurors or grand juries; except as follows:

1. A fine imposed, after the first day of September, 1877, upon a person drawn as a grand juror, and duly summoned to attend a term of a court of record as a grand juror, as prescribed in those statutes, must be imposed as prescribed in article fourth of title third of chapter tenth of this act; and sections 1073 to 1077 of this act, both inclusive, apply to such a person, as if he had been drawn, and notified to attend, as a trial juror.

2. Where a provision of those statutes refers to the lists of petit jurors, the ballots containing their names, the box or boxes in which those ballots are deposited or contained, the selecting, drawing, summoning, or empanelling of petit jurors, the imposition of a fine upon a petit juror, or the enforcement, reduction, or remission thereof, it is deemed to refer to the same subject, as provided for in this act, in like manner as it refers to those statutes.

See 2 R. S. 483, 484, §§ 16-21; Id., 722, § 13.

§ 3352. Id.; upon proceedings taken, or rights accrued, etc., under former statutes.

Nothing contained in any provision of this act, other than in chapter fourth, renders ineffectual, or otherwise impairs, any proceeding in an action or a special proceeding, had or taken, pursuant to law, or any other lawful act done, or right, defence, or limitation, lawfully accrued or established, before the provision in question takes effect; unless the contrary is expressly declared in the provision in question. As far as it may be necessary, for the purpose of avoiding such a result, or carrying into effect such a proceeding or other act, or enforcing or protecting such a right, defence, or limitation, the statutes in force on the day before the provision takes effect, are deemed to remain in force, notwithstanding the repeal thereof.

See L. 1876, c. 449, § 6, subd. 1.

§ 3353. Id.; upon former appointment of terms.

This act does not affect the appointment of a term, or the designation of one or more judges to hold a term, made pursuant to the statutes in force on the thirty-first day of August, 1877, until new terms are appointed, or one or more judges are newly designated, as prescribed in this act.

See Id., § 13.

§ 3354. Id.; upon officers and offices.

This act does not create a vacancy in any office or employment, designated or referred to therein, by the title or description thereof, contained in the statutes in force on the day before the provision referring thereto takes effect, or by another title or description; nor does it affect any provision of those statutes, relating to the amount, or the time or the mode of payment, of the compensation of an officer or employee, so designated or referred to, who is in office or employed on that day: except that where the tenure of his office or employment is not prescribed in this act, he may be removed at pleasure by the court, officer, or officers,

authorized by this act to appoint a person to discharge the same duties. Until he is removed, or his office or place becomes otherwise vacant, the provisions of this act apply to him, and to the discharge of his duties. The court, officer, or officers, authorized by this act to appoint a person to an office or employment, may from time to time fill a vacancy therein.

See Id., § 14.

§ 3355. [Am'd, 1882.] When this act deemed to have been passed, etc.

For the purpose of determining the effect of the different provisions of this act with respect to each other, they are deemed to have been enacted simultaneously. For the purpose of determining the effect of this act upon other acts, and the effect of other acts upon this act, chapters fourteen to twenty-two of this act, both inclusive, are deemed to have been enacted on the twelfth day of January, in the year 1880, and all acts passed after the last-mentioned date are to have the same effect as if they were passed after those chapters.

New. Am'd by L. 1882, c. 399.

§ 3356. When this act takes effect.

Subject to the qualifications contained in the foregoing sections of this title, this act shall take effect as follows: titles third and fourth, and article first of title fifth of chapter tenth, on the first day of May, in the year 1877; the remainder of chapters first to thirteenth, both inclusive, on the first day of September, in the year 1877; chapters fourteenth to twenty-first, both inclusive, on the first day of September, 1880; and this chapter immediately.[1]

[1] The first thirteen chapters of the Code (including §§ 1-1495) were enacted by L. 1876, c. 448. Chapters fourteen to twenty-two (including §§ 1496 to 3356) were enacted by L. 1880, c. 178.

CHAPTER XXIII.

[Added by L. 1890, c. 95. In effect May 1, 1890.]

Supplemental Provisions.

TITLE I.—Proceedings for the Condemnation of Real Property.
TITLE II.—Proceedings for the Sale of Corporate Real Property.

TITLE I.

Proceedings for the condemnation of real property.

Sec. 3357. Title.
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3383. Repealing clause; limitations.
3384. When act takes effect.

§ 3357. [Added, 1890.] Title.

This title shall be known as the condemnation law.

Added by L. 1890, c. 95.

§ 3358. [Added, 1890; am'd, 1896.] Definitions.

The term "person," when used herein, includes a natural person and also a corporation, joint-stock association, the state and a political division thereof, and any commission, board, board of managers or trustees in charge or having control of any of the charitable or other institutions of the state; the term "real property," any right, interest or easement therein or appurtenances thereto; and the term "owner," all persons having any estate, interest, or easement in the property to be taken, or any lien, charge, or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought, the defendant.

Id. Am'd by L. 1896, c. 580 (in effect May 12, 1896).

§ 3359. [Added, 1890.] Proceeding to be taken as prescribed in this title.

Whenever any person is authorized to acquire title to real property, for a public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title.

Added by L. 1890, c. 95.

§ 3360. [Added, 1890; am'd, 1896.] Petition to be presented; contents thereof.

The proceeding shall be instituted by the presentation of a petition by the plaintiff to the supreme court, setting forth the following facts:

1. His name, place of residence, and the business in which engaged; if a corporation or joint-stock association, whether foreign or domestic, its principal place of business within the state, the names and places of residence of its principal officers, and of its directors, trustees or board of managers, as the case may be, and the object or purpose of its incorporation or association; if a political division of the state, the names and places of residence of its principal officers; and if the state, or any commission or board of managers or trustees in charge or having control of any of the charitable or other institutions of the state, the name, place of residence of the officer acting in its or their behalf in the proceedings.

2. A specific description of the property to be condemned, and its location, by metes and bounds, with reasonable certainty.

3. The public use for which the property is required and a concise statement of the facts showing the necessity of its acquisition for such use.

4. The names and places of residence of the owners of the property; if an infant, the name and place of residence of his general guardian, if he has one; if not, the name and place of residence of the person with whom he resides; if a lunatic, idiot, or habitual drunkard, the name and place of residence of his committee or trustee, if he has one; if not, the name and place of residence of the person with whom he resides. If a non-resident, having an agent or attorney residing in the state authorized to contract for the sale of the property, the name and place of residence of such agent or attorney; if the name or place of residence of any owner cannot after diligent inquiry be ascertained, it may be so stated with a specific statement of the extent of the inquiry which has been made.

5. That the plaintiff has been unable to agree with the owner of the property for its purchase, and the reason of such inability.

6. The value of the property to be condemned.

7. A statement that it is the intention of the plaintiff, in good faith, to complete the work or improvement, for which the property is to be condemned; and that all the preliminary steps required by law have been taken to entitle him to institute the proceeding.

8. A demand for relief, that it may be adjudged that the public use requires the condemnation of the real property described, and that the plaintiff is entitled to take and hold such property for the public use specified, upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken.

Added by L. 1890, c. 95. Am'd by L. 1896, c. 589 (in effect May 12, 1896).

§ 3361. [Added, 1890.] Notice annexed to petition; when petition and notice served.

There must be annexed to the petition a notice of the time and place at which it will be presented to a special term of the supreme court, held in the judicial district where the property or some portion of it is situated, and a copy of the petition and notice must be served upon all the owners of the property at least eight days prior to its presentation.

Added by L. 1890, c. 95.

§ 3362. [Added, 1890.] How petition and notice served.

Service of the petition and notice must be made in the same manner as the service of a summons in an action in the supreme court is required to be made, and all the provisions of articles one and two of title one of chapter five of this act, which relate to the service of a summons, either personally or in any other way, and the mode of proving service, shall apply to the service of the petition and notice. If the defendant has an agent or attorney residing in this state, authorized to contract for the sale of the real property described in the petition, service upon such agent or attorney will be sufficient service upon such defendant. In case the defendant is an infant of the age of fourteen years or upwards, a copy of the petition and notice shall also be served upon his general guardian, if he has one; if not, upon the person with whom he resides.

Id.

§ 3363. [Added, 1890.] Appearance of infant, idiot, lunatic or habitual drunkard.

If a defendant is an infant, idiot, lunatic or habitual drunkard, it shall be the duty of his general guardian, committee or trustee, if he has one, to appear for him upon the presentation of the petition and attend to his interests, and in case he has none, or in case his general guardian, committee or trustee fails to appear for him, the court shall, upon the presentation of the petition and notice, with proof of service, without further notice, appoint a guardian ad litem for such defendant, whose duty it shall be to appear for him and attend to his interests in the proceeding, and, if deemed necessary to protect his rights, the court may require a general guardian, committee or trustee, or a guardian ad litem to give security in such sum and with such sureties as the court may approve. If a service other than personal has been made upon any defendant, and he does not appear upon the presentation of the petition, the court shall appoint some competent attorney to appear for him and attend to his interests in the proceeding.

Id.

§ 3364. [Added, 1890.] Appearance of parties generally.

The provisions of law and of the rules and practice of the court, relating to the appearance of parties in person or by attorney in actions in the supreme court, shall apply to the proceeding from and after the service of the petition, and all subsequent orders, notices and papers may be served upon the attorney appearing and upon a guardian ad litem in the same manner and with the same effect as the service of papers in an action in the supreme court may be made.

Id.

§ 3365. [Added, 1890.] Answer; contents thereof.

Upon presentation of the petition and notice with proof of service thereof, an owner of the property may appear and interpose

an answer, which must contain a general or specific denial of each material allegation of the petition controverted by him, or of any knowledge or information thereof sufficient to form a belief, or a statement of new matter constituting a defence to the proceeding.
Id.

§ 3366. [Added, 1890.] Verification of petition or answer.

A petition or answer must be verified, and the provisions of this act relating to the form and contents of the verification of pleadings in courts of record, and the persons by whom it may be made, shall apply to the verification.
Id.

§ 3367. [Added, 1890.] Trial; case; exceptions.

The court shall try any issue raised by the petition and answer at such time and place as it may direct, or it may order the same to be referred to a referee to hear and determine, and upon such trial the court or referee shall file a decision in writing, or deliver the same to the attorney for the prevailing party, within twenty days after the final submission of the proofs and allegations of the parties, and the provisions of this act relating to the form and contents of decisions upon the trial of issues of fact by the court or a referee, and to making and filing exceptions thereto, and the making and settlement of a case for the review thereof upon appeal, and to the proceedings which may be had, in case such decision is not filed or delivered within the time herein required, and to the powers of the court and referee upon such trial, shall be applicable to a trial and decision under the title.
Id.

§ 3368. [Added, 1890.] Certain provisions of code applicable.

The provisions of title one of chapter eight of this act shall also apply to proceedings had under this title.
Id.

§ 3369. [Added, 1890; am'd, 1895.] Judgment; costs to defendant; commissioners.

Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant, the petition shall be dismissed, with costs to be taxed by the clerk, at the same rates as are allowed, of course, to a defendant prevailing in an action in the supreme court, including the allowances for proceedings before and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use specified, upon making compensation therefor, and the court shall thereupon appoint three disinterested and competent freeholders, residents of the judicial district embracing the county where the real property, or some part of it, is situated, or of some county adjoining such judicial district, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for the first meeting of the commissioners. Provided, however, that in any such proceeding instituted within the first or second judicial district, such commissioners shall be residents of the county where the real property, or some part of it, is situated.

or of some adjoining county. If a trial has been had, at least eight days' notice of such appointment must be given to all the defendants who have appeared. The parties may waive, in writing, the provisions of this section as to the residence of the commissioners, and in that case they may be residents of any county in the State. Where owners of separate properties are joined in the same proceeding, or separate properties of the same owner are to be condemned, more than one set of commissioners may be appointed.

Id. Am'd by L. 1895, c. 530 (in effect May 23, 1895).

§ 3370. [Added, 1880; am'd, 1888, 1913.] Powers and duties of commissioners.

The commissioners shall take and subscribe the constitutional oath of office. Any of them may issue subpœnas and administer oaths to witnesses; a majority of them may adjourn the proceeding before them, from time to time in their discretion. Whenever they meet, except by appointment of the court or pursuant to adjournment, they shall cause at least eight days' notice of such meeting to be given to the defendants who have appeared, or their agents or attorneys. They shall view the premises described in the petition, and hear the proof and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all being present, shall, without unnecessary delay ascertain and determine the compensation which ought justly to be made by the plaintiff to the owners of the property appraised by them; and, in fixing the amount of such compensation, they shall not make any allowance or deduction on account of any real or supposed benefits which the owners may derive from the public use for which the property is to be taken, or the construction of any proposed improvement connected with such public use. But in case the plaintiff is a railroad corporation and such real property shall belong to any other railroad corporation, the commissioners on fixing the amount of such compensation, shall fix the same at its fair value for railroad purposes. They shall make a report of their proceedings to the supreme court with the minutes of the testimony taken by them, if any; and they shall each be entitled to six dollars for services for every day they are actually engaged in the performance of their duties, and their necessary expenses, to be paid by the plaintiff; provided, that in proceedings within the counties of New York and Kings, such commissioners shall be entitled to such additional compensation not exceeding twenty-five dollars for every such day, as may be awarded by the court, and provided that in proceedings instituted by a village or any board thereof under this title such commissioners shall be entitled to such additional compensation, not exceeding five dollars for every such day, as may be awarded by the court.

Id. Am'd by L. 1898, c. 384; L. 1913, c. 232 (in effect Sept. 1, 1913).

§ 3371. [Added, 1890.] Confirmation or setting aside of report; deposit, when deemed a payment.

Upon filing the report of the commissioners, any party may move for its confirmation at a special term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceedings shall be had for the

confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.

Added by L. 1890, c. 95.

§ 3372. [Added, 1890.] Offer to purchase; costs; additional allowance.

In all cases where the owner is a resident and not under legal disability to convey title to real property the plaintiff, before service of his petition and notice, may make a written offer to purchase the property at a specified price, which must within ten days thereafter be filed in the office of the clerk of the county where the property is situated; and which cannot be given in evidence before the commissioners, or considered by them. The owner may at the time of the presentation of the petition, or at any time previously, serve notice in writing of the acceptance of plaintiff's offer, and thereupon the plaintiff may, upon filing the petition, with proof of the making of the offer, and its acceptance, enter an order that upon payment of the compensation agreed upon, he may enter into possession of the real property, described in the petition, and take and hold it for the public use therein specified. If the offer is not accepted, and the compensation awarded by the commissioners does not exceed the amount of the offer with interest from the time it was made, no costs shall be allowed to either party. If the compensation awarded shall exceed the amount of the offer with interest from the time it was made, or if no offer was made, the court shall, in the final order, direct that the defendant recover of the plaintiff the costs of the proceeding, to be taxed by the clerk at the same rate as is allowed, of course, to the defendant when he is the prevailing party in an action in the supreme court, including the allowances for proceedings, before and after notice of trial, and the court may also grant an additional allowance of costs, not exceeding five per centum upon the amount awarded. The court shall also direct in the final order what sum shall be paid to the general or special guardian, or committee or trustee of an infant, idiot, lunatic or habitual drunkard, or to an attorney appointed by the court to attend to the interests of any defendant upon whom other than personal service of the petition and notice may have been made, and who has not appeared, for costs, expenses and counsel fees, and by whom or out of what fund the same shall be paid. If a trial has been had, and all the issues determined in favor of the plaintiff, costs of the trial shall not be allowed to the defendant, but the plaintiff shall recover of any defendant answering the costs of such trial caused by the interposition of the unsuccessful defence, to be taxed by the clerk at the same rate as is allowed to the prevailing party for the trial of an action in the supreme court.

§ 3373. [Added, 1890.] Judgment, how enforced; delivery of possession of premises; when writ of assistance to issue.

Upon the entry of the final order, the same shall be attached to the judgment-roll in the proceeding, and the amount directed to be paid, either as compensation to the owners, or for the costs or expenses of the proceeding, shall be docketed as a judgment against the person who is directed to pay the same, and it shall have all the force and effect of a money judgment in an action in the supreme court, and collection thereof may be enforced by execution and by the same proceedings as judgments for the recovery of money in the supreme court may be enforced under the provisions of this act. When payment of the compensation awarded, and costs of the proceeding, if any, has been made, as directed in the final order, and a certified copy of such order has been served upon the owner, he shall, upon demand of the plaintiff, deliver possession thereof to him, and in case possession is not delivered when demanded, the plaintiff may apply to the court without notice, unless the court shall require notice to be given, upon proof of such payment and of service of the copy order, and of the demand and non-compliance therewith, for a writ of assistance, and the court shall thereupon cause such writ to be issued, which shall be executed in the same manner as when issued in other cases for the delivery of possession of real property.

Id.

§ 3374. [Added, 1890; am'd, 1894.] Abandonment and discontinuance of proceeding.

Upon the application of the plaintiff to be made at any time after the presentation of the petition and before the expiration of thirty days after the entry of the final order, upon eight days' notice of motion to all other parties to the proceeding who have appeared therein or upon an order to show cause, the court may, in its discretion, and for good cause shown, authorize and direct the abandonment and discontinuance of the proceeding, upon payment of the fees and expenses, if any, of the commissioners, and the costs and expenses directed to be paid in such final order, if such final order shall have been entered, and upon such other terms and conditions as the court may prescribe; and upon the entry of the order granting such application and upon compliance with the terms and conditions therein prescribed, payment of the amount awarded for compensation, if such compensation shall have been theretofore awarded, shall not be enforced, but in such case, if such abandonment and discontinuance of the proceeding be directed upon the application of the plaintiff, the order granting such application, if permitting a renewal of such proceedings, shall provide that proceedings to acquire title to such lands or any part thereof shall not be renewed by the plaintiff without a tender or deposit in court of the amount of the award and interest thereon.

Id. Am'd by L. 1894, c. 475 (in effect May 3, 1894).

§ 3375. [Added, 1890; am'd, 1895.] Appeal from final order; stay of proceedings.

Appeal may be taken to the appellate division of the supreme court from the final order, within the time provided for appeals from orders by title four of chapter twelve of this act; and all the provisions of such chapter relating to appeals to the appellate division of the supreme court from orders of the special term shall apply to such appeals. Such appeal will bring up for review

all the proceedings subsequent to the judgment, but the judgment and proceedings antecedent thereto may be reviewed on such appeal, if the appellant states in his notice that the same will be brought up for review, and exceptions shall have been filed to the decision of the court or the referee, and a case or a case and exceptions shall have been made, settled and allowed, as required by the provisions of this act for the review of the trial of actions in the supreme court without a jury. The proceedings of the plaintiff shall not be stayed upon such an appeal, except by order of the court, upon notice to him, and the appeal shall not affect his possession of the property taken, and the appeal of a defendant shall not be heard except on his stipulation not to disturb such possession.

Added by L. 1890, c. 95. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3376. [Added, 1890; am'd, 1895.] Appeal by plaintiff to appellate division of Supreme Court.

If a trial has been had and judgment entered in favor of the defendant, the plaintiff may appeal therefrom to the appellate division of the supreme court within the time provided for appeals from judgments by title four of chapter twelve of this act, and all the provisions of said chapter relating to appeals from judgments shall apply to such appeals; and on the hearing of the appeal the appellate division may affirm, reverse or modify the judgment, and in case of reversal may grant a new trial, or direct that judgment be entered in favor of the plaintiff. If the judgment is affirmed, costs shall be allowed to the respondent, but if reversed or modified, no costs of the appeal shall be allowed to either party.

Added by L. 1890, c. 95. Am'd by L. 1895, c. 946 (in effect Jan. 1, 1896).

§ 3377. [Added, 1890.] Court may direct a new appraisal.

On the hearing of the appeal from the final order the court may direct a new appraisal before the same or new commissioners, in its discretion, and the report of such commissioners shall be final and conclusive upon all parties interested. If the amount of the compensation to be paid is increased by the last report, the difference shall be a lien upon the land appraised, and shall be paid to the parties entitled to the same, or shall be deposited as the court shall direct; and if the amount is diminished, the difference shall be refunded to the plaintiff by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the last report, against the parties liable to pay the same.

Added by L. 1890, c. 95.

§ 3378. [Added, 1890.] Conflicting claimants.

If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the court may direct the money to be paid into the court by the plaintiff, and may determine who is entitled to the same, and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and direction are to be made.

Id.

§ 3379. [Added, 1890; am'd, 1900.] Plaintiff in possession may have stay of proceedings on giving security.

At any stage of the proceeding the court may authorize the plaintiff, if in possession of the property sought to be condemned,

to continue in possession, and may stay all actions or proceedings against him on account thereof, upon giving security, or depositing such sum of money as the court may direct to be held as security for the payment of the compensation which may be finally awarded to the owner therefor and the costs of the proceedings, and in every such case the owner may conduct the proceeding to a conclusion, if the plaintiff delays or neglects to prosecute the same. When the final award to any owner is less than fifty dollars, in proceedings to condemn a right of way, for telephone or telegraph poles and wires, the allowance of costs, if any, and the amount thereof not exceeding that prescribed by statute, shall be in the discretion of the court in any action or proceeding that may have been or may hereafter be stayed, if the telephone or telegraph poles and wires, in such action or proceeding so stayed, shall have been erected for more than three years prior to the commencement thereof.

Id. Am'd by L. 1900, c. 774 (in effect Sept. 1, 1900).

§ 3380. [Added, 1890.] Temporary possession pending proceedings.

When an answer to the petition has been interposed, and it appears to the satisfaction of the court that the public interests will be prejudiced by delay, it may direct that the plaintiff be permitted to enter immediately upon the real property to be taken, and devote it temporarily to the public use specified in the petition, upon depositing with the court the sum stated in the answer as the value of the property, and which sum shall be applied, so far as it may be necessary for that purpose, to the payment of the award that may be made, and the costs and expenses of the proceeding, and the residue, if any, returned to the plaintiff, and, in case the petition should be dismissed, or no award should be made, or the proceedings should be abandoned by the plaintiff, the court shall direct that the money so deposited, so far as it may be necessary, shall be applied to the payment of any damages which the defendant may have sustained by such entry upon and use of his property, and his costs and expenses of the proceeding, such damages to be ascertained by the court, or a referee to be appointed for that purpose, and if the sum so deposited shall be insufficient to pay such damages, and all costs and expenses awarded to the defendant, judgment shall be entered against the plaintiff for the deficiency, to be enforced and collected in the same manner as a judgment in the supreme court; and the possession of the property shall be restored to the defendant.

Added by L. 1890, c. 95.

§ 3381. [Added, 1890.] Notice of pendency of action to be filed.

Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk's office of each county where any part of the property is situated, a notice of the pendency of the proceeding, stating the names of the parties and the object of the proceeding, and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subsequently executed or subsequently recorded, is bound by all proceedings taken in the pro-

ceeding, after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notices of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.

Id.

§ 3382. [Added, 1890.] Practice in cases not herein provided for.

In all proceedings under this title, where the mode or manner of conducting all or any of the proceedings therein is not expressly provided for by law, the court before whom such proceedings may be pending, shall have the power to make all necessary orders and give necessary directions to carry into effect the object and intent of this title, and of the several acts conferring authority to condemn lands for public use, and the practice in such cases shall conform, as near as may be, to the ordinary practice in such court.

Id.

§ 3383. [Added, 1890; am'd, 1890.] Repealing clause; limitations.

So much of all acts and parts of acts as prescribe a method of procedure in proceedings for the condemnation of real property for a public use is repealed, except such acts and parts of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue, or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for, by, on behalf, on the part, or in the name of the corporation of the city of New-York, known as the mayor, aldermen, and commonalty of the city of New-York, or by whatever name known, or by or on the application of any board, department, commissioners or other officers acting for or on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title.

Id. Am'd by L. 1890, c. 247.

§ 3384. [Added, 1890.] When act takes effect.

This title shall take effect on the first day of May, 1890, and shall not affect any proceeding previously commenced.

Added by L. 1890, c. 35.

TITLE II.

Proceedings for the sale of corporate real property.

[N. B. — The whole of this Title (comprising §§ 3390-3397) has been transferred by L. 1909, c. 65, to the General Corporation Law of the "Consolidated Laws."]

§§ 3390-3397. [Omitted; see Table, p. iii.]

TITLE III.

Proceedings for the enforcement of mechanics' liens on real property.

[N. B. — The whole of this Title (comprising §§ 3398-3419) has been transferred by L. 1909, c. 65, to the Lien Law of the "Consolidated Laws."]

§§ 3398-3419. [Omitted; see Table, p. iii.]

TITLE IV.

Proceedings to enforce liens on vessels.

[N. B. — The whole of this Title (comprising §§ 3419-3441) has been transferred by L. 1909, c. 65, to the Lien Law of the "Consolidated Laws."]

§§ 3419-3441. [Omitted; see Table, p. iii.]

APPENDIX I.

GENERAL CONSTRUCTION LAW.

LAWS OF 1909, CHAPTER 27.

An act relating to construction, constituting chapter 22 of the consolidated laws.

Art. 1. Short title (§ 1).
2. Meaning of terms (§§ 10-68).
3. Ancient statutes and resolutions (§§ 70-72).
4. References, titles and head notes (§§ 80, 81).
5. Effect of repeals (§§ 90-96).
6. Effect of consolidated laws (§§ 100, 101).
7. Application of chapter (§ 110).
8. Laws repealed; when to take effect (§§ 120, 121).

ARTICLE 1.

Short Title.

Sec. 1. Short title.

§ 1. Short title.

This chapter shall be known as "General Construction Law."

ARTICLE 2.

Meaning of Terms.

Sec. 10. Acknowledge and acknowledgment.
11. Acknowledgment or proof of instrument.
12. Affidavit.
13. Adjournment of meeting.
14. Bond and undertaking.
15. Chattels.
16. Choose.
17. Civil code and criminal code.
18. Consolidated laws.
19. Day, calendar.
20. Day, computation.
21. Folio.
22. Gender.
23. Heretofore and hereafter.
24. Holiday and half holiday.
25. Holiday in contractual obligations.
26. Judge.
27. Last, preceding, next and following.
28. Lunatic and lunacy.
29. Men.
30. Month, computation.
31. Month in statute, contract and public or private instrument.
32. Municipal officers.
33. Notice.

34. Now.
35. Number, singular and plural.
36. Oath, affidavit and swear.
37. Person.
38. Property.
39. Property, personal.
40. Property, real.
41. Quorum and majority.
42. Register of county.
43. Seal of court, public officer or corporation.
44. Seal, private.
45. Seal, private as corporate seal.
46. Signature.
47. State.
48. Tense, present.
49. Territory.
50. Time, computation.
51. Time, night.
52. Time, standard.
53. Time, use of standard.
54. Village.
55. Women.
56. Writing and written.
57. Year, common and leap.
58. Year in statute, contract and public or private instrument.

§ 10. Acknowledge and acknowledgment.

The terms acknowledge and acknowledgment, when used with reference to the execution of an instrument or writing other than a deed of real property, include a compliance with the provisions of the next section by either such proof or acknowledgment.

From Stat'ry Constr'n Law, § 15 pt.

§ 11. Acknowledgment or proof of instrument.

When the execution of any instrument or writing is authorized or required by law to be acknowledged, or to be proven so as to entitle it to be filed or recorded in a public office, the acknowledgment may be taken or the proof made before any officer then and there authorized to take the acknowledgment or proof of the execution of a deed of real property to entitle it to be recorded in a county clerk's office, and shall be made and certified in the same manner as such acknowledgment or proof of such deed.

From Stat'ry Constr'n Law, § 15 pt.

§ 12. Affidavit.

When an affidavit is authorized or required it may be sworn to before any officer authorized by law to take the acknowledgment of deeds in this state, unless a particular officer is specified before whom it is to be taken.

From Stat'ry Constr'n Law, § 14 pt.

§ 13. Adjournment of meeting.

Any meeting referred to in section 41 of this chapter may be adjourned by a less number than a quorum.

From Stat'ry Constr'n Law, § 19 pt.

§ 14. Bond and undertaking.

A provision of law authorizing or requiring a bond to be given shall be deemed to have been complied with by the execution of an undertaking to the same effect.

From Stat'ry Constr'n Law, § 16.

§ 15. Chattels.
The term chattels includes goods and chattels.
From Stat'ry Constr'n Law, § 4 pt.

§ 16. Choose.
The term choose includes elect and appoint.
From Stat'ry Constr'n Law, § 17.

§ 17. Civil code and criminal code.
The term civil code means the code of civil procedure. The term criminal code means the code of criminal procedure.
From Stat'ry Constr'n Law, § 29.

§ 18. Consolidated Laws.
The term Consolidated Laws shall mean the compilation of the statutes prepared by the board of statutory consolidation and the amendments thereof.

§ 19. Day, calendar.
A calendar day includes the time from midnight to midnight. Sunday or any day of the week specifically mentioned means a calendar day.
From Stat'ry Constr'n Law, § 27 pt., as am'd by L. 1894, c. 447, § 1.

§ 20. [Am'd, 1910.] Day, computation.
A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday, other than a half holiday, must be excluded from the reckoning if it is the last day of any such period, or if it is an intervening day of any such period of two days. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.
From Stat'ry Constr'n Law, § 27 pt., as am'd by L. 1894, c. 447, § 1. Am'd by L. 1910, c. 347 (in effect May 21, 1910).

§ 21. [Am'd, 1914.] Folio.
The term folio shall mean one hundred words, counting each figure as a word. When an officer empowered by law to do so shall order an official advertisement published in a newspaper in display type or to be so displayed as to leave an unusual quantity of blank space in the advertisement, or to contain pictures or diagrams, or where the character of such advertisement requires it, such advertisement shall be paid for by measurement over all of such space necessarily used, two square inches of space to count as one folio. When there are over fifty and under one hundred words, they shall be counted as one folio; but a less number than fifty words shall not be counted, except when the whole statute, notice or order contains less than fifty words.
From Stat'ry Constr'n Law, § 11. Am'd by L. 1914, c. 72 (in effect March 24, 1914).

§ 22. Gender.
Words of the masculine gender include the feminine and the neuter, and may refer to a corporation, or to a board or other body or assemblage of persons; and, when the sense so indicates, words of the neuter gender may refer to any gender.
From Stat'ry Constr'n Law, § 8 pt.

§ 23. Heretofore and hereafter.
Each of the terms, heretofore and hereafter, in any provision of a statute, relates to the time such provision takes effect.
From Stat'ry Constr'n Law, § 9 pt.

§ 24. [Am'd, 1909.] Holiday and half holiday.

The term holiday includes the following days in each year: The first day of January, known as New Year's day; the twelfth day of February, known as Lincoln's birthday; the twenty-second day of February, known as Washington's birthday; the thirtieth day of May, known as Memorial day; the fourth day of July, known as Independence Day; the first Monday of September, known as Labor day; the twelfth day of October, known as Columbus Day; and the twenty-fifth day of December, known as Christmas day; and if either of such days is Sunday, the next day thereafter; each general election day and each day appointed by the president of the United States or by the governor of this state as a day of general thanksgiving, general fasting and prayer, or other general religious observances. The term half holiday includes the period from noon to midnight of each Saturday which is not a holiday.

From Stat'ry Constr'n Law, § 24 pt., as am'd by L. 1902, c. 39, § 1. Am'd by L. 1909, c. 112 (in effect March 23, 1909).

§ 25. Holiday in contractual obligations.

Where a contract by its terms requires the payment of money or the performance of a condition on a public holiday, such payment may be made or condition performed on the next business day succeeding such holiday, with the same force and effect as if made or performed in accordance with the terms of the contract.

From Stat'ry Constr'n Law, § 24 pt., as am'd by L. 1902, c. 39, § 1.

§ 26. Judge.

The term judge includes every judicial officer authorized, alone or with others, to hold or preside over a court of record.

From Stat'ry Constr'n Law, § 6.

§ 27. Last, preceding, next and following.

A reference to the last or preceding section, or other provision of a statute, means the section or other division immediately preceding, and a reference to the next or following section or other division of a statute means the section or other division immediately following.

From Stat'ry Constr'n Law, § 10.

§ 28. Lunatic and lunacy.

The terms lunatic and lunacy include every kind of unsoundness of mind except idiocy.

From Stat'ry Constr'n Law, § 7.

§ 29. Men.

The term men includes boys.

From Stat'ry Constr'n Law, § 8 pt.

§ 30. Month, computation.

A number of months after or before a certain day shall be computed by counting such number of calendar months from such day, exclusive of the calendar month in which such day occurs, and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not

so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted.

From Stat'ry Constr'n Law, § 26 pt.

§ 31. Month in statute, contract and public or private instrument.

In a statute, contract or public or private instrument, unless otherwise provided in such contract or instrument or by law, the term month means a calendar month and not a lunar month.

From Stat'ry Constr'n Law, § 26 pt.

§ 32. Municipal officers.

A reference to several officers of a municipal corporation holding the same office, or to a board of such officers, shall be deemed to refer to the single officer holding such office, when but one person is chosen to fill such office in pursuance of law.

From Stat'ry Constr'n Law, § 18.

§ 33. Notice.

When a notice is required to be given to a board or body, service of such notice upon the clerk or chairman thereof shall be sufficient.

From Stat'ry Constr'n Law, § 20.

§ 34. Now.

The term now in any provision of a statute, referring to other laws in force, or to persons in office, or to any facts or circumstances as existing, relates to the laws in force, or to the person in office, or to the facts or circumstances existing, respectively, immediately before the taking effect of such provision.

From Stat'ry Constr'n Law, § 9 pt.

§ 35. Number, singular and plural.

Words in the singular number include the plural, and in the plural number include the singular.

From Stat'ry Constr'n Law, § 8 pt.

§ 36. Oath, affidavit and swear.

The terms oath and affidavit include every mode authorized by law of attesting the truth of that which is stated. The term swear includes every mode authorized by law for administering an oath.

From Stat'ry Constr'n Law, § 14 pt.

§ 37. Person.

The term person includes a corporation and a joint-stock association. When used to designate a party whose property may be the subject of any offense, the term person also includes the state, or any other state, government or country which may lawfully own property in the state.

From Stat'ry Constr'n Law, § 5.

§ 38. Property.

The term property includes real and personal property.

From Stat'ry Constr'n Law, § 2.

§ 39. Property, personal.

The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien or incumbrance in, to or upon property, or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership.

Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.

From Stat'ry Constr'n Law, § 4 pt.; L. 1883, c. 372, § 1.

§ 40. Property, real.

The term real property includes real estate, lands, tenements and hereditaments, corporeal and incorporeal.

From Stat'ry Constr'n Law, § 3.

§ 41. Quorum and majority.

Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of all such persons or officers at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, may perform and exercise such power, authority or duty, and if one or more of such persons or officers shall have died or have become mentally incapable of acting, or shall refuse or neglect to attend any such meeting, a majority of the whole number of such persons or officers shall be a quorum of such board or body, and a majority of a quorum, if not less than a majority of the whole number of such persons or officers, may perform and exercise any such power, authority or duty.

From Stat'ry Constr'n Law, § 19 pt.

§ 42. Register of county.

Any act done in pursuance of law by the register of a county shall be deemed to be a compliance with any provision of law authorizing or requiring such act to be done by the county clerk of such county, and any instrument or writing filed, entered or recorded in pursuance of law in the office of a register of a county, shall be deemed to be a compliance with any provision of law authorizing or requiring such paper to be filed, entered or recorded, as the case may be, in the office of the clerk of such county. The term county clerk when used in relation to conveyances of real property or the filing or recording of instruments which are or may be filed in the office of the register of a county, shall include the register of each county in which there is a register.

From Stat'ry Constr'n Law, § 21, as am'd by L. 1907, c. 200, § 1.

§ 43. Seal of court, public officer or corporation.

A seal of a court, public officer or corporation may be impressed directly upon the instrument or writing to be sealed, or

upon wafer, wax or other adhesive substance affixed thereto, or upon paper, or other similar substance affixed thereto by mucilage or other adhesive substance.

From Stat'ry Constr'n Law, § 13 pt.

§ 44. Seal, private.

The private seal of a person, other than a corporation, to any instrument or writing shall consist of a wafer, wax or other similar adhesive substance affixed thereto, or of paper or other similar substance affixed thereto, by mucilage or other adhesive substance, or of the word "seal," or the letters "L. S.," opposite the signature.

From Stat'ry Constr'n Law, § 13 pt.

§ 45. Seal, private as corporate seal.

An instrument or writing duly executed, in the corporate name of a corporation, which shall not have adopted a corporate seal, by the proper officers of the corporation under their private seals, shall be deemed to have been executed under the corporate seal.

From Stat'ry Constr'n Law, § 13 pt.

§ 46. Signature.

The term signature includes any memorandum, mark or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing.

From Stat'ry Constr'n Law, § 12 pt.

§ 47. State.

The term state, when used generally to include every state of the United States, includes also every territory of the United States and the District of Columbia.

From Stat'ry Constr'n Law, § 23 pt.

§ 48. Tense, present.

Words in the present tense include the future.

From Stat'ry Constr'n Law, § 8 pt.

§ 49. Territory.

The term territory when used generally to include every territory of the United States, includes also the District of Columbia.

From Stat'ry Constr'n Law, § 26 pt.

§ 50. Time, computation.

Time shall continue to be computed in this state according to the Gregorian or new style. The first day of each year after the year seventeen hundred and fifty-two is the first day of January, according to such style.

From Stat'ry Constr'n Law, § 25 pt.

§ 51. Time, night.

Night time includes the time from sunset to sunrise.

From Stat'ry Constr'n Law, § 27 pt., as am'd by L. 1894, c. 447, § 1.

§ 52. Time, standard.

The standard time throughout this state is that of the seventy-fifth meridian of longitude west from Greenwich, and all courts and public officers, and legal and official proceedings, shall be regulated thereby.

From Stat'ry Constr'n Law, § 28 pt.

§ 53. Time, use of standard.

Any act required by or in pursuance of law to be performed at or within a prescribed time, shall be performed according to the standard time.

From Stat'ry Constr'n Law, § 28 pt.

§ 54. Village.

The term village means an incorporated village.

From Stat'ry Constr'n Law, § 22.

§ 55. Women.

The term women includes girls.

From Stat'ry Constr'n Law, § 8 pt.

§ 56. Writing and written.

The terms writing and written include every legible representation of letters upon a material substance, except when applied to the signature of an instrument.

From Stat'ry Constr'n Law, § 12 pt.

§ 57. Year, common and leap.

For the purpose of computing and reckoning the days of the year in the same regular course in the future, every year, the number of which in the Christian era is a multiple of four, is a bissextile or leap year consisting of three hundred and sixty-six days, unless such number of the year is a multiple of one hundred and the first two figures thereof treated as a separate number is not a multiple of four, and every year which is not a leap year is a common year consisting of three hundred and sixty-five days.

From Stat'ry Constr'n Law, § 25 pt.

§ 58. Year in statute, contract and public or private instrument.

The term year in a statute, contract or any public or private instrument, means three hundred and sixty-five days, but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day. In a statute, contract or public or private instrument, the term year means twelve months, the term half year, six months, and the term a quarter of a year, three months.

From Stat'ry Constr'n Law, § 25 pt.

ARTICLE 3.

Ancient Statutes and Resolutions.

Sec. 70. Statutes of England and Great Britain inoperative in this State.
71. Acts of the legislature of the colony of New York inoperative.
72. Resolutions of the congress of the colony and the convention of New York inoperative.

§ 70. Statutes of England and Great Britain inoperative in this State.

A statute of England or Great Britain shall not be deemed to have had any force or effect in this state since May 1, 1788.

From Stat'ry Constr'n Law, § 30 pt.

§ 71. Acts of the legislature of the colony of New York inoperative.

Acts of the legislature of the colony of New York shall not be deemed to have had any force or effect in this state since December 29, 1828.

From Stat'ry Constr'n Law, § 30 pt.

§ 72. Resolutions of the congress of the colony and the convention of New York inoperative.

The resolutions of the congress of the colony of New York and of the convention of the state of New York, shall not be deemed to be the laws of this state hereafter.

From Stat'ry Constr'n Law, § 30 pt.

ARTICLE 4.

References, Titles and Head Notes.

Sec. 80. References to repealed provisions.
81. Titles and head notes.

§ 80. References to repealed provisions.

If any provision of a law be repealed and, in substance, re-enacted, a reference in any law to such repealed provision shall be deemed a reference to such re-enacted provision.

From Stat'ry Constr'n Law, § 32 pt., as am'd by L. 1894, c. 448, § 1.

§ 81. Titles and head notes.

If the title of any article or other division of a statute, or the head note of a section shall be amended or repealed in the body of the statute, or if a new article or other division having a title, or a new section having a new head note be added to a statute, the corresponding title or head note, if any, in an abstract of contents at the beginning of the article or other division of the statute, shall be deemed to be correspondingly amended or repealed, although there be no express reference thereto.

From Stat'ry Constr'n Law, § 34.

ARTICLE 5.

Effect of Repeals.

Sec. 90. Effect of the repeal of a repealing statute.
91. Effect of the repeal of a statute upon amendments thereof.
92. Effect of the repeal of an amending statute.
93. Effect of repealing statute upon existing rights.
94. Effect of repealing statute upon pending actions and proceedings.
95. Effect of the repeal of a statute by another statute substantially re-enacting the former.
96. Effect of hyphen in schedule of repeals.

§ 90. Effect of the repeal of a repealing statute.

The repeal hereafter or by this chapter of any provision of a statute, which repeals any provision of a prior statute, does not revive such prior provision.

From Stat'ry Constr'n Law, § 31 pt.

§ 91. Effect of the repeal of a statute upon amendments thereof.

The repeal by the consolidated laws of a statute includes a statute amendatory of the statute repealed.

§ 92. Effect of the repeal of an amending statute.

The repeal hereafter or by this chapter of any provision of a statute, which amends a provision of a prior statute, leaves such prior provision in force unless the amendatory statute be a substantial re-enactment of the statute amended.

From Stat'ry Constr'n Law, § 31 pt.

§ 93. Effect of repealing statute upon existing rights.

The repeal of a statute or part thereof shall not affect or impair any act done, offense committed, or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been effected.

From Stat'ry Constr'n Law, § 31 pt.

§ 94. Effect of repealing statute upon pending actions and proceedings.

Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

From Stat'ry Constr'n Law, § 31 pt.

§ 95. Effect of the repeal of a statute by another statute substantially re-enacting the former.

The provisions of a law repealing a prior law, which are substantial re-enactments of provisions of the prior law, shall be construed as a continuation of such provisions of such prior law, modified or amended according to the language employed, and not as new enactments.

From Stat'ry Constr'n Law, § 32 pt., as am'd by L. 1894, c. 448, § 1.

§ 96. Effect of hyphen in schedule of repeals.

When two numbers in a schedule of repeals of the consolidated laws are connected by a hyphen both such numbers are included as well as all intermediate numbers.

ARTICLE 6.

Effect of Consolidated Laws.

Sec. 100. Effect of consolidation upon laws passed at same session or before consolidation takes effect.
101. Effect of Consolidated Laws and Code of Civil Procedure on Penal and Criminal Codes.

§ 100. Effect of consolidation upon laws passed at same session or before consolidation takes effect.

No provision of any chapter of the consolidation of the general laws, of which this chapter is a part, shall supersede or repeal by implication any law passed at the same session of the legislature at which any such chapter was enacted, or passed after the enactment of any such chapter and before it shall have taken effect; and an amendatory law passed at such session or at any subsequent session begun before any such chapter takes effect, shall not be deemed repealed, unless specifically designated in the repealing schedule of such chapter.

From Stat'ry Constr'n Law, § 33.

§ 101. Effect of consolidated laws on penal law and civil and criminal codes.

The Consolidated Laws shall not be construed to amend, repeal or otherwise affect any provision of the Penal Law, Code of Civil Procedure or Code of Criminal Procedure unless expressly so stated.

ARTICLE 7.

Application of Chapter.

Sec. 110. Application of chapter.

§ 110. Application of chapter.

This chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter.

From Stat'ry Constr'n Law, § 1 pt.

ARTICLE 8.

Laws Repealed; When to Take Effect.

Sec. 120. Laws repealed.
121. When to take effect.

§ 120. Laws repealed.

Of the laws enumerated in the schedule hereto annexed,[1] that portion specified in the last column is hereby repealed.

From Stat'ry Constr'n Law, § 35.

§ 121. When to take effect.

This chapter shall take effect immediately.[2]

[1] The original statute (L. 1909, c. 27) has appended to it a schedule of laws repealed. But this schedule is not of sufficient importance to reprint it here.
[2] This act took effect February 17, 1909.

APPENDIX II.

DECEDENT ESTATE LAW.

L. 1909, CHAP. 18, BEING CHAP. 13 OF THE CONSOLIDATED LAWS. IN EFFECT FEB. 17, 1909.

Art. 1. Short title and definitions (§§ 1, 2).
2. Wills (§§ 10–47).
3. Descent and distribution (§§ 80–103).
4. Executors, administrators and testamentary trustees (§§ 110–120).

ARTICLE 1.

Short Title and Definitions.

Sec. 1. Short title.
2. Definitions.

§ 1. Short title.

This chapter shall be known as the "Decedent Estate Law."

§ 2. Definitions.

The term "will," as used in this chapter, shall include all codicils as well as wills.

ARTICLE 2.

Wills.

Sec. 10. Who may devise.
11. What real property may be devised.
12. Who may take real property by devise.
13. [Repealed.]
14. Wills of real estate, how construed.
15. Who may make wills of personal estate.
16. Unwritten wills of personal property, when allowed.
17. Devise or bequest to certain societies, associations and corporations.
18, 19, 20. [Repealed.]
21. Manner of execution of will.
22. Witnesses to will to write names and places of residence.
23. What wills may be proved.
24. Effect of change of residence since execution of will.
25. Application of certain provisions to wills previously made.
26. Child born after making of will.
27. Devise or bequest to subscribing witness.
28. Action by child born after making of will, or by subscribing witness.
29. Devise or bequest to child or descendant not to lapse.
30. Reception of wills for safe keeping.
31. Sealing and indorsing wills received for safe keeping.
32. Delivery of wills received for safe keeping.
33. Opening wills received by surrogate for safe keeping.
34. Revocation and cancellation of written wills.
35. Revocation by marriage and birth of issue.
36. Will of unmarried woman.
37. Bond or agreement to convey property devised or bequeathed not a revocation.
38. Charge or incumbrance not a revocation.
39. Conveyance, when not to be deemed a revocation.
40. Conveyance, when to be deemed a revocation.

41. Canceling or revocation of second will not to revive first.
42. Record of wills in county clerk's office.
43. County clerk's index of recorded wills.
44. Recording will proved in another state or foreign country.
45. Authentication of papers from another state or foreign country for use in this state.
46. Validity of purchase notwithstanding devise.
47. Validity and effect of testamentary dispositions.
48. Application of certain sections in this article.

§ 10. Who may devise.

All persons, except idiots, persons of unsound mind and infants, may devise their real estate, by a last will and testament, duly executed, according to the provisions of this article.

From R. S., Part 2, c. 6, Tit. 1, Art. 1, § 1, as am'd by L. 1867, c. 782, § 3.

§ 11. What real property may be devised.

Every estate and interest in real property descendible to heirs, may be so devised.

From Id., Art. 1, § 2.

§ 12. Who may take real property by devise.

Such a devise of real property may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise.

From Id., Art. 1, § 3.

§ 13. [Repealed by L. 1913, c. 153].

§ 14. Wills of real estate, how construed.

Every will that shall be made by a testator, in express terms, of all his real estate, or in any other terms denoting his intent to devise all his real property, shall be construed to pass all the real estate, which he was entitled to devise, at the time of his death.

From Id., Art. 2, § 5.

§ 15. Who may make wills of personal estate.

Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing.

From Id., Art. 2, § 21, as am'd by L. 1867, c. 782, § 4.

§ 16. Unwritten wills of personal property, when allowed.

No nuncupative or unwritten will, bequeathing personal estate, shall be valid, unless made by a soldier while in actual military service, or by a mariner, while at sea.

From Id., Art. 2, § 22.

§ 17. Devise or bequest to certain societies, associations and corporations.

No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half, and no more.

From L. 1860, c. 360.

§§ 18, 19, 20. [Repealed by L. 1911, c. 857.]

§ 21. Manner of execution of will.

Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.

2. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him, to have been so made, to each of the attesting witnesses.

3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed, to be his last will and testament.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.

From R. S., Part 2, c. 6, Tit. 1, Art. 3, § 40.

§ 22. Witnesses to will to write names and places of residence.

The witnesses to any will, shall write opposite to their names their respective places of residence; and every person who shall sign the testator's name to any will by his direction, shall write his own name as a witness to the will. Whoever shall neglect to comply with either of these provisions, shall forfeit fifty dollars, to be recovered by any person interested in the property devised or bequeathed, who will sue for the same. Such omission shall not affect the validity of any will; nor shall any person liable to the penalty aforesaid, be excused or incapacitated on that account, from testifying respecting the execution of such will.

From Id., Art. 3, § 41.

§ 23. What wills may be proved.

A will of real or personal property, executed as prescribed by the laws of the state, or a will of personal property executed without the state, and within the United States, the Dominion of Canada, or the Kingdom of Great Britain and Ireland, as prescribed by the laws of the state or country where it is or was executed, or a will of personal property executed by a person not a resident of the state, according to the laws of the testator's residence, may be admitted to probate in this state.

From L. 1876, c. 118, §§ 1, 2.

§ 24. Effect of change of residence since execution of will.

The right to have a will admitted to probate, the validity of the execution thereof, or the validity or construction of any provision contained therein, is not affected by a change of the testator's residence made since the execution of the will.

From Id., § 3.

§ 25. Application of certain provisions to wills previously made.

The last two sections apply only to a will executed by a person dying after April 11, 1876, and they do not invalidate a will executed before that date, which would have been valid but for the enactment of sections one and two of chapter 118 of the laws of 1876, except where such a will is revoked or altered, by a will which those sections rendered valid, or capable of being proved as prescribed in

article first of title third of chapter eighteen of the code of civil procedure.

From Id., §§ 4, 5. Sections 1 and 2 of L. 1876, c. 118, referred to in this section, were the same as § 23, *supra*, Art. 1, Tit. 3, of c. 18 of Code Civ. Pro., referred to in this section, corresponds, in general, with Art. 2, Tit. 3, of c. 18 of the present Code.

§ 26. Child born after making of will.

Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.

From R. S., Part 2, c. 6, Tit. 1, Art. 3, § 49, as am'd by L. 1869, c. 22, § 1.

§ 27. Devise or bequest to subscribing witness.

If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void, so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will, in like manner as if no such devise or bequest had been made.

But if such witness would have been entitled to any share of the testator's estate, in case the will was not established, then so much of the share that would have descended, or have been distributed to such witness, shall be saved to him, as will not exceed the value of the devise or bequest made to him in the will, and he shall recover the same of the devisees or legatees named in the will, in proportion to, and out of, the parts devised and bequeathed to them.

From Id., Art. 3, §§ 50, 51.

§ 28. Action by child born after making of will, or by subscribing witness.

A child, born after the making of a will, who is entitled to succeed to a part of the real or personal property of the testator, or a subscribing witness to a will, who is entitled to succeed to a share of such property, may maintain an action against the legatees or devisees, as the case requires, to recover his share of the property; and he is subject to the same liabilities, and has the same rights, and is entitled to the same remedies, to compel a distribution or partition of the property, or a contribution from other persons interested in the estate, or to gain possession of the property, as any other person who is so entitled to succeed.

From former § 1868 of the Code Civ. Pro.

§ 29. Devise or bequest to child or descendant, or to a brother or sister of the testator, not to lapse.

Whenever any estate, real or personal, shall be devised or be-

queathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate.

From R. S., Part 2, c. 6, Tit. 1, Art. 3, § 52, as am'd by L. 1912, c. 384 (in effect May 5, 1912).

§ 30. Reception of wills for safe keeping.

The clerk of every county in this state, the register of deeds in the city and county of New York, and the surrogate of every county, upon being paid the fees allowed therefor by law, shall receive and deposit in their offices respectively, any last will or testament which any person shall deliver to them for that purpose, and shall give a written receipt therefor to the person depositing the same.

From R. S., Part 3, c. 7, Tit. 3, Art. 7, § 67.

§ 31. Sealing and indorsing wills received for safe keeping.

Such will shall be inclosed in a sealed wrapper, so that the contents thereof cannot be read, and shall have indorsed thereon the name of the testator, his place of residence, and the day, month and year when delivered; and shall not, on any pretext whatever, be opened, read or examined, until delivered to a person entitled to the same, as hereinafter directed.

From Id., Art. 7, § 68.

§ 32. Delivery of wills received for safe keeping.

Such will shall be delivered only,

1. To the testator in person; or,

2. Upon his written order, duly proved by the oath of a subscribing witness; or,

3. After his death to the persons named in the indorsement on the wrapper of such will, if any such indorsement be made thereon; or,

4. If there be no such indorsement, and if the same shall have been deposited with any other officer than a surrogate, then to the surrogate of the county.

From Id., Art. 7, § 69.

§ 33. Opening wills received by surrogate for safe keeping.

If such will shall have been deposited with a surrogate, or shall have been delivered to him as above prescribed, such surrogate, after the death of the testator, shall publicly open and examine the same, and make known the contents thereof, and shall file the same in his office, there to remain until it shall have been duly proved, if capable of proof, and then to be delivered to the person entitled to the custody thereof; or until required by the authority of some competent court to produce the same in such court.

From Id., Art. 7, § 70.

§ 34. Revocation and cancellation of written wills.

No will in writing, except in the cases hereinafter mentioned,

nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

From R. S., Part 2, c. 6, Tit. 1, Art. 3, § 42.

§ 35. Revocation by marriage and birth of issue.

If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation, shall be received.

From Id., Art. 3, § 43.

§ 36. Will of unmarried woman.

A will executed by an unmarried woman, shall be deemed revoked by her subsequent marriage.

From Id., Art. 3, § 44.

§ 37. Bond or agreement to convey property devised or bequeathed not a revocation.

A bond, agreement, or covenant, made for a valuable consideration, by a testator, to convey any property devised or bequeathed in any will previously made, shall not be deemed a revocation of such previous devise or bequest, either at law or in equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, agreement or covenant, for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.

From Id., Art. 3, § 45.

§ 38. Charge or incumbrance not a revocation.

A charge or incumbrance upon any real or personal estate, for the purpose of securing the payment of money, or the performance of any covenant, shall not be deemed a revocation of any will relating to the same estate, previously executed; but the devises and legacies therein contained, shall pass and take effect, subject to such charge or incumbrance.

From Id., Art. 3, § 46.

§ 39. Conveyance, when not to be deemed a revocation.

A conveyance, settlement, deed, or other act of a testator, by

which his estate or interest in property, previously devised or bequeathed by him, shall be altered, but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs, or pass to his next of kin; unless in the instrument by which such alteration is made, the intention is declared, that it shall operate as a revocation of such previous devise or bequest.

From Id., Art. 3, § 47.

§ 40. Conveyance, when to be deemed a revocation.

But if the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.

From Id., Art. 3, § 48.

§ 41. Canceling or revocation of second will not to revive first.

If, after the making of any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will, shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to his first will; or unless after such destruction, canceling or revocation, he shall duly republish his first will.

From Id., Art. 3, § 53.

§ 42. Record of wills in county clerk's office.

A will of real property, which has been, at any time, either before or after this chapter takes effect duly proved in the supreme court, or the court of chancery, or before a surrogate of the state with the certificate of proof thereof annexed thereto, or indorsed thereon, or an exemplified copy thereof, may be recorded in the office of the clerk or the register, as the case requires, of any county in the state, in the same manner as a deed of real property. Where the will relates to real property, the executor or administrator, with the will annexed, must cause the same, or an exemplified copy thereof, to be so recorded, in each county where real property of the testator is situated, within twenty days after letters are issued to him. An exemplification of the record of such a will, from any surrogate's or other office where the same has been so recorded, either before or after this chapter takes effect, may be in like manner recorded in the office of the clerk or register of any county. Such a record or exemplification, or an exemplification of the record thereof, must be received in evidence, as if the original will was produced and proved.

From former § 2633 of the Code Civ. Pro., as am'd by L. 1881, c. 535; L. 1882, c. 399.

§ 43. County clerk's index of recorded wills.

Upon recording a will or exemplification, as prescribed in the last section, the clerk or register must index it in the same books,

and substantially in the same manner, as if it was a deed recorded in his office.

From former § 2634 of the Code Civ. Pro.

§ 44. Recording will proved in another state or foreign country.

Where real property situated within this state, or an interest therein, is devised or made subject to a power of disposition by a will duly executed in conformity with the laws of this state, of a person who was at the time of his, or her death, a resident elsewhere within the United States, or in a foreign country, and such will has been admitted to probate within the state or territory, or foreign country, where the decedent so resided, and is filed or recorded in the proper office as prescribed by the laws of that state or territory or foreign country, a copy of such will or of the record thereof and of the proofs or of the records thereof, or if the proofs are not on file or recorded in such office, of any statement, on file or recorded in such office, of the substance of the proofs, authenticated as prescribed in section 45 of this chapter, or if no proofs and no statement of the substance of the proofs be on file or recorded in such office, a copy of such will or of the record thereof, authenticated as prescribed in said section 45, accompanied by a certificate that no proofs or statement of the substance of proof of such will, are or is on file or recorded in such office, made and likewise authenticated as prescribed in said section 45, may be recorded in the office of the surrogate of any county in this state where such real property is situated; and such record in the office of such surrogate or an exemplified copy thereof shall be presumptive evidence of such will and of the execution thereof, in any action or special proceeding relating to such real property.

From former § 2703 of the Code Civ. Pro., as am'd by L. 1909, c. 240, § 13.

§ 45. Authentication of papers from another state or foreign country for use in this state.

To entitle a copy of a will admitted to probate or of letters testamentary or of letters of administration, granted in any other state or in any territory of the United States, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state as provided in article 7 of title 3 of chapter 18 of the code of civil procedure or in section 44 of this chapter, such copy must be authenticated by the seal of the court or officer by which or whom such will was admitted to probate or such letters were granted, or having the custody of the same or of the record thereof, and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer if any; and must be further authenticated by a certificate under the great or principal seal of such state or territory, and the signature of the officer who has the custody of such seal, to the effect that the court or officer by which or whom such will was admitted to probate or such letters were granted, was duly authorized by the laws of such state or territory to admit wills to probate or to grant letters testamentary or of administration and to keep the same and records thereof; that the seal of such court or officer affixed to such copy is genuine, and that the officer making such certificate

under such seal of such state or territory verily believes that each of the signatures attesting such copy is genuine; and to entitle any certificate concerning proofs accompanying the copy of the will or of the record so authenticated, to be recorded or used in this state, as provided in said article or section, such certificate must be under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under such great or principal seal of such state or territory, and the signature of the officer having the custody thereof, to the effect that the seal of the court or officer affixed to such certificate concerning proofs is genuine, and that such officer making such certificate under such seal of such state or territory, verily believes that the signature to such certificate concerning proofs is genuine. To entitle a copy of a will admitted to probate or of letters testamentary, or of letters of administration, granted in a foreign country, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state, as provided in said article or section, such copy must be authenticated in the manner prescribed by the laws of such foreign country, and must be further authenticated by a certificate of a judge of a court of record or by the chief officer of the department of justice of such foreign country to the effect that such authentication is in conformity with the laws of such foreign country, and that the court or officer by which or by whom such will was so admitted to probate, or such letters were granted, was duly authorized by the laws of such foreign country to admit wills to probate, or to grant letters testamentary or of administration, and to keep the same and records thereof; and the signature and official character of such judge or court of record or of such chief officer of the department of justice shall be attested by a consular officer of the United States, resident in such foreign country, under the seal of his office; and to entitle any certificate concerning proofs accompanying the copy of the will or of the records so authenticated, to be used and recorded in this state, as provided in said article or section, such certificate concerning the proofs must be similarly authenticated and attested.

From former § 2704 of the Code Civ. Pro., as am'd by L. 1909, c. 804.

§ 46. Validity of purchase notwithstanding devise.

The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within four years after the testator's death, the will devising the same is either admitted to probate and recorded as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction of the state, in an action brought for that purpose. But if, at the time of the testator's death, the devisee is either within the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or without the state; or, if the will was con-

cealed by one or more of the heirs of the testator, the limitation created by this section does not begin until after the expiration of one year from the removal of such a disability, or the delivery of the will to the devisee or his representative, or to the proper surrogate.

From former § 2628 of the Code Civ. Pro.

§ 47. Validity and effect of testamentary dispositions.

The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such property or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent. Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property, where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident, at the time of his death. Whenever a decedent, being a citizen of the United States, wherever resident, shall have declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws.

From former § 2694 of the Code Civ. Pro., as am'd by L. 1911, c. 244 (in effect June 6, 1911).

§ 48. Application of certain sections in this article.

Section 2514 of the code of civil procedure is applicable to the provisions of sections 23 to 25, both inclusive, and sections 42 to 47, both inclusive, of this chapter.

Added by L. 1909, c. 240, § 16 (in effect April 22, 1909). What was § 2714 of the Code when this amendment was adopted is now § 2768.

ARTICLE 3.

Descent and Distribution.

Sec. 80. Definitions and use of terms; effect of article.
81. General rule of descent.
82. Lineal descendants of equal degree.
83. Lineal descendants of unequal degree.
84. When father inherits.
85. When mother inherits.
86. When collateral relatives inherit; collateral relatives of equal degree.
87. Brothers and sisters and their descendants.
88. Brothers and sisters of father and mother and their descendants and grandparents.
89. Illegitimate children.
90. Relatives of the half-blood.
91. Relatives of husband or wife.
92. Cases not hereinbefore provided for.
93. Posthumous children and relatives.
94. Inheritance, sole or in common.
95. Alienism of ancestor.
96. Advancements of real and personal estates.
97. How advancement adjusted.
98. Distribution of personal property of decedent.
99. Advancements of personal estates.
100. Estates of married women.
101. Liability of heirs and devisees for debt of decedent.
102. Liability of heir or devisee not affected where will makes specific provision for payment of debt.
103. Action against husband for debts of deceased wife.
104. Application of certain sections in this article.

§ 80. Definitions and use of terms; effect of article.

1. The term "real property" as used in this article, includes every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate, seized or possessed thereof, or in any manner entitled thereto; leases for years, estates for the life of another person; and real property held in trust, not devised by the beneficiary. "Inheritance" means real property as herein defined, descended according to the provisions of this article.

2. The expressions "Where the inheritance shall have come to the intestate on the part of the father" or "mother," as the case may be, include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent.

3. When in this article a person is described as "living," it means living at the time of the death of the intestate from whom the descent came; when he is described as having "died," it means that he died before such intestate.

4. This article does not affect a limitation of an estate by deed or will, or tenancy by the curtesy or dower.

From R. S., Part 2, c. 2, §§ 20, 21, 27, 28, 29.

§ 81. General rule of descent.

The real property of a person who dies without devising the same shall descend:

1. To his lineal descendants.
2. To his father.
3. To his mother; and

4. To his collateral relatives, as prescribed in the following sections of this article.

From Id., § 1.

§ 82. Lineal descendants of equal degree.

If the intestate leave descendants in the direct line of lineal descent, all of equal degree of consanguinity to him, the inheritance shall descend to them in equal parts however remote from him the common degree of consanguinity may be.

From Id., § 2.

§ 83. Lineal descendants of unequal degree.

If any of the descendants of such intestate be living, and any be dead, the inheritance shall descend to the living, and the descendants of the dead, so that each living descendant shall inherit such share as would have descended to him had all the descendants in the same degree of consanguinity who shall have died leaving issue been living; and so that issue of the descendants who shall have died shall respectively take the shares which their ancestors would have received.

From Id., §§ 3, 4.

§ 84. When father inherits.

If the intestate die without lawful descendants, and leave a father, the inheritance shall go to such father, unless the inheritance came to the intestate on the part of his mother, and she be living; if she be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants, according to the law of inheritance by collateral relatives hereinafter provided; if there be no such brothers or sisters or their descendants living, such inheritance shall descend to the father in fee.

From Id., § 5.

§ 85. When mother inherits.

If the intestate die without descendants and leave no father, or leave a father not entitled to take the inheritance under the last section, and leave a mother, and a brother or sister, or the descendant of a brother or sister, the inheritance shall descend to the mother for life, and the reversion to such brothers and sisters of the intestate as may be living, and the descendants of such as may be dead, according to the same law of inheritance hereinafter provided. If the intestate in such case leave no brother or sister or descendant thereof, the inheritance shall descend to the mother in fee.

From Id., § 6.

§ 86. When collateral relatives inherit; collateral relatives of equal degree.

If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inherit-

ance shall descend to them in equal parts, however remote from him the common degree of consanguinity may be.

From Id., § 7.

§ 87. Brothers and sisters and their descendants.

If all the brothers and sisters of the intestate be living, the inheritance shall descend to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants, in whatever degree, of those dead; so that each living brother or sister shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died, leaving issue, had been living, and so that such descendants in whatever degree shall collectively inherit the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

From Id., §§ 8, 9.

§ 88. Brothers and sisters of father and mother and their descendants and grandparents.

If there be no heir entitled to take, under either of the preceding sections, the inheritance, if it shall have come to the intestate on the part of the father, shall descend:

1. To the brothers and sisters of the father of the intestate in equal shares, if all be living.

2. If any be living, and any shall have died, leaving issue, to such brothers and sisters as shall be living and to the descendants of such as shall have died.

3. If all such brothers and sisters shall have died, to their descendants.

4. If there be no such brothers or sisters of such father, nor any descendants of such brothers or sisters, to the brothers and sisters of the mother of the intestate, and to the descendants of such as shall have died, or if all have died, to their descendants. But, if the inheritance shall have come to the intestate on the part of his mother, it shall descend to her brothers and sisters and their descendants; and if there be none, to the brothers and sisters of the father and their descendants, in the manner aforesaid. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to the brothers and sisters both of the father and mother of the intestate, and their descendants in the same manner. In all cases mentioned in this section the inheritance shall descend to the brothers and sisters of the intestate's father or mother, as the case may be, or to their descendants in like manner as if they had been the brothers and sisters of the intestate.

5. If there be no such brothers or sisters of such father or mother, nor any descendants of such brothers or sisters, the inheritance, if it shall have come to the intestate on the part of his father, shall descend to his father's parents, then living, in equal parts, and if they be dead, then to his mother's parents, then living, in equal parts; but if the inheritance shall have come to the intestate on the part of his mother, it shall descend to his mother's parents, then living, in equal parts, and if they be dead, to his father's parents,

then living, in equal parts. If the inheritance has not come to the intestate on the part of either father or mother, it shall descend to his living grandparents in equal parts.

From Id., §§ 10-13, as am'd by L. 1904, c. 106.

§ 89. Illegitimate children.

If an intestate who shall have been illegitimate die without lawful issue, or illegitimate issue entitled to take, under this section, the inheritance shall descend to his mother; if she be dead, to his relatives on her part, as if he had been legitimate. If a woman die without lawful issue, leaving an illegitimate child, the inheritance shall descend to him as if he were legitimate. In any other case illegitimate children or relatives shall not inherit.

From Id., §§ 14, 19; L. 1858, c. 547.

§ 90. Relatives of the half-blood.

Relatives of the half-blood and their descendants, shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

From Id., § 15.

§ 91. Relatives of husband or wife.

When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate.

From L. 1901, c. 481.

§ 92. Cases not hereinbefore provided for.

In all cases not provided for by the preceding sections of this article, the inheritance shall descend according to the course of the common law.

From R. S., Part 2, c. 2, § 16.

§ 93. Posthumous children and relatives.

A descendant or a relative of the intestate begotten before his death, but born thereafter, shall inherit in the same manner as if he had been born in the lifetime of the intestate and had survived him.

From Id., § 18.

§ 94. Inheritance, sole or in common.

When there is but one person entitled to inherit, he shall take and hold the inheritance solely; when an inheritance or a share of an inheritance descends to several persons they shall take as tenants in common, in proportion to their respective rights.

From Id., § 17.

§ 95. Alienism of ancestor.

A person capable of inheriting under the provisions of this article, shall not be precluded from such inheritance by reason of the alienism of an ancestor.

From Id., § 22.

§ 96. Advancements of real and personal estates.

If a child of an intestate shall have been advanced by him, by settlement or portion, real or personal property, the value thereof must be reckoned for the purposes of descent and distribution as part of the real and personal property of the intestate descendible to his heirs and to be distributed to his next of kin; and if such advancement be equal to or greater than the amount of the share which such child would be entitled to receive of the estate of the deceased, such child and his descendants shall not share in the estate of the intestate; but if it be less than such share, such child and his descendants shall receive so much, only, of the personal property, and inherit so much only, of the real property, of the intestate, as shall be sufficient to make all the shares of all the children in the whole property, including the advancement, equal. The value of any real or personal property so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise it must be estimated according to the worth of the property when given. Maintaining or educating a child, or giving him money without a view to a portion or settlement in life is not an advancement. An estate or interest given by a parent to a descendant by virtue of a beneficial power, or of a power in trust with a right of selection, is an advancement.

From R. S., Part 2, c. 2, §§ 23-26; Id., c. 1, Tit. 2, § 127.

§ 97. How advancement adjusted.

When an advancement to be adjusted consisted of real property, the adjustment must be made out of the real property descendible to the heirs. When it consisted of personal property, the adjustment must be made out of the surplus of the personal property to be distributed to the next of kin. If either species of property is insufficient to enable the adjustment to be fully made, the deficiency must be adjusted out of the other.

From L. 1896, c. 547, § 296.

§ 98. Distribution of personal property of decedent.

If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed $2000; if the residue exceeds that sum, she shall receive in addition to the one-half, $2000; and the remainder shall be distributed to the brothers and sisters and their representatives.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. [Am'd, 1903.] If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; and if all the brothers and sisters of the intestate be living, the whole surplus shall be distributed to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree of those dead; so that to each living brother or sister shall be distributed such share as would have been distributed to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living, and so that there shall be distributed to such descendants in whatever degree, collectively, the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

8. If the deceased leave a mother, and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled

thereto, according to their respective stocks; so that those who take in their own rights shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. [**Am'd, 1898, 1905, 1909.**] No representation shall be admitted among collaterals after brothers' and sisters' descendants. This subdivision shall not apply to the estate of a decedent who shall have died prior to May 18, 1905.

13. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him.

15. [**Added, 1897.**] If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.

15-a. [**Added, 1913.**] If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be allotted to a surviving child of the husband or wife of the deceased, or if there be more than one, it shall be distributed equally among them.

16. [**Added, 1901; am'd, 1913.**] If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, and no child or children of the husband or wife of the deceased, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this article or in chapter eighteen of the code of civil procedure; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person.

From former § 2732, Code Civ. Pro., as am'd by L. 1897, c. 37; L. 1898, c. 319; L. 1901, c. 410; L. 1903, c. 367; L. 1905, c. 539; L. 1909, c. 240; L. 1913, c. 489 (in effect May 14, 1913).

§ 99. Advancements of personal estates.

If any child of such deceased person have been advanced by the deceased, by settlement or portion of real or personal property, the value thereof shall be reckoned with that part of the surplus of the personal property, which remains to be distributed among the children; and if such advancement be equal or superior to the amount, which, according to the preceding section, would be distributed to such child, as his share of such surplus and advancement, such child and his descendants shall be excluded from any share in the distribution of the surplus. If such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only, as is sufficient to make all the shares of all the children, in such surplus and advancement, to be equal, as near as can be estimated. The maintaining or educating, or the giving

of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, within the meaning of this section, nor shall the foregoing provisions of this section apply in any case where there is any real property of the intestate to descend to his heirs.

From former § 2738, Code Civ. Pro.; derived from 2 R. S. 97, §§ 76-78; L. 1909, c. 65.

§ 100. Estates of married women.

The provisions of this article respecting the distribution of property of deceased persons apply to the personal property of married women dying, leaving descendants them surviving. The husband of any such deceased married woman shall be entitled to the same distributive share in the personal property of his wife to which a widow is entitled in the personal property of her husband by the provisions of this article and no more.

From former § 2734, Code Civ. Pro.; derived from 2 R. S. 97, § 79; L. 1867, c. 782, § 11.

§ 101. Liability of heirs and devisees for debt of decedent.

The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by, the decedent.

From former § 1843, Code Civ. Pro.; derived from R. S. Part 3, c. 8, Tit. 3, § 32.

§ 102. Liability of heir or devisee not affected where will makes specific provision for payment of debt.

The preceding section and article 2 of title 3 of chapter 15 of the code of civil procedure do not affect the liability of an heir or devisee, for a debt of a testator, where the will expressly charges the debt exclusively upon the real property descended or devised, or makes it payable exclusively by the heir or devisee, or out of the real property descended or devised, before resorting to the personal property, or to any other real property descended or devised.

From former § 1859, Code Civ. Pro.; derived from R. S., Part 3, c. 8, Tit. 3, §§ 35, 58.

§ 103. Action against husband for debts of deceased wife.

If a surviving husband does not take out letters of administration on the estate of his deceased wife, he is presumed to have assets in his hands sufficient to satisfy her debts, and is liable therefor. A husband is liable as administrator for the debts of his wife only to the extent of the assets received by him. If he dies leaving any assets of his wife unadministered, except as otherwise provided by law, they pass to his executors or administrators as part of his personal property, but are liable for her debts in preference to the creditors of the husband.

From former § 2660, Code Civ. Pro., in part, as am'd by L. 1909, c. 240, § 15.

§ 104. Application of certain sections in this article.

Section 2514 of the code of civil procedure is applicable to the provisions of sections 98 to 100, both inclusive, and section 103, of this chapter.

Added by L. 1909, c. 240, § 16. Section 2514 of the Code (referred to in this section) is now § 2768.

ARTICLE 4.

Executors, Administrators and Testamentary Trustees.

Sec. 110. Sales of real estate by executors under authority of will.
111. Investment of trust funds.
112. Executors de son tort abolished.
113. Special promise to answer for debt of testator or intestate.
114. Liability of executors and administrators of executors and administrators.
115. Rights of administrators de bonis non.
116. Actions upon contract by and against executors.
117. Administrators to have same rights and liabilities as executors.
118. Actions of trespass by executors and administrators.
119. Actions of trespass against executors and administrators.
120. Actions for wrongs, by or against executors and administrators.
121. Action or proceeding by executor of executor.
122. Appraisal of estate of deceased person.

§ 110. Sales of real estate by executors under authority of will.

Sales of real estate situate within the state of New York, made by executors in pursuance of an authority given by any last will, unless otherwise directed in such will, may be public or private and on such terms as in the opinion of the executor shall be most advantageous to those interested therein.

From L. 1883, c. 65, § 1.

§ 111. Investment of trust funds.

An executor, administrator, trustee or other person holding trust funds for investment may invest the same in the same kind of securities as those in which savings banks of this state are by law authorized to invest the money deposited therein, and the income derived therefrom, and in bonds and mortgages on unincumbered real property in this state worth fifty per centum more than the amount loaned thereon. Any executor, administrator, trustee or other person holding trust funds may require such personal bonds or guaranties of payment to accompany investments as may seem prudent, and all premiums paid on such guaranties may be charged to or paid out of income, providing that such charge or payment be not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself.

From L. 1897, c. 417, § 9, as am'd by L. 1902, c. 295, § 1, and L. 1907, c. 669, § 1.

§ 112. Executors de son tort abolished.

No person shall be liable to an action as executor of his own wrong, for having received, taken or interfered with, the property or effects of a deceased person; but shall be responsible as a wrongdoer in the proper action to the executors, or general or special administrators, of such deceased person, for the value of any property or effects so taken or received, and for all damages caused by his acts, to the estate of the deceased.

From R. S., Part 3, c. 8, Tit. 3, Art. 1, § 17.

§ 113. Special promise to answer for debt of testator or intestate.

No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator

or intestate, out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, be in writing, and signed by such executor or administrator, or by some other person by him thereunto specially authorized.

From R. S., Part 2, c. 6, Tit. 5, § 1.

§ 114. Liability of executors and administrators of executors and administrators.

The executors and administrators of every person, who, as executor, either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use, any goods, chattels, or estate, of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been, if living.

From R. S., Part 2, c. 6, Tit. 5, § 6.

§ 115. Rights of administrators de bonis non.

When administration of the effects of a deceased person, which shall have been left unadministered by any previous executor or administrator of the same estate, shall be granted to any person, such person may appeal from any judgment obtained against such previous executor or administrator of the same estate, or against the original testator or intestate; and shall defend any appeal from any such judgment; and shall have the same remedies, in the prosecution or defense of any action, by or against such previous executors or administrators, and for the collection and enforcing of any judgment obtained by them, as they would have by law.

From R. S., Part 3, c. 8, Tit. 3, Art. 1, § 18.

§ 116. Actions upon contract by and against executors.

Actions of account, and all other actions upon contract, may be maintained by and against executors, in all cases in which the same might have been maintained, by or against their respective testators.

From R. S., Part 2, c. 6, Tit. 5, § 2.

§ 117. Administrators to have same rights and liabilities as executors.

Administrators shall have actions to demand and recover the debts due to their intestate, and the personal property and effects of their intestate; and shall answer and be accountable to others to whom the intestate was holden or bound, in the same manner as executors.

From Id., § 3.

§ 118. Actions of trespass by executors and administrators.

Executors and administrators shall have actions of trespass against any person who shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods of their testator or intestate in his lifetime. They may also maintain actions for trespass committed on the real estate of the deceased, in his lifetime.

From Id., § 4.

§ 119. Actions of trespass against executors and administrators.

Any person, or his personal representatives, shall have actions

of trespass against the executor or administrator of any testator or intestate, who in his lifetime shall have wasted, destroyed, taken or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of any such person.

From Id., § 5.

§ 120. Actions for wrongs, by or against executors and administrators.

For wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death, by his executors or administrators, against such wrongdoer, and after his death against his executors or administrators, in the same manner and with the like effect, in all respects, as actions founded upon contracts. This section shall not extend to an action for personal injuries, as such action is defined in section 3343 of the code of civil procedure; except that nothing herein contained shall affect the right of action now existing to recover damages for injuries resulting in death.

Added by L. 1909, c. 240, § 16; derived from R. S., Part 3, c. 8, Tit. 3, §§ 1, 2.

§ 121. Action or proceeding by executor of executor.

An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the testator of the first executor, or to take any charge or control thereof, as such executor.

Added by L. 1909, c. 240, § 16; derived from R. S., Part 3, c. 8, Tit. 3, § 11.

§ 122. Appraisal of estate of deceased person.

Whenever by reason of the provisions of any law of this state it shall become necessary to appraise in whole or in part the estate of any deceased person, the persons whose duty it shall be to make such appraisal shall value the real estate at its full and true value, taking into consideration actual sales of neighboring real estate similarly situated during the year immediately preceding the date of such appraisal, if any; and they shall value all such property, stocks, bonds, or securities as are customarily bought or sold in open markets in the city of New York or elsewhere, for the day on which such appraisal or report may be required, by ascertaining the range of the market and the average of prices as thus found, running through a reasonable period of time.

From L. 1891, c. 34.

TABLE OF CITED CASES

Which Have Construed Sections of the Code.

(For recent cases see Supplementary List, following this Table.)

§ 1.—Misc.: 35-310.

§ 2.— How. Pr.: 66-341.
subd. 3.— N. Y.: 164-91. App. Div.: 30-28. St. Rep'r: 17-444.
subd. 9.—N. Y.: 110-370. Misc.: 16-618; 29-235. St. Rep'r: 51-911. Civ. Pro. R.: 15 229; 8-382.
subd. 13.— Hun: 36-109.
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§ 3.—Hun: 36-109. Misc.: 33-302.
subd. 1.—How. Pr.: 66-339.
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§ 4. — N. Y.: 94-342. App. Div.: 41-207. Hun: 36-109. Misc.: 16-618; 21-331. N. Y. Supp.: 29-1106.

§ 5.— App. Div.: 51-60. Misc.: 23-488.

§ 6.—N. Y.: 44-438. App. Div.: 73-175. Misc.: 14-55; 35-320, 321.

§ 7.—N. Y.: 83-164. Misc.: 19-134.
subd. 3.— Abb. N. C.: 30-59n.

§ 8.—N. Y.: 101-245 (aff'g 36 Hun, 277); 133-225; 135-79; 143-223; 147-290; 113-480; 88-636; 163-272. App. Div.: 73-537. Hun: 37-330; 67-254; "44; 92-17 Misc.: 465. St. Rep'r: 50-908; 56-557. Abb. N. C.: 24-437; 29-175. Civ. Pro. R.: 4-267; 11-274; 17-390.
subd. 1. — N. Y.: 121-678 (aff'g 56 Hun, 351). Hun: 37-336.
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subd. 4. — Hun: 26-1; 78-169. Abb. N. C.: 8-40n.
subd. 5.—Hun: 35-472; 37-536. Misc.: 8-160.
subd. 6.—N. Y.: 147-295. Hun: 92-477. St. Rep'r.: 15-402. N. Y. Supp.: 3-754.

§ 9.—N. Y.: 144-263; 116-133. App. Div.: 73-537. Hun: 36-279; 78-161; 67-254; 26-4; 39-630; 40-42; 37-330. Misc.: 20-694. St. Rep'r.: 50-903. Civ. Pro. R.: 9-404; 7-30. How. Pr. N. S.: 1-252.

§ 10.—N. Y.: 147-295; 37-241. App. Div.: 16-251. Hun: 82-242; 78-161; 56-355; 37-330. Misc.: 20-694. Abb. N. C.: 24-442. Civ. Pro. R.: 7-30. How. Pr. N. S.: 1-253.

§ 11.—N. Y.: 147-295. Hun: 78-161; 37-330.

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§ 729.—**App. Div.:** 25-462; 61-505. **Hun:** 20-562; 34-330; 69-447. **Misc.:** 26-596. **St. Rep'r:** 35-734; 52-633. **Abb. N. C.:** 20-247. **Civ. Pro. R.:** 12-161; 30-242. **N. Y Supp.:** 13-561. **Dem.:** 6-140.

§ 730.—**N. Y.:** 76-596 (aff'g 15 Hun, 585). **App. Div.:** 25-462. **Hun:** 20-562; 22-138; 34-330; 69-447. **Misc.:** 6-439; 11-444; 26-596. **St. Rep'r:** 35-724; 52-633. **Abb. N. C.:** 20-247. **Civ. Pro. R.:** 9-416; 30-242. **N. Y. Supp.:** 13-561. **Dem.:** 6-140.

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§ 2384.—N. Y.: 157-640. Hun: 37-143. St. Rep'r: 5-143; 36-430.

§ 2386.—N. Y.: 95-242; 119-478. App. Div.: 12-427. Hun: 26-451.

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§ 2388.—N. Y.: 65-581; 68-153. App. Div.: 27-405. Hun: 51-509. St. Rep'r: 21-684.
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§ 2393.—N. Y.: 42-89. Hun: 51-439. Abb. N. C.: 22-419n. Civ. Pro. R.: 14-260.

§ 2395.—N. Y.: 31-157; 86-428. Hun: 32-531. Misc.: 39-214.

§ 2396.—N. Y.: 65-581; 68-153; 72-531. Hun: 35-453.

§ 2397.—Hun: 35-452. Civ. Pro. R.: 9-240.

§ 2398.—Hun: 35-452. Civ. Pro. R.: 9-240.

§ 2400.—N. Y.: 86-428. Hun: 35-452.

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§ 2409.—Hun: 52-362. St. Rep'r: 23-432. N. Y. Supp.: 5-365.

§ 2411.—Hun: 33-574.

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§ 2420.—N. Y.: 132-218; 151-516. App. Div.: 1-375. Hun: 52-177; 81-146. St. Rep'r: 17-882; 28-418. Civ. Pro. R.: 15-218. N. Y. Supp.: 2-221. N. Y. An. Cas.: 2-125.

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§ 2423.—N. Y.: 128-552; 132-218; 136-169; 143-263. App. Div.: 1-166, 375; 9-550; 11-393; 14-390; 31-42; 34-161; 39-577; 52-566; 57-515, 518 (see 167 N. Y. 623); 63-367, 368; 78-594; 79-139 (aff'd 174 N. Y. 247). Hun: 29-431; 52-179; 81-146. Misc.: 30-211; 34-533. St. Rep'r: 40-232; 41-356; 43-164. Abb. N. C.: 27-307. Civ. Pro. R.: 21-219. N. Y. Supp.: 2-221. N. Y. An. Cas.: 2-125.

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§ 2425.—N. Y.: 132-218. App. Div.: 1-375. Hun: 29-431; 81-146. N. Y. Supp.: 2-221. N. Y. An. Cas.: 2-125.

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§ 2431.—N. Y: 132-218; 153-208. App. Div.: 1-375. St. Rep'r: 17-882; 28-420. Abb. N. C.: 19-366n; 22-232. Civ. Pro. R.: 15-219. N. Y. An. Cas.: 2-125.

§ 2432.—N. Y.: 48-27; 54-516; 94-31; 132-218; 168-108. App. Div.: 75-281. Hun: 25-73; 36-109; 44-455; 58-311. Misc.: 16-618; 17-147; 22-486; 25-91; 38-233. St. Rep'r: 26-96; 34-512.

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§ 2434.—N. Y.: 131-567 (aff'g 58 Hun, 308). App. Div.: 73-77; 75-280. Hun: 25-72, 73; 36-111; 43-126; 46-625; 67-149. Misc.: 16-618. St. Rep'r: 39-18; 34-512; 46-568; 51-744. Abb. N.C.: 25-40n. Civ.Pro.R.: 6-396n; 11-225, 281; 12-166; 18 362.

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§ 2471a.—N. Y.: 170-185. App. Div.: 15-572; 33-466; 71-423 (aff'd 171 N. Y. 529). Misc.: 23-753.

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§ 2485.—Hun: 32-445.

§ 2486.—App. Div.: 9-422. Hun: 32-430; 60-536. St. Rep'r: 39-503; 42-474.

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§ 2568.—N. Y.: 98-441; 172-567. App. Div.: 11-354; 55-271; 71-2; 73-348. Hun: 32-550; 39-64; 45-363 (aff'd 111 N. Y. 66). Misc.: 34-152. St. Rep'r: 11-803; 52 729.

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§ 2619.—App. Div.: 6-215; 47-50. Abb. N. C.: 19-49. Civ. Pro. R.: 12-49. Dem.: 2-216; 5-413; 6-252.

§ 2620.—N. Y.: 27-9; 52-517; 83-592; 91-255; 95-329; 119-617. App. Div.: 9-562; 19-267; 47-49, 125; 76-212. Hun: 46-466; 47-7; 56-174; 61-104. Misc.: 3-387; 7-222; 13-467; 14-490; 17-191; 25-459, 460; 33-146, 329; 38-472. St. Rep'r: 17-613; 22-880; 35-340; 37-467; 39-700, 854; 43-31; 54-240. Abb. N. C.: 17-332. Civ. Pro. R.: 5-343; 6-133; 12-49; 16-426. Dem.: 2-216, 433; 4-57, 69; 5-413; 6-107, 239. Connoly: 2-259, 261. Wkly. Dig.: 19-387; 20-141.

§ 2621.—N. Y.: 26-433; 84-643; 167-168. App. Div.: 70-524; 74-569 (aff'd 174 N. Y. 504). Hun: 45-108; 76-522. Misc.: 19-387; 25-459, 460; 30-2; 36-473. St. Rep'r: 7-292. Abb. N. C.: 17-332; 19-86. Civ. Pro. R.: 5-200; 2-87. Dem.: 2-423, 426; 4-588; 5-399; 6-32, 361. Wkly Dig.: 26-546.

§ 2622.—N. Y.: 53-627; 94-554; 95-231; 141-166; 166 336. Hun: 41-93; 85-588. Misc.: 13-467. St. Rep'r: 5-334; 22-866; 37-573; 41-339. Abb. N. C.: 19-49; 23-427; Civ. Pro. R.: 11-170; 12-49. N. Y. Supp.: 13-256. Dem.: 2-456; 3-136; 5-413; 6-249.

§ 2623.—N. Y.: 25-9; 88-357; 128-430. App. Div.: 45-211; 47-180; 71-220; 77-142. Hun: 46-467; 81-213. Misc.: 27-421; 39-66. St. Rep'r: 11-108; 22-877; 37-432, 573; 41-339. Abb. N. C.: 19-49; 26-395. Civ. Pro. R.: 12-49. N. Y. Supp.: 13-256. Dem.: 2-428; 5-414; 6-249.

§ 2624.—N. Y.: 113-573; 126-76; 136-25, 59; 153-476. App. Div.: 32-185. Hun: 63-37; 67 8; 75-132; 88-376. Misc.: 9-300; 22-412; 23-452; 24-300; 25-254; 27-477; 30-281; 31-418; 37-115 (rev'd 75 App. Div. 207). St. Rep'r: 32-140; 34-149; 37-572, 573; 41-339; 42-166; 50-750. Abb. N. C.: 24-207. Civ. Pro. R.: 9-297; 16-415; 22-56. Dem.: 2-88, 210; 3-109, 340, 361, 533; 4-316, 429, 474; 5-123, 288, 525; 6-194, 393, 457.

§ 2625.—N. Y.: 136-25. St. Rep'r 37-573. Abb. N. C.: 31-120.

§ 2626.—N. Y.: 91-539; 95-256; 112-504; 136-25; 149-235 (aff'g 87 Hun, 23). App. Div.: 56-277, 279. Hun: 36-549; 50-240; 35-323; 89-366. Misc.: 15-182. St. Rep'r: 37-573. Abb. N. C.: 31-119.

§ 2627.—N. Y.: 95-256; 112-504; 136-61; 149 235 (aff'g 87 Hun, 23). App. Div.: 6-11; 14-446, 449; 29-277; 35-280. Hun: 36-549; 50-240; 76-101; 89-366. Misc.: 15-182; 32-119, 300. St. Repr: 35-340; 37-573; 41-339.

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§ 2629.—N. Y.: 109-619 (aff'g 39 Hun, 220). Misc.: 32-300. St. Rep'r: 37-573; 41-339.

§ 2632.—App. Div.: 68-185.

§ 2633.—N. Y.: 118-252. Misc.: 38-489. St. Rep'r: 37-574. N. Y. Supp.: 6-123.

§ 2635.—Misc.: 37-707. Abb. N. C.: 19-45. Civ. Pro. R.: 12-45. Dem.: 5-409.

§ 2636.—App. Div.: 73-347. Hun: 36-125. St. Rep'r: 4-212. Civ. Pro. R.: 9-451. Dem.: 4-452, 494; 5-498.

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§ 2638.—App. Div.: 73-347. Misc.: 19-85. Dem.: 3-541; 4-496; 5-498; 6-343.

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§ 2639.—App. Div.: 27-508. Misc.: 17-470: 29-39; 37-585 (rev'd 77 App. Div. 155), 712. Dem.: 3-166; 5-180.

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§ 2642.—N. Y.: 88-309. Hun: 55-378; 87-95 (aff'd 155 N. Y. 5). St. Rep'r: 17-747. Civ. Pro. R.: 14-289.

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§ 2649.—N. Y.: 112-504, 507. App. Div.: 9-423. Hun: 31-177; 51-210; 90-159. Misc.: 15-655; 28-373. Dem.: 2-71, 76n, 316; 4-113; 6-446.

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§ 2652.—N. Y.: 109-662 (aff'g 46 Hun, 661); 112-501. Hun: 28-211; 90-159. Misc.: 28-373. St. Rep'r: 5-334; 9-740. How. Pr. N. S.: 1-296. Dem.: 2-71, 76n; 3-137; 4-113.

§ 2653.—App. Div.: 50-131. Hun: 84-98; 90-159. St. Rep'r: 20-614; 22-79. Civ. Pro. R.: 5-208. Dem.: 2-71, 76n; 4-113.

§ 2653a.—N. Y.: 150-163 (rev'g 89 Hun, 189); 160-584 (aff'g 27 App. Div. 520). App. Div.: 6-216, 604; 9-35, 423, 489; 14-599; 16-457; 20-336; 28-359; 29-374; 35-280; 37-116; 43-389; 45-117, 620; 47-642; 51-546; 63-265; 65-58, 59, 582, 583; 74-338 (aff'd 173 N. Y. 639); 77-114. Hun: 79-442; 82-440; 87-346; 89-366; 90-159; 91-164, 167. Misc.: 15-655; 22-656.

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§ 2656.—N. Y.: 173-325.

§ 2660.—N. Y.: 47-351; 89-401; 94-549; 119-62. App. Div.: 22-366. Misc.: 24-419; 29-723; 33-271, 274; 37-458, 541, 669, 715. Hun: 97-321.

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§ 2662.—N. Y.: 89-401. App. Div.: 15-547; 47-123. Hun: 43-456; 50-524; 77-231; 79-589. Misc.: 29-724; 37-458. St. Rep'r: 32-637. Abb. N. C.: 15-430. Dem.: 2-432, 652.

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(For recent cases see Supplementary List, following this Table.)

§ **2663.**—**N. Y.: 53-630; 76-316; 112-525** (rev'g 42 Hun, 470). **App. Div.: 15-547. Hun: 44-68; 50-524; 92-321, 322. Misc.: 29-724. St. Rep'r: 5-363; 32-637; 40-16. Civ. Pro. R.: 11-235. Dem.: 5-263, 294.**

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§ **2672.**—**N. Y.: 124-532; 154-450. Hun: 31-180, 181. Misc.: 25-260; 35-730. St. Rep'r: 36-689. Abb.: N. C. 13-355. Civ. Pro. R.: 4-178. N. Y. Supp.: 49-574. Dem.: 2-265, 580; 3-279; 5-336, 365.**

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§ **2674.**—**N. Y.: 124-532. Hun: 28-283. St. Rep'r: 36-689. Abb. N. C.: 15-188. Dem.: 3-287; 5-365.**

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§ **2684.**—**N. Y.: 126-358. Hun: 79-376. St. Rep'r: 32-637. Dem.: 5-387. Connoly: 1-553.**

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§ **2686.**—**N. Y.: 142-488. App. Div.: 15-546. St. Rep'r: 32-637. How. Pr. N. S.: 1-94. Dem.: 2-422, 442; 3-233.**

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§ **2688.**—**App. Div.: 73-150.**

§ **2689.**—**App. Div.: 9-295. Hun: 79-376. Misc: 15-554. St. Rep'r: 5-813. Dem.: 3-169; 4-162, 341, 359, 454.**

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§ **2694.**—**N. Y.: 43-494; 46-144; 53-192; 85-153; 140-30; 141-564. App. Div.: 56-458; 66-144. Misc.: 15-658; 21-255; 28-370; 36-482. Abb. N. C.: 19-118n. Civ. Pro. R.: 5-55. N. Y. Supp.: 15-134. Dem.: 5-298.**

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(For recent cases see Supplementary List, following this Table.)

2695.—N. Y.: 32-21; 53-192; 73-292; 85-153; 95 55; 125-403; 162-517. App. Div.: 17-519; 56-458; 78-67. Hun: 30-58. Misc.: 37-708. Civ. Pro. R.: 4-13; 5-55, 57. Dem.: 2-407, 408.

§ 2696.—N. Y.: 32-21; 111-350; 112-220, 663. App. Div.: 56-458. Hun: 30-58; 76-214. Civ. Pro. R.: 4-13; 5-56. Dem.: 2-408. subd. 2.—St. Rep'r: 5-361. Dem.: 4-252; 5-293.

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§ 2701.—N. Y.: 53-198; 95-55; 125-404, 405; 140-47; 169-470. App. Div.: 39-513; 56-458; 73-528. Hun: 53-397; 70-359. St. Rep'r: 20-58; 54-182, 183. Civ. Pro. R.: 5-55.

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§ 2707.—N. Y.: 113-460; 126-359. App. Div.: 11-290; 35-448; 65-282, 283, 291, 292. Hun: 25-321, 322; 36-521, 577; 41-453; 62-194; 64-332; 77-565; 83-40. Misc.: 31-667; 37-238. St. Rep'r: 15-442, 450; 27-129; 32-786; 42-674; 67-413. Abb. N. C.: 23-143; 38-58. Civ. Pro. R.: 12-3. N. Y. Supp.: 6-884, 885; 7-553. How. Pr. N. S.: 2-159. Dem.: 2 297, 397; 3-3, 202; 5-9, 372; 6-344, 347, 423.

§ 2708.—N. Y.: 126-359. App. Div.: 11-290; 65-291. Hun: 25 322; 77-565; 83-40. Misc.: 37-238. St. Rep'r. 27-129. Civ. Pro. R.: 12-3. N. Y. Supp.: 6-884. How. Pr. N. S.: 2-159. Dem.: 2-398; 5-372; 6-347.

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§ 2712.—Hun: 83 40.
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§ 2713.—N. Y.: 56-615; 173-164. App. Div.: 53-570. Hun: 83-40. Misc.: 38-213; 39-221.
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- subd. 2.—Misc.: 38-168.
- subd. 3.—App. Div.: 31-618. Misc.: 37-454; 38-168.
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(For recent cases see Supplementary List, following this Table.)

§ 2714.—N. Y.: 59-140; 85-128; 89-1; 95-340; 1a0-98. App. Div.: 9-493. Hun.: 83-40. Misc.: 21-423; 33-74, 75 (rev'd 60 App. Div. 68); 37-329; 38-155.

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§ 2724.—App. Div.: 53-571; 55-439. Hun: 30-543. Misc.: 1-247; 13-374. St. Rep'r: 54-300.

§ 2725.—Hun: 50-572. Misc.: 30-355; 37-156. St. Rep'r: 15-798; 41-798; 45-455. Civ. Pro. R.: 6-86. N. Y. Supp.: 9-462, 927. Dem: 3-31; 4-181.

subd. 1.—App. Div.: 34-398. Misc.: 37-156, 473. Dem.: 2-24.

subd. 2.—Hun: 77-205.

subd. 3.—N. Y.: 94-574 (aff'g 27 Hun, 577). Hun: 77-205. Wkly. Dig.: 19-269.

subd. 4.—App. Div.: 6-412. Hun: 77-205. St. Rep'r: 37-646, 959. Dem.: 3-415.

§ 2726.—N. Y.: 59-390; 88-121. App. Div.: 36-82; 49-419. Hun: 32-445; 44-394; 66-121; 77-205

(Consult Tables II and III (on pages xxa to xxf, ante) to find what sections of the new Surrogate's Act correspond with the former sections.)

(For recent cases see Supplementary List, following this Table.)

Misc.: 5-428; 9 228; 25-264; 30-354; 33-624, 625; 39-521, 610. N. Y. Supp.: 15-535. St. Rep'r: 31-482; 32-1062; 37-577. Dem.: 4-454; 5-385.

subd. 1.—N. Y.: 172-550. App. Div.: 68-160. Hun: 44-397. Misc.: 9-234; 15-560; 17-433; 25-262. St. Rep'r: 37-579. Dem.: 5-48.

subd. 2.—N. Y.: 81-573; 104-105. Hun: 68-283. Connoly: 1-83.

subd. 3.—App. Div.: 42-305. Misc.: 25-262.

subd. 4.—N. Y.: 117-382. St. Rep'r: 31-963; 54-109.

§ 2727.—N. Y.: 56-615; 119-33. App. Div.: 6-413; 16-38; 24-34; 35-338; 38-321; 46-316; 59-266 (see 167 N. Y. 498); 68-358, 70-568. Hun: 26-216; 25-483; 32-445; 50-572; 59-78; 66-121; 76-131. Misc.: 5-561; 15-560, 601; 17-493, 494; 20-308; 25-256, 280; 30-354; 35-154; 37-661; 39-521. St. Rep'r: 15-732, 745; 32-290; 33-945; 35-524; 37-580; 45-455; 49 436, 427. Abb. N. C.: 22-480n; 23-479. Civ. Pro. R.: 15-55. N. Y. Supp.: 39-826. Dem.: 2-234, 597; 3-415; 5-37, 348, 385. Connoly: 2-641. Wkly. Dig.: 19-269.

§ 2728.—N. Y.: 66-480; 89-479; 107-110. App. Div.: 16 38; 24-28, 34; 59-266 (see 167 N. Y. 498); 64-571. Hun: 56-572; 59-78; 76-131; 86-391. Misc.: 20-307; 30-34; 33-625; 35-154; 36-97; 37-178, 662; 38-65, 724; 39 227. St. Rep'r: 5-342; 26-945; 29-210; 32-291; 35-524; 49-326; 54-236. N. Y. Supp.: 39-828. Dem.: 2-234; 5 346; 6 200.

subd. 2.—N. Y.: 170-427. Hun: 49-601; 74-358 (aff'd 145 N. Y. [illegible]. Misc.: 10-492; 30-31; 37-117. St. Rep'r: 22-904; 37-647; 52-383. Dem.: 2-248; 4-365.

§ 2729.—N. Y.: 162-461, App. Div.: 16-38; 49-419; 74-223. Misc.: 4-377. St. Rep'r: 11-694; 28-317; 38-595; 39-851; 46-842; 68-941. N. Y. Supp.: 6-239; 39-828. Dem.: 4-152. Connoly: 1-68.

subd. 1.—App. Div.: 43-235; 69-291; 74-472. N. Y. Supp.: 23-1048. Dem.: 5-22; 6-28.

subd. 2.—App. Div.: 43-333; 70-567. Misc.: 4-43. St. Rep'r: 5-434. Dem.: 5-217.

subd. 3.—App. Div.: 78-465.

§2730.—N. Y.: 41-143; 78-306, 535; 88-121; 95-154, 263, 528; 98-527; 104-268; 112-290; 126-291; 169-153; 170-139 (see 57 App. Div. 494). App. Div.: 9-291; 12-135; 13-97; 23-136; 38-475; 49-419; 51-358; 55-149; 64-436, 566, 569, 570; 67-117; 70-5 (see 172 N. Y. 494); 72-211 (aff'd 172 N. Y. 617); 79-301. Hun: 54-204, 205; 63-166; 73-53. Misc.: 5-180. 7-729; 13-376; 15-603; 16-203; 36-517; 37-702; 39-140, 437, 514. St. Rep'r: 5-353; 22-291; 35-707; 44-276. Abb. N. C.: 19-419; 23-32, 38n. Civ. Pro. R.: 4-282; 7-93, 96. N. Y. Supp.: 24-99. How. Pr.: 67-520. How Pr. N. S.: 1-328, 330. Dem.: 2-144, 291; 3-175, 512, 516; 4-464; 5-84, 172, 192, 200, 237, 421; 6-56. Redf.: 4-34. Connolly: 1 128.

§ 2731.—N. Y.: 60-610; 72-400; 74-476; 89-352; 96-88; 124 366; 129-641; 136-419; 160-570. App. Div.: 28-310; 36-545; 44-492; 57-234; 58-585; 59-267; 64-388; 75 341. Hun: 32-601; 39-278, 284; 48-412; 56-554; 86-327. Misc.: 2-223; 4-35; 6-502; 7-265; 38-220. St. Rep'r: 9-482; 15-117, 736; 22-350; 29-948, 951; 31-962; 33-913; 49-325; 54-274. Civ. Pro. R.: 4-375; 5-292. Dem.: 5-384; 6-367.

§ 2732.—Hun: 85-195. Misc.: 37-457; 39-675.

subd. 1.—Misc.: 38-273.

subd. 4.—Misc.: 29-459.

subd. 5.—N. Y.: 172-458. App Div.: 43-252. Misc.: 27-353; 36-475. Civ. Pro. R.: 29-389.

subd. 7.—N. Y.: 164-68. Misc.: 16-678; 20-65.—Civ. Pro. R.: 30-270.

subd. 10.—N. Y: 172-458. N. Y. Supp.: 60-4. Misc.: 34-475.

subd. 11.—Misc.: 36-275.

(Consult Tables II and III (on pages xxx to xxx, ante) to find what sections of the new Surrogate's Act correspond with the former sections.)

(For recent cases see Supplementary List, following this Table.)

subd. 12.—N. Y.: 79-52; 172-458. App. Div.: 34-180. Misc.: 36-475.

§ 2733.—N. Y.: 79-346. Misc.: 28-671; 33-732; 39-72.

§ 2734.—N. Y.: 47-351; 85-593; 88-445. App. Div.: 23-136; 43-235.

§ 2742.—N. Y.: 80-139; 85-561; 90-512; 92-239; 100-211; 102-160; 103-614; 105-518; 113-214; 140-430; 144-295, 563; 152-498; 160-571; 172-556. App. Div.: 1-281; 24-62; 40-117; 47-66; 79-499. Hun: 35-41; 44-444; 53-597; 62-106; 76-131; 79-378; 74-359. Misc.: 36-313. St. Rep'r: 13-170; 15-715; 42-70. Abb. N. C.: 15-477. Civ. Pro. R.: 4-135; 9-203; 11-128.

§ 2743.—N. Y.: 59-414; 66-480; 72-518; 88-434; 89-479; 91-439; 92-446; 117-474; 140-430; 144-275, 295; 152-320. App. Div.: 1-30; 2-15; 7-93; 22-220; 24-30, 33; 32-336; 42-258; 47-66, 231; 53-8; 54-281; 60-423; 63-493; 68-398 (see 172 N. Y. 25). Hun: 41-98; 50-570, 572; 54-321; 68-288; 71-345. Misc.: 1-493; 8-576; 13-757; 16-509; 17-494; 20-308; 22-222, 499; 25-257; 27-415; 29-300; 30-32; 33-324, 325, 706; 35-363, 866; 36-97; 37-178; 38-465; 39-75. St. Rep'r: 18-813; 22-904; 51-557; 53-384; 54-236. Abb. N. C.: 23-52; 28-59; 29-477. Civ. Pro. R.: 4-132, 135. N. Y. Supp.: 39-899. How. Pr. N. S.: 1-17. Dem.: 2-223, 248, 493; 3-189, 241; 4-548; 5-123; 6-111, 200. Connoly: 2-267.

§ 2744.—N. Y.: 159-136. App. Div.: 78-615. Misc.: 20-538. N. Y. Supp.: 24-98.

§ 2745.—N. Y.: 50-546. Misc.: 37-190, 537. N. Y. Supp.: 55-435. Connoly: 2-643.

§ 2746.—N. Y.: 144-707 (aff'g 68 Hun, 110); 171-7. App. Div.: 55-459. Hun: 46-348; 72-163; 85-105. Misc.: 7-379; 24-352; 28-597; 20-272; 31-119. St. Rep'r: 21-137; 52-82; 68-829. Dem.: 2-625; 5-215; 6-202.

§ 2747.—N. Y.: 101-683. St. Rep'r: 54-236. Connoly: 2-268.

§ 2748. Misc.: 22-222; 38-465. St. Rep'r: 54-236. Abb. N. C.: 15-139n. Dem.: 3-283. Connoly: 2-267.

§ 2749.—N. Y.: 81-109; 88-153; 105-497; 110-164; 142-545; 151-208; 168-388. App. Div.: 20-64; 35-72; 39-249; 40-495; 48-4; 65-461; 75-341; 79-512. Hun: 34-502; 39-185; 41-187; 48-414; 60-267; 14-296; 67-14; 74-278; 82-115; 88-357. Misc.: 3-149; 10-197; 15-535; 17-477; 22-65; 37-580. St. Rep'r: 13-172; 15-222; 38-227; 43-698; 45-917; 51-8, 12. Abb. N. C.: 22-417n. Civ. Pro. R.: 5-424; 10-175; 11-130, 317; 23-129. N. Y. Supp.: 45-624. Dem.: 2-138; 3-526; 5-5, 15, 106; 6-46, 60, 474. Super. Ct.: 51-300; 52-507; 55-388.

§ 2750.—N. Y.: 62-494; 88-309; 95-31; 102-159; 110-164; 127-304, 552; 136-420; 149-67; 151-208. App. Div.: 3-214; 20-68; 39-322; 53-544; 65-460, 599. Hun: 36-577; 39-185; 43-196; 69-163; 86-49. Misc.: 1-41; 10-197; 11-224; 21-420; 33-625. St. Rep'r: 15-222; 19-704; 23-124; 32-784; 46-917; 52-827, 830. Abb. N. C.: 28-119. Civ. Pro. R.: 5-50; 6-63; 7-270; 9-202; 10-204. How. Pr. N. S.: 1-384. Dem.: 3-21, 88; 4-103; 5-6, 254; 6-455, 474. Connoly: 1-300. Wkly. Dig.: 17-36. Super. Ct.: 51-300.

§ 2751.—N. Y.: 127-305. App. Div.: 29-169; 48-4; 52-458; 65-461, 599. Hun: 69-168, 164. Misc.: 10-197. St. Rep'r: 32-783; 52-539. Civ. Pro. R.: 18-119.

§ 2752.—N. Y.: 127-305; 144-13. App. Div.: 65-461, 599; 70-323. Hun: 39-181. Misc.: 10-197; 17-474; 33-167; 35-686. St. Rep'r: 32-784. Dem: 5-15.

subd. 1.—N. Y.: 102-159. Dem.: 3-21.

subd. 2.—App. Div.: 5-537. Dem.: 3-583.

subd. 3.—N. Y.: 144-17. Misc.: 17-477. St. Rep'r: 38-513. Civ. Pro. R.: 21-327. Dem.: 6-64.

(Consult Tables II and III (on pages xxa to xxf, ante) to find what sections of the new Surrogate's Act correspond with the former sections.)

(For recent cases see Supplementary List, following this Table.)

subd. 4.—N. Y.: 133-175. App. Div.: 65-461, 599; 71-277 (see 172 N. Y. 606). Misc.: 1-86; 16-667.

§ 2753.—Misc.: 10-197. St. Rep'r: 32-784. N. Y. Supp.: 6-877.

§ 2754.—N. Y.: 2-459; 88 309; 102-159. App. Div.: 44-181, 182; 65-461, 599. Hun: 34-502; 41-187. Misc.: 10-197; 17-476. St. Rep'r: 32-784. Civ. Pro. R.: 9-202; 21-827. Dem.: 5-15; 6-64.

§ 2755.—N. Y.: 45-806; 102-159; 136-419; 142-545. App. Div.: 11-45; 48-511; 65-461, 599; 66-479. Hun: 34-503; 41-209. Misc.: 12-250; 25-135. St. Rep'r: 19-702; 32-784. Abb. N. C.: 17-326. Civ. Pro. R.: 9-202. Dem.: 3-20; 4-50.

§ 2756.—N. Y.: 102-160; 127-306; 173-332. App. Div.: 65-461; 70-324. Misc.: 11-230; 15-533; 25-134; 38-693. St. Rep'r: 32-784; 38-593. N. Y. Supp.: 6-877.

subd. 1.—Hun: 34-503.

subd 2.—N. Y.: 111-559; 133-170. App. Div.: 39-85; 71-277 (see 172 N. Y. 606). Hun: 40-449. Misc.: 1-38; 11-294; 16-667; 21-421. Civ. Pro. R.: 10-205; 18-119. Dem.: 2-551; 4-549; 5-255.

§ 2757.—N. Y.: 88-309; 112-663; 127-307. Hun: 48-414; 79-179. Dem.: 2-551. Misc.: 21-425. N. Y. Supp.: 6-877.

§ 2758.—App. Div.: 42-304. Misc.: 21-425; 25-136. Dem.: 2-551. St. Rep'r: 19-209.

§ 2759.—App. Div.: 42-304. Dem.: 2-551.

§ 2761.—N. Y.: 3-301; 26-53; 44-237. App. Div.: 12-17. Dem.: 2-616.

§ 2763.—Hun: 34-503. Wkly. Dig.: 17-36. Civ. Pro. R.: 8-210. Dem.: 3-346.

§ 2774.—N. Y.: 26-53; 44-237.

§ 2777.—N. Y.: 95-31; 146-31. Misc.: 31-79.

§ 2798.—N. Y.: 81-109; 139-341. App. Div.: 20-65, 66, 459; 50-82; 79-162. Hun: 25-71; 68 408; 69-164. Misc.: 24-350; 25-27, 133; 34-667. St. Rep'r: 23-403; 52-539, 691. Super. Ct.: 52-507.

§ 2799.—N. Y.: 139-341. App. Div. 20-65, 66, 459. Hun: 69-164 Misc.: 24-350; 25-133; 34-667. St. Rep'r: 52-539.

§ 2802.—N. Y.: 53-263; 78-535; 88-121; 95-103, 154, 263, 528; 96-327; 104-103, 250; 140-265. App. Div.: 9-291; 12-136; 64-436; 70-5 (see 172 N. Y. 494). Hun: 33-342; 36-261, 582; 50-274; 61-463; 78-301. Misc.: 1-492, 494; 15-550; 39-140. St. Rep'r: 41-39; 51-738. How. Pr. N. S.: 1-203.

§ 2803.—N. Y.: 94-558. Hun: 52-89. Misc.: 1-492. St. Rep'r: 41-798. Civ. Pro. R.: 7-157. How. Pr. N. S.: 1-203.

§ 2804.—N. Y.: 94-558; 158-721 (aff'g 35 App. Div. 434). App. Div.: 40-75. Hun: 41-187; 52-89. Misc.: 1-492; 4-339; 24-352; 30-574, 575. Abb. N. C.: 26-380. Dem.: 3-241; 4-363. Connoly: 2-640.

§ 2805.—N. Y.: 94-558. Hun: 52-89. Misc.: 1-492; 4-339; 20-159; 24-352; 37-583. Dem.: 4-363.

§ 2806.—Hun: 41-187; 50-275. Misc.: 1-492; 27-416; 30-575. Dem.: 3-223.

§ 2807.—N. Y.: 88-121; 100-223. App. Div.: 23-406. Hun: 51-201. Misc.: 1-492; 27-416. St. Rep'r: 39-393. Civ. Pro. R.: 7-157. How. Pr. N. S.: 1-203. Connoly: 2-641.

subd. 1.—App. Div.: 17-311.

§ 2808.—Hun: 26-216; 50-275. Misc.: 1-492; 27-416. St. Rep'r: 39-393. Civ. Pro. R.: 7-157. How. Pr. N. S.: 1-203. Dem.: 5-348. Connoly: 2-641.

§ 2809.—Hun.: 50-275. Misc.: 1-492. St. Rep'r: 39-393. Connoly: 2-641.

§ 2810.—N. Y.: 170-139, 427. App. Div.: 55-149. Hun: 36-261; 50-275. Misc.: 1-493. Dem.: 5-346.

§ 2811.—N. Y.: 88-121; 112-298. App. Div.: 70-5 (see 172 N. Y. 494).

(Consult Tables II and III (on pages xxa to xxf, ante) to find what sections of the new Surrogate's Act correspond with the former sections.)

(For recent cases see Supplementary List, following this Table.)

Hun: 50-275. Misc.: 1-492; 39-140. Civ. Pro. R.: 4-282. Dem.: 2-144; 3-241.

§ 2812. — App. Div.: 7-93. Hun: 50-275. St. Rep'r: 41-144. Abb. N. C.: 28-63. Dem.: 2-66. Connoly: 2-249.

§ 2813. — Hun: 50-275. Dem.: 2-65.

§ 2814.—N. Y.: 96-327. App. Div.: 9-295; 22-218; 24-192. Hun: 50-275. Misc.: 15-554; 19-325; 39-760. How. Pr. N. S.: 2-323. Dem.: 4-163, 359.

§ 2815. — App. Div.: 49-53. Hun: 26-632; 50-275. Civ. Pro. R.: 7-156; 8-157; 16-346. How. Pr. N. S.: 1-93, 202. Dem.: 3-231, 534, 615; 4-344; 5-497; 6-343. Wkly. Dig.: 24-182.

§ 2816. — Civ. Pro. R.: 7-156; 16-346. How. Pr. N. S.: 1-94, 202. Dem.: 3-333; 4-344.

§ 2817.—App. Div.: 62-40. How. Pr. N. S.: 1-94. Dem.: 3-233; 4-343.

subd. 1. — Hun: 36-128. St. Rep'r: 4-215. Civ. Pro. R.: 9-399. Dem.: 4-470.

subd. 2. — N. Y.: 84-339; 100-223; 138-310. App. Div.: 3-524. Hun: 36-582; 86-196. Misc.: 37-186. How. Pr. N. S.: 2-308. Dem.: 4-154; 5-356.

subd. 3.—St. Rep'r: 26-227; 42-156.

§ 2818. — N. Y.: 123-404; 138-310. App. Div.: 9-296; 10-510; 22-218; 69-270 (aff'd 174 N. Y. 540). Hun: 71-62; 86-196. Misc.: 15-556; 19-226; 35-552, 555. St. Rep'r: 21-783; 23-638, 634; 47-209; 54-197. Abb. N. C.: 13-355. Civ. Pro. R.: 9-399; 16-346. How. Pr. N. S.: 1-91. Dem.: 2-560; 3-228, 564; 4-470.

§ 2819.—N. Y.: 88-121. Hun: 26-632. Dem.: 2-144; 3-26; 4-359.

§ 2820.—How. Pr. N. S.: 1-204.

§ 2821.—N. Y.: 82-90; 126-390; 159-134. Hun: 74-21. Misc.: 20-538. How. Pr. N. S.: 3-21. Dem.: 4-396. Connoly: 1-502, 539.

§ 2822. — N. Y.: 159-135. App. Div.: 73-526. Hun: 70-467. St. Rep'r: 20-388; 53-711. Dem.: 4-39.

§ 2823.—St. Rep'r: 20-388. Wkly. Dig.: 24-234.

§ 2825.—St. Rep'r: 20-389. Connoly: 1-508, 539.

§ 2827.—App. Div.: 40-168; 73-526. Hun: 71-197. St. Rep'r: 20-388; 53-880; 70-431.

§ 2828.—App. Div.: 52-234.

§ 2830.—App. Div.: 18-497; 55-459; 67-71 (aff'd 175 N. Y. 150). Misc.: 29-272; 30-163; 31-118. St. Rep'r: 70-431. Civ. Pro. R.: 7-135.

§ 2831.—App. Div.: 67-71 (aff'd 175 N. Y. 150).

§ 2832.—App. Div.: 10-129. Civ. Pro. R.: 8-159n; 9-247. How. Pr. N. S.: 2-308; 3-360. Dem.: 2-648; 4-398.

subd. 6.—Dem.: 2-14, 440; 4-154. Wkly. Dig.: 18-42.

§ 2833. — App. Div.: 10-129. St. Rep'r: 21-108. Dem.: 2-442.

§ 2834.—App. Div.: 10-129. N. Y. Supp.: 4-125, 136.

§ 2837.—App. Div.: 52-234. Dem.: 2-648. Connoly: 2-110.

§ 2838—Dem.: 3-11, 387.

subd. 1. — St. Rep'r: 68-829. N. Y. Supp.: 9-296. Dem.: 2-11; 4-38.

§ 2839.—Dem.: 4-38, 94.

§ 2840.—Hun: 89-530. St. Rep'r: 68-829. Abb. N. C.: 27-61. Dem.: 4-38.

§ 2842.—N. Y.: 104-266; 159-135; App. Div.: 76-128. Hun: 34-269. St. Rep'r: 17-822. Dem.: 2-41, 441.

§ 2843. — App. Div.: 76-128. St. Rep'r: 17-822, 823. N. Y. Supp.: 53-976. Dem.: 2-41.

§ 2844. — N. Y.: 104-266; 159-135. St. Rep'r: 37-648. Dem.: 2-41.

§ 2845.—N. Y.: 104-266. Dem.: 2-41, 443.

(Consult Tables II and III (on pages xxx to xxf, ante,) to find what sections of the new Surrogate's Act correspond with the former sections.)

(For recent cases see Supplementary List, following this Table.)

§ 2846. — N. Y.: 159-134; 171-7. App. Div.: 72-330 Hun: 59-591. Misc.: 4-368; 7 379; 9 241; 25-284; 36-739. St. Rep'r: 37-437; 51-561. Dem.: 2 42, 648; 4 146; 6 42.

2847.—N. Y.: 104-267; 126-390; 159-135. Hun: 32-225; 73-532. Dem.: 2 596.

subd. 1.—App. Div.: 70-402. Hun: 36-261 (rev'd 100 N. Y. 206); 50-389. Dem.: 2-42.

subd. 3.—Hun: 36 261 (rev'd 100 N. Y. 206).

§ 2848.—N. Y.: 104-267. Dem.: 2-596.

§ 2849.—N. Y.: 104-267. App. Div.: 30-216; 70-404. Misc: 32-197. Dem.: 2-596.

§ 2850.—N. Y.: 49-667; 104-268; 159-136. App. Div.: 43-335. Hun: 26-149; 36-261. Misc.: 20-588. Dem.: 2-596; 5-84.

§ 2851.—Hun: 64-69. Misc.: 25-138. Dem.: 2-8.

§ 2852.—Misc.: 25-138. St. Rep'r: 70-431. Civ. Pro. R.: 16-264.

§ 2853.—N. Y.: 104-265.

§ 2855.—N. Y.: 104-265. Hun: 36-261.

§ 2856.—N. Y.: 104-266.

§ 2857.—N. Y.: 104-266.

§ 2858.—Civ. Pro. R.: 8-160n. How. Pr. N. S.: 2-308. Dem.: 4-154.

§ 2861.—N. Y.: 155-278. App. Div.: 9 20; 30-176. Hun: 57-367, 89-181; 92-526. Misc.: 11-119; 18-241; 29-281. St. Rep'r: 1-731. Civ Pro. R.: 8 101.

§ 2862.—N. Y.: 155-278. Hun: 30-165; 50 599. Misc.: 25 199. St. Rep'r: 28 423, 446. Wkly. Dig.: 17 239.

subd. 1.—App. Div.: 30-176. Misc.: 24-572. Abb. N. C.: 20-223n.

subd. 2.—N. Y.: 56-595; 128-178. App. Div.: 61-451. Misc.: 34-526 785. St. Rep'r: 37-401. Civ. Pro. R.: 20 206. N. Y. Supp.: 15-520.

subd. 6.—Hun: 65 362. Misc.: 24-752, 853. St. Rep'r: 47-780.

subd. 7.—N. Y.: 42-542. App. Div.: 46-193. Misc.: 29-278. Civ Pro. R.: 8-99.

§ 2863.—N. Y.: 155-278. Hun: 27-374. Misc.: 18 241; 24-758. St Rep'r: 28-423. Civ. Pro. R.: 13-319.

subd. 1.—App. Div.: 48-198, 199. Abb. N. C.: 29-293.

subd. 2.—N. Y.: 25-180; 77-598; 128-172; 153-428. Hun: 6-555; 63-577; 87-535. St. Rep'r: 40 891; 45-86. Abb. N. C.: 28-397.

subd. 3.—Hun: 54-613. Misc.: 23-366; 33-728, 729. St. Rep'r: 37 401, 557. Civ. Pro. R.: 20-206. N. Y. Supp.: 15-520.

subd. 4.—N. Y.: 75-417; 111-517. App. Div.: 51-205; 62-584, 585, 586; 66-280. Hun: 36-18; 75-294. Misc.: 29-565. St. Rep'r: 19-112; 27-863; 46-68; 53-633. Abb. N. C.: 13-60; 29-293; 31-269. Civ. Pro. R.: 4-228, 311; 8-345, 348n. How. Pr. N. S.: 3-63. Super. Ct.: 55-254.

subd. 5.—N. Y.: 111-578. App. Div.: 54-18; 66-279; 73-410. Misc.: 16 383; 30-77; 31-299. Abb. N. C.: 29-293. Civ. Pro. R.: 29-125.

§ 2864.—Hun: 57-304.

§ 2865.—N. Y.: 124-22. App. Div.: 44-605. St. Rep'r: 28-423. Civ. Pro. R.: 18-217.

§ 2868.—App. Div.: 30-429; 61-447. Hun: 84-306. St. Rep'r: 17-470. Civ. Pro. R.: 13-375.

§ 2869.—N. Y.: 51-673; 139-510; 171-94. App. Div.: 29-167; 39-429. Hun: 57-367; 67-473.

subd. 1.—N. Y.: 31-289.

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§ 15.—**N. Y.:** 185-599. **App. Div.:** 86-286; 108-13; 109-757; 130-707.
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§ 52.—**App. Div.:** 95-25. **Misc.:** 44-266; 54-38; 62-36, 376.
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§ 59.—**App. Div.:** 113-137; 115-348 (aff'd 188 N. Y. 49); 140-588.
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§ **70.**—**App. Div.**: **113**-137; **146**-492. **Misc.**: **67**-552.

§ **72.**—**N. Y.**: **188**-55. **App. Div.**: **140**-588.

§ **73.**—**N. Y.**: **186**-283. **App. Div.**: **86**-584; **91**-108 (aff'd 180 N. Y. 558); **108**-158 (aff'd 184 N. Y. 222); **113**-25; **119**-824. **Misc.**: **44**-335.

§ **74.**—**N. Y.**: **184**-228; **186**-283; **188**-450. **App. Div.**: **79**-562; **84**-259 (see 177 N. Y. 582); **86**-584; **118**-67 (rev'd 193 N. Y. 634); **133**-551 (aff'd 196 N. Y. 530); **135**-772; **137**-669; **152**-644 (aff'd 208 N. Y. 631); **156**-475; **170**-623. **Misc.**: **93**-613.

§ **75.**—**N. Y.**: **184**-228. **App. Div.**: **86**-584; **118**-68 (rev'd 193 N. Y. 634); **133**-555 (aff'd 196 N. Y. 530).

§ **77.**—**App. Div.**: **91**-108 (aff'd 180 N. Y. 558).

§ **81.**—**N. Y.**: **198**-185. **Misc.**: **68**-83.

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§ **102.**—**Misc.**: **58**-556.

§ **111.**—**N. Y.**: **201**-475. **App. Div.**: **132**-464; **137**-348; **145**-268; **170**-330. **Misc.**: **71**-533.

§ **126.**—**App. Div.**: **129**-366 (aff'd 200 N. Y. 521). **Misc.**: **65**-329.

§ **135.**—**Misc.**: **42**-208.

§ **144.**—**Misc.**: **43**-300.

§ **149.**—**Misc.**: **54**-26.

§ **151.**—**Misc.**: **78**-255.

§ **157.**—**Misc.**: **50**-511.

§ **159.**—**App. Div.**: **156**-69.

§ **160.**—**Misc.**: **78**-255.

§ **190.**—**N. Y.**: **181**-391; **187**-93, 321; **188**-196; **193**-600; **196**-195; **200**-204; **204**-9; **213**-336. **App. Div.**: **125**-719.

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§ **217.**—**N. Y.**: **200**-202. **App. Div.**: **117**-822; **137**-793. **Misc.** **87**-68.

§ **219.**—**App. Div.**: **150**-782.

§ **220.**—**N. Y.**: **197**-437. **App. Div.**: **97**-568; **109**-139; **110**-452; **111**-539 (aff'd 185 N. Y. 603); **150**-782. **Misc.**: **52**-14.

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§ **232.**—**App. Div.**: **117**-157 (aff'd 118 N. Y. 549); **122**-149 (aff'd 191 N. Y. 219).

§ **234.**—**N. Y.**: **191**-118. **App. Div.**: **122**-148 (aff'd 191 N. Y. 219); **147**-33 (aff'd 205 N. Y. 556).

§ **238.**—**App. Div.**: **99**-30. **Misc.**: **61**-581.

§ **239.**—**App. Div.**: **99**-30.

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§ 380.—N. Y.: 183-408; 212-210. App. Div.: 93-490 (rev'd 179 N. Y. 308); 94-25; 98-380 (rev'd 183 N. Y. 395); 106-17; 111-18; 123-244; 132-453 (rev'd 198 N. Y. 261); 163-351; 179-201. Misc.: 89-710; 90-612.

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§ 388.—N. Y.: 181-445; 183-397; 190-59; 191-450; 194-76; 200-260; 200-385; 207-130; 215-15; 217-530. App. Div.: 66-344 (aff'd 179 N. Y. 563); 83-576 (aff'd 178 N. Y. 618); 89-164; 90-490; 93-108, 335 (aff'g 40 Misc. 601); 106-334; 117-289 (rev'g 50 Misc. 328); 119-147, 508; 130-221; 138-80; 155-437; 156-251; 158-708 (aff'd 214 N. Y. 616); 164-238; 166-316, 537; 167-307; 168-490. Misc.: 40-58; 41-35, 477; 46-320; 62-540; 64-650; 68-176; 73-392; 80-278; 85-529.

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§ 508.—N. Y.: 192-220; 195-338. App. Div.: 86-516; 163-275, 279; 166-156; 167-10; 113-660, 834; 117-1; 125-435; 128-345, 847 (see 198 N. Y. 301); 130-316, 566; 153-643; 166-141; 167-613. Misc.: 41-314; 43-369; 46-58; 51-500 (rev'd 119 App. Div. 794); 70-136.

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§ 523.—App. Div.: 117-471; 124-784; 128-713; 165-886; 171-103. Misc.: 48-494; 54-250; 87-420 (aff'd 165 App. Div. 885).

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subd. 4.—App. Div.: **87**-37; **149**-584.
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§ **709.—App. Div.**: **89**-380; **82**-476; **108**-311; **114**-122; **118**-819; **133**-943. **Misc.**: **42**-329; **44**-420; **45**-646.
§ **713.—App. Div.**: **116**-504 (aff'd 190 N. Y. 546); **121**-816; **125**-543; **135**-390; **150**-833; **168**-326.
subd. 1.—App. Div.: **104**-81; **132**-850; **141**-865; **155**-633. **Misc.**: **53**-17.
§ **714.—App. Div.**: **120**-321; **125**-543; **150**-833. **Misc.**: **53**-17.
§ **715.—N. Y.**: **213**-312. **App. Div.**: **86**-552; **90**-254; **92**-176; **140**-422; **165**-924.
§ **716.—App. Div.**: **153**-158 (aff'd 214 N. Y. 635). **Misc.**: **41**-203.
§ **720.—N. Y.**: **200**-291.
§ **721.—N. Y.**: **200**-207; **207**-360. **App. Div.**: **110**-453; **111**-584 (aff'd 189 N. Y. 402); **142**-768; **164**-818. **Misc.**: **53**-341; **63**-47; **68**-596; **75**-481; **84**-98, 389.
subd. 3.—Misc.: **68**-595.
subd. 5.—App. Div.: **128**-233.
subd. 7.—App. Div.: **164**-816.
subd. 9.—Misc.: **84**-98.
subd. 12.—App. Div.: **130**-409; **148**-416. **Misc.**: **91**-506.
§ **722.—N. Y.**: **200**-207. **App. Div.**: **84**-397 (aff'd 178 N. Y. 630); **110**-453; **111**-584 (aff'd 189 N. Y. 402). **Misc.**: **68**-596.
§ **723.—N. Y.**: **182**-440; **183**-438; **185**-114; **187**-266; **189**-408; **190**-388; **191**-207; **197**-322; **200**-207; **203**-253; **216**-226. **App. Div.**: **78**-178 (aff'd 177 N. Y. 359); **79**-550 (aff'd 178 N. Y. 568), 632; **80**-633; **81**-102, 605; **82**-98 (aff'd 178 N. Y. 559), 241, 562; **83**-129, 215; **84**-468, 559 (rev'd 180 N. Y. 76); **85**-85; **87**-516; **88**-416, 518, 587; **89**-76, 82; **91**-233 (rev'd 180 N. Y. 116), 465; **92**-322; **93**-570; **94**-417, 458; **95**-84, 264, 360, 624 (see 180 N. Y. 503); **96**-270 (aff'd 184 N. Y. 545); **97**-76, 135, 193; **98**-316; **99**-128, 236; **100**-228, 448 (aff'd 183 N. Y. 505); **106**-98, 293; **109**-332, 514, 613; **110**-149, 453; **112**-15, 71, 199, 239; **113**-91, 757; **114**-324; **115**-172, 453, 499; **116**-483; **118**-83 (aff'd 189 N. Y. 542), 466, 811; **119**-849; **123**-688; **124**-115, 523; **126**-236, 431; **127**-71; **128**-233; **129**-410; **130**-180; **131**-79, 894; **133**-810 (see 197 N. Y. 316), 867 (aff'd 201 N. Y. 105); **135**-705; **136**-207, 407, 591; **137**-400; **138**-472; **139**-297; **141**-374 (rev'd 205 N. Y. 617); **142**-261, 337; **145**-138; **147**-471; **149**-858 (aff'd 210 N. Y. 581); **150**-401, 676; **152**-97; **153**-411 (aff'd 207 N. Y. 691); **155**-32, 401, 460; **156**-289, 575; **163**-19; **166**-743; **167**-585; **169**-842; **170**-428, 612; **171**-97. **Misc.**: **28**-289 (rev'd 76 App. Div. 174); **41**-337 (aff'd 87 App. Div. 632); **43**-407; **45**-268; **48**-175; **51**-666; **52**-290, 461; **53**-252; **55**-31; **56**-342, 352; **57**-138; **61**-383; **62**-631; **63**-47, 49; **67**-233; **68**-596; **70**-24; **71**-147; **75**-479; **79**-366; **82**-272; **83**-368 (rev'd 163 App. Div. 866), 375 (aff'd 161 App. Div. 559); **84**-97, 389; **85**-19, 61; **93**-361, 583.
§ **724.—N. Y.**: **196**-286; **200**-207; **203**-253; **215**-108. **App. Div.**: **80**-584; **82**-241; **83**-429; **88**-336; **89**-303; **102**-583; **110**-453; **112**-15, 441; **113**-803; **114**-793; **118**-344; **122**-451; **125**-212; **130**-444; **132**-210; **133**-594; **135**-759; **142**-337; **143**-484; **154**-308. **Misc.**:

45-153; 51-591; 55-31; 62-18; 75-523; 82-375 (aff'd 161 App. Div. 859); 82-452.

§ 725.—App. Div.: 164-818.

§ 727.—App. Div.: 127-910 (see 195 N. Y. 610); 138-247.

§ 729.—N. Y.: 193-287. App. Div.: 82-183.

§ 730.—N. Y.: 207-360. App. Div.: 82-183; 128-11.

§ 731.—N. Y.: 185-114; 210-272. App. Div.: 117-187; 185-79; 140-506. Misc.: 62-268; 69-836.

§ 732.—N. Y.: 185-114. App. Div.: 135-79; 153-758. Misc.: 56-362; 62-268; 87-317.

§ 733.—N. Y.: 185-114. App. Div.: 135-79. Misc.: 62-268.

§ 734.—N. Y.: 185-114. App. Div.: 135-79; 140-506. Misc.: 56-361.

§ 735.—App. Div.: 133-433 (aff'd 198 N. Y. 209).

§ 738.—App. Div.: 94-197; 99-248; 101-344 (aff'd 181 N. Y. 556); 144-278; 168-846. Misc.: 78-65.

§ 739.—Misc.: 71-437.

§ 740.—App. Div.: 82-348 (aff'd 178 N. Y. 629); 101-287; 131-172.

§ 743.—N. Y.: 185-114; 213-189. App. Div.: 162-854.

§ 744.—N. Y.: 204-280; 213-189. App. Div.: 153-753. Misc.: 77-591.

§ 744a.—N. Y.: 204-280. App. Div.: 153-753; 156-782. Misc.: 77-590.

§ 745.—N. Y.: 185-114; 213-189.

§ 746.—N. Y.: 213-189. App. Div.: 161-435 (aff'd 213 N. Y. 629).

§ 747.—N. Y.: 200-144. App. Div.: 81-347 (aff'd 177 N. Y. 543).

§ 748.—N. Y.: 185-114.

§ 749.—App. Div.: 81-347 (aff'd 177 N. Y. 543).

§ 750.—App. Div.: 110-539 (aff'd 185 N. Y. 600).

§ 751.—N. Y.: 200-144; 213-189. App. Div.: 81-346 (aff'd 177 N. Y. 543); 110-538 (aff'd 185 N. Y. 600); 121-627; 158-820. Misc.: 82-496.

§ 753.—App. Div.: 117-250.

§ 755.—N. Y.: 187-4; 208-475. App. Div.: 88-586; 104-533; 119-355; 141-465; 144-375 (aff'd 203 N. Y. 611); 145-827; 156-325 (rev'd 214 N. Y. 454). Misc.: 50-408; 82-522.

§ 756.—N. Y.: 176-100; 178-242; 182-385. App. Div.: 81-162; 82-101 (aff'd 178 N. Y. 559); 87-6 (see 177 N. Y. 558); 88-586; 97-183 (aff'd 186 N. Y. 554); 112-637; 115-508; 132-799; 137-264; 145-827; 153-887; 159-734; 161-902; 169-416. Misc.: 48-479; 49-615; 56-450; 73-24; 74-518; 82-522; 91-536.

§ 757.—App. Div.: 81-161; 82-101 (aff'd 178 N. Y. 559); 98-294; 104-535; 112-749; 118-186 (aff'd 189 N. Y. 543); 123-412; 141-465; 144-375 (aff'd 203 N. Y. 611); 156-325 (rev'd 214 N. Y. 454); 159-58; 161-522; 168-34. Misc.: 57-372; 72-153.

§ 758.—N. Y.: 199-377; 206-183. App. Div.: 112-750; 123-547; 125-148; 132-57. Misc.: 50-408; 53-6 (aff'd 119 App. Div. 355); 59-267; 70-52.

§ 759.—Misc.: 53-6 (aff'd 119 App. Div. 355).

§ 760.—App. Div.: 109-323; 112-748; 123-413; 149-245; 159-735. Misc.: 59-268; 79-87.

§ 761.—Misc.: 79-87.

§ 763.—N. Y.: 196-130. App. Div.: 134-322; 137-782 (aff'd 199 N. Y. 533); 161-522. Misc.: 45-477 (aff'd 108 App. Div. 322).

§ 764.—App. Div.: 112-745; 117-55; 123-663; 134-543; 144-680; 149-323.

§ 765.—App. Div.: 104-533; 134-544; 137-782 (aff'd 199 N. Y. 533); 161-465; 156-325 (rev'd 214 N. Y. 459); 167-544.

§ 766.—N. Y.: 195-242. App. Div.: 112-808; 141-465; 156-325 (rev'd 214 N. Y. 454).

§ 767.—App. Div.: 81-148; 101-467; 114-199; 118-8; 120-307; 124-61; 142-169; 151-623; 168-492. Misc.: 54-650; 62-39; 72-156; 76-211; 92-404.

§ 768.—App. Div.: 81-148; 96-592; 97-535; 109-537; 127-339; 147-37, 105; 148-302 (see 210 N. Y. 602); 149-3, 53, 444; 162-930; 165-424; 171-84. Misc.: 73-402; 76-428; 77-573; 78-96; 82-422; 85-663; 86-101 (rev'd 164 App. Div. 931); 87-320; 88-299 (aff'd 168 App. Div. 917); 93-66.

§ 769.—App. Div.: 91-272 (see 179 N. Y. 571); 106-387. Misc.: 70-569; 76-47.

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§ 772.—N. Y.: 177-236. App. Div.: 83-168; 105-119; 144-148 (aff'g 70 Misc. 506); 157-76. Misc.: 37-746 (aff'd 78 App. Div. 644); 59-331; 62-591; 63-33; 65-118.

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§ 780.—App. Div.: 85-288; 92-134 (aff'd 179 N. Y. 601); 130-874; 148-429; 154-586. Misc.: 72-158; 87-320.

§ 781.—N. Y.: 177-236. App. Div.: 88-275; 90-542; 157-76.

§ 782.—App. Div.: 120-666; 147-589; 154-308.

§ 784.—N. Y.: 200-208. App. Div.: 144-151. Misc.: 39-795; 55-176; 80-398.

§ 787.—Misc.: 52-428.

§ 788.—App. Div.: 100-413.

§ 791.—App. Div.: 96-165; 98-102

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subd. 1.—App. Div.: 81-576; 119-486; 123-140. Misc.: 44-45, 316; 56-123.
subd. 2.—App. Div.: 81-576. Misc.: 62-62.
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§ 793.—App. Div.: 96-102 (aff'd 181 N. Y. 531), 145, 147, 620; 107-249; 117-476; 120-382; 150-669. Misc.: 56-123, 336, 606; 62-379; 66-230; 77-144.

§ 796.—N. Y.: 175-234; 201-407. App. Div.: 136-452, 811. Misc.: 45-502; 56-334; 58-496; 79-88; 93-404.

§ 797.—N. Y.: 201-408. App. Div.: 99-534. Misc.: 45-502; 56-334; 58-496; 59-439; 93-404.
subd. 1.—App. Div.: 114-110; 119-148; 136-811. Misc.: 51-82; 52-92; 58-497; 79-88.
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§ 798.—N. Y.: 194-392. App. Div.: 93-306; 113-123; 116-497; 134-751; 147-219; 153-493. Misc.: 41-16, 558 (aff'd 93 App. Div. 607); 51-83; 52-269; 58-495; 81-417.

§ 799.—App. Div.: 146-249; 154-587.

§ 801.—N. Y.: 201-407. App. Div.: 136-811.

§ 802.—N. Y.: 201-407. App. Div.: 121-759; 136-811; 146-249. Misc.: 58-495, 496; 79-88.

§ 803.—App. Div.: 79-617, 626; 80-40; 87-472; 88-548; 95-543, 548; 96-149; 113-494, 840; 114-876, 377; 117-486; 118-276; 120-234, 747; 124-36; 126-814; 127-729; 128-266, 272, 275, 919; 131-823; 132-707; 133-421; 134-435; 137-752; 138-424; 139-726; 146-528; 146-249, 436; 148-243, 246, 776; 149-493; 152-163; 160-14, 258; 161-737; 166-230; 170-598. Misc.: 41-438; 42-618; 44-514; 51-644; 52-93, 640; 54-66, 580; 55-326; 57-364, 365; 58-384; 64-454; 66-157; 70-26; 73-20; 76-428; 80-146; 82-407; 84-263; 90-43; 92-294, 661.

§ 804.—App. Div.: 124-36; 134-437. Misc.: 54-580; 55-327.

§ 806.—App. Div.: 85-576; 90-296; 134-437; 157-251. Misc.: 56-604; 66-157.

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§ 813.—App. Div.: 79-428 (aff'd 179 N. Y. 551); 95-568 (aff'd 180 N. Y. 535); 117-359; 124-971; 144-511; 165-256; 171-207. Misc.: 50-147; 61-542; 65-315; 67-170; 73-272.

§ 813.—App. Div.: 116-674.

§ 814.—App. Div.: 118-663; 120-450. Misc.: 45-602; 48-223; 79-359; 88-632.

§ 815.—App. Div.: 155-96 (see 209 N. Y. 145).

§ 817.—App. Div.: 124-556; 128-263; 132-742; 146-138; 152-253. Misc.: 58-351; 77-162 (rev'd 154 App. Div. 142, 207 N. Y. 290); 82-384.

§ 818.—App. Div.: 118-160; 124-556; 128-263; 132-742. Misc.: 58-351.

§ 820.—N. Y.: 204-283. App. Div.: 81-204; 85-317, 483; 87-170 (see 178 N. Y. 603), 395; 96-394; 102-249; 104-91; 105-459; 118-839; 124-852; 125-547; 132-515; 138-887; 144-419 (aff'd 205 N. Y. 366); 148-766, 809; 149-608; 152-751; 157-286; 158-557; 162-606; 165-161; 166-865; 170-887. Misc.: 43-379; 44-317; 45-28, 42, 347; 46-17, 556; 50-655; 51-567; 58-553, 59-409; 71-451; 72-99, 378; 74-584; 92-449.

§ 820a.—N. Y.: 204-288; 217-93. App. Div. 129-594; 146-607; 153-750; 162-605. Misc.: 72-376; 79-362.

§ 821.—Misc.: 51-229.

§ 822.—App. Div.: 89-145; 92-250, 251; 106-591; 112-182; 119-45; 121-401, 612; 123-73; 124-372; 128-278; 133-739; 134-353; 137-61; 138-276; 149-861; 154-320, 348; 155-804. Misc.: 51-229, 589; 52-647; 62-479; 66-387; 74-408; 82-587; 88-552.

§ 823.—Misc.: 93-427.

§ 824.—App. Div.: 142-78.

§ 825.—Misc.: 55-19.

§ 827.—App. Div.: 112-707. Misc.: 65-540; 90-276.

§ 828.—App. Div.: 156-411; 157-138.

§ 829.—N. Y.: 175-379; 180-121, 264; 185-378; 187-491; 188-425; 196-322; 202-127; 204-225; 205-50, 177, 386; 206-480; 212-137; 215-474. App. Div.: 69-293, 460 (aff'd 174 N. Y. 540); 82-612; 85-6, 287, 368, 481; 86-385; 87-18; 90-20 (aff'g 40 Misc. 290); 94-10; 95-333; 97-430; 98-371, 418, 471, 486, 492; 99-83, 371; 100-3; 101-552; 102-592; 104-183, 334 (see 185 N. Y. 559); 105-257 (aff'd 185 N. Y. 128), 316; 106-136; 111-87; 112-379, 470; 114-412, 768; 115-310 (rev'd 187 N. Y. 541), 754 (aff'd 188 N. Y. 626); 116-185; 117-185 (see 189 N. Y. 500), 498, 501; 120-186; 121-333; 122-823; 124-88; 125-310, 354; 126-56, 568, 609; 127-606; 129-797, 818; 131-402, 428; 133-437; 134-431, 478; 135-791; 136-465, 593; 137-471, 612; 138-537, 609; 140-116; 142-690, 823 (aff'd 204 N. Y. 611); 147-7, 413 (rev'd 207 N. Y. 298), 654 (see 205 N. Y. 544); 148-279, 774; 149-261; 151-21, 360; 152-319 (aff'd 209 N. Y. 12); 154-362; 155-299, 342; 157-137; 158-195, 339 (aff'd 213 N.

Y. 676), 849; **160**-865 (aff'd 213 N. Y. 689); **163**-87; **167**-823. **Misc.**: **40**-153; **42**-50, 455, 597; **46**-346; **47**-88, 513; **48**-344; **49**-37 (aff'd 113 App. Div. 16); **50**-217, 289; **54**-176; **58**-106; **60**-505; **62**-602; **71**-120, 642; **73**-185, 494; **74**-38; **75**-69, 133, 389, 522; **76**-573; **77**-508; **78**-423; **79**-68, 223 (rev'd 157 App. Div. 868), 573; **82**-340, 464, 564; **84**-310; **85**-14; **87**-192, 400 (aff'd 167 App. Div. 958), 561; **90**-127, 243, 381; **91**-196, 388.

§ **830.**—**N. Y.**: **177**-357; **178**-131; **187**-193. **App. Div.**: **88**-463; **95**-391 (see 182 N. Y. 510); **105**-424; **126**-568; **125**-6; **154**-605; **167**-587. **Misc.**: **66**-226.

§ **831.**—**App. Div.**: **86**-162; **87**-156; **119**-853; **128**-804; **123**-217; **136**-379, 686; **146**-432; **147**-916; **148**-485; **156**-413; **157**-57. **Misc.**: **74**-565.

§ **832.**—**N. Y.**: **207**-71. **App. Div.**: **160**-681; **163**-258. **Misc.**: **69**-271; **71**-626; **76**-396.

§ **833.**—**Misc.**: **72**-278.

§ **834.**—**N. Y.**: **175**-98; **178**-62, 66; **184**-57; **185**-138; **187**-429; **188**-352; **192**-254; **193**-5, 13; **194**-458; **199**-452. **App. Div.**: **77**-219 (aff'g 38 Misc. 97); **86**-613; **81**-77; **82**-512; **87**-506; **89**-509; **94**-325; **96**-29; **99**-9, 74; **100**-367 (aff'd 185 N. Y. 375); **105**-317, 360; **113**-735; **116**-363; **119**-140; **120**-231, 773 (aff'd 192 N. Y. 581); **126**-273; **130**-14; **132**-573; **133**-806; **137**-316, 387; **142**-701; **146**-433; **149**-807; **151**-623; **153**-496; **154**-841; **156**-36 (aff'd 214 N. Y. 678); **162**-935; **164**-627; **170**-921. **Misc.**: **54**-176; **75**-133, 216 (aff'd 151 App. Div. 939); **82**-643.

§ **835.**—**N. Y.**: **179**-283; **182**-175; **194**-269; **201**-127; **213**-333; **216**-35. **App. Div.**: **94**-161; **96**-419; **120**-734; **126**-550; **143**-181, 686; **146**-117, 200; **148**-730; **152**-729; **158**-484; **161**-179; **162**-80; **166**-638. **Misc.**: **38**-105 (aff'd 77 App. Div. 215); **40**-529; **48**-486; **61**-547; **64**-285; **68**-353; **73**-154; **76**-372; **89**-645; **92**-507, 570.

§ **836.**—**N. Y.**: **178**-62; **182**-175; **184**-58; **188**-352; **193**-9, 14; **201**-128; **213**-333. **App. Div.**: **80**-614; **89**-509; **100**-367 (aff'd 185 N. Y. 375); **105**-268 (aff'd 185 N. Y. 128), 317; **116**-363; **120**-232; **126**-550; **133**-806; **143**-686; **146**-433; **149**-807; **151**-623; **153**-497; **156**-38 (aff'd 214 N. Y. 678); **158**-278 (aff'd 216 N. Y. 28); **161**-179, **164**-632. **Misc.**: **55**-64; **58**-172; **61**-547; **75**-216 (aff'd 151 App. Div. 939).

§ **837.**—**N. Y.**: **176**-253; **188**-52; **197**-236. **App. Div.**: **82**-448; **116**-576; **128**-713; **162**-506. **Misc.**: **49**-55; **68**-456; **70**-438.

§ **840.**—**N. Y.**: **202**-270. **App. Div.**: **93**-281 (aff'd 182 N. Y. 538); **100**-473 (aff'd 183 N. Y. 506); **112**-226 (aff'd 186 N. Y. 543); **123**-242; **127**-436. **Misc.**: **43**-424 (aff'd 102 App. Div. 614).

§ **841.**—**App. Div.**: **157**-339. **Misc.**: **72**-465; **75**-452.

§ **841b.**—**N. Y.**: **214**-305; **215**-69. **App. Div.**: **160**-359; **163**-25, 115, 181; **164**-411, 790; **169**-603; **171**-92. **Misc.**: **85**-564 (see 165 App. Div. 921).

§ **842.**—**N. Y.**: **184**-116. **Misc.**: **62**-517.

§ **843.**—**Misc.**: **47**-523.

§ **844.**—**App. Div.**: **115**-139. **Misc.**: **54**-86; **60**-144.

§ **845.**—**N. Y.**: **200**-55. **Misc.**: **47**-523.

§ **846.**—**N. Y.**: **200**-56.

§ **847.**—**N. Y.**: **200**-56.

§ **852.**—**N. Y.**: **185**-68. **App. Div.**: **139**-551. **Misc.**: **63**-190.

§ **853.**—**N. Y.**: **185**-68. **Misc.**: **72**-119.

§ **854.**—**N. Y.**: **185**-68; **204**-155. **App. Div.**: **115**-309; **139**-676, 774; **154**-881. **Misc.**: **62**-339; **63**-190; **70**-11; **73**-405 (aff'd 147 App. Div. 593, rev'd 204 N. Y. 313).

§ **855.**—**N. Y.**: **204**-115. **App. Div.**: **139**-778; **147**-599 (rev'd 204 N. Y. 313). **Misc.**: **70**-11.

§ **856.**—**N. Y.**: **204**-112. **App. Div.**: **95**-419; **105**-103; **139**-778; **169**-342. **Misc.**: **39**-459 (rev'd 81 App. Div. 51, 176 N. Y. 253); **40**-65 (rev'd 82 App. Div. 112); **68**-480; **70**-11; **72**-408 (aff'd 147 App. Div. 593, rev'd 204 N. Y. 313).

§ **857.**—**N. Y.**: **179**-284. **App. Div.**: **95**-419.

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§ 1366.—App. Div.: 165-572. Misc.: 56-450.

§ 1367.—App. Div.: 165-572.

§ 1368.—App. Div.: 165-572. Misc.: 56-451; 61-388.

§ 1369.—N. Y.: 179-376. App. Div.: 121-439; 138-849; 165-572. Misc.: 59-24; 61-388; 80-681.

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§ 1371.—Misc.: 60-311.

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§ 1375.—App. Div.: 94-26; 126-453 (aff'g 59 Misc. 447). Misc.: 56-451.

§ 1376.—App. Div.: 126-453 (aff'g 59 Misc. 447); 161-522. Misc.: 56-450; 59-25; 61-388.

§ 1377.—N. Y.: 193-268. App. Div.: 126-453 (aff'g 59 Misc. 447); 144-747; 155-251. Misc.: 59-25, 234; 76-368.

§ 1378.—N. Y.: 193-268. App. Div.: 144-747; 155-43. Misc.: 59-237.

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§ 1380.—App. Div.: 101-359; 115-862. Misc.: 42-633; 59-26.

§ 1381.—Misc.: 59-26.

§ 1388.—N. Y.: 195-242.

§ 1389.—App. Div.: 138-834 (aff'd 201 N. Y. 358).

§ 1390.—App. Div.: 106-323; 108-320; 131-397. Misc.: 42-394; 54-42; 56-537.

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§ **1382.**—**Misc.**: **54**-42.

§ **1383.**—**App. Div.**: **105**-47; **106**-323; **107**-154; **152**-425; **165**-613. **Misc.**: **51**-482; **66**-627.

§ **1385-1397.**—**App. Div.**: **106**-323.

§ **1400.**—**App. Div.**: **106**-325.

§ **1404.**—**App. Div.**: **107**-154. **Misc.**: **42**-319; **66**-627.

§ **1404a.**—**App. Div.**: **138**-834 (aff'd 201 N. Y. 358).

§ **1405.**—**App. Div.**: **87**-35; **167**-576. **Misc.**: **50**-338.

§ **1408.**—**App. Div.**: **145**-214. **Misc.**: **62**-67.

§ **1410.**—**App. Div.**: **139**-326.

§ **1412.**—**App. Div.**: **157**-435.

§ **1418.**—**App. Div.**: **80**-605 (aff'd 178 N. Y. 552); **150**-240. **Misc.**: **62**-307; **70**-113.

§ **1419.**—**App. Div.**: **150**-240. **Misc.**: **62**-308.

§ **1420.**—**Misc.**: **39**-664 (aff'd 81 App. Div. 586).

§ **1421.**—**Misc.**: **53**-278.

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§ **1425.**—**Misc.**: **53**-278.

§ **1439.**—**App. Div.**: **83**-407. **Misc.**: **63**-550.

§ **1439.**—**App. Div.**: **137**-642.

§ **1440.**—**App. Div.**: **83**-407.

§ **1441.**—**App. Div.**: **83**-407. **Misc.**: **46**-286.

§ **1471.**—**App. Div.**: **89**-607.

§ **1472.**—**Misc.**: **38**-659 (rev'd 89 App. Div. 603).

§ **1472.**—**App. Div.**: **89**-607.

§ **1478.**—**App. Div.**: **83**-407.

§ **1487.**—**N. Y.**: **195**-406. **App. Div.**: **82**-542; **86**-284; **90**-204; **93**-410; **101**-598; **109**-756; **116**-338; **127**-40; **135**-283. **Misc.**: **70**-218.

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subd. 2.—**Misc.**: **45**-349.

§ **1488.**—**N. Y.**: **195**-406. **Misc.**: **58**-363.

§ **1489.**—**N. Y.**: **216**-303. **Misc.**: **40**-264; **41**-557 (aff'd 95 App. Div. 619).

§ **1490.**—**App. Div.**: **158**-723.

§ **1494.**—**App. Div.**: **168**-134.

§ **1495.**—**App. Div.**: **168**-134.

§ **1496.**—**N. Y.**: **178**-453; **186**-490; **191**-325, 453; **197**-201. **Misc.**: **40**-471 (aff'd 83 App. Div. 643), 548; **43**-306.

§ **1497.**—**N. Y.**: **178**-453; **191**-326. **App. Div.**: **146**-747. **Misc.**: **40**-471 (aff'd 83 App. Div. 643); **43**-307.

§ **1498.**—**N. Y.**: **191**-315; **198**-423. **Misc.**: **48**-341 (aff'd 119 App. Div. 56).

§ **1499.**—**App. Div.**: **97**-16; **139**-528. **Misc.**: **64**-415; **74**-592.

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§ **1500.**—**N. Y.**: **191**-324. **Misc.**: **58**-399.

§ **1501.**—**App. Div.**: **125**-344 (aff'd 195 N. Y. 333); **137**-835; **140**-465; **141**-856; **145**-611; **153**-872. **Misc.**: **71**-223.

§ **1502.**—**App. Div.**: **106**-473; **109**-417. **Misc.**: **58**-399.

§ **1503.**—**Misc.**: **58**-399.

§ **1504.**—**Misc.**: **74**-411.

§ **1505.**—**App. Div.**: **93**-565. **Misc.**: **47**-239; **67**-421.

§ **1515.**—**App. Div.**: **70**-395 (see 172 N. Y. 666, 176 N. Y. 576).

§ **1519.**—**N. Y.**: **175**-467; **216**-373. **App. Div.**: **134**-846.

§ **1522.**—**App. Div.**: **84**-878; **137**-400.

§ **1523.**—**App. Div.**: **137**-400.

§ **1524.**—**App. Div.**: **126**-573; **137**-468 (aff'd 203 N. Y. 615). **Misc.**: **79**-62 (rev'd 155 App. Div. 931).

§ **1526.**—**App. Div.**: **137**-468 (aff'd 203 N. Y. 615). **Misc.**: **79**-62 (rev'd 155 App. Div. 931).

§ **1529.**—**App. Div.**: **107**-614. **Misc.**: **79**-62 (rev'd 155 App. Div. 931).

§ **1531.**—**N. Y.**: **175**-467; **178**-454; **187**-166; **191**-326; **199**-412. **App. Div.**: **115**-96; **126**-664. **Misc.**: **40**-471 (aff'd 83 App. Div. 643); **65**-366.

§ **1532.**—**N. Y.**: **186**-490; **199**-412; **206**-475; **212**-493. **App. Div.**: **77**-270 (rev'd 175 N. Y. 181); **86**-236; **116**-898; **121**-270; **125**-130 (see 193 N. Y. 653); **139**-658; **147**-432; **161**-492; **164**-49 (aff'd 214 N. Y. 710); **168**-154. **Misc.**: **41**-207 (aff'd 96 App. Div. 625); **42**-256; **46**-288; **62**-655; **64**-589; **69**-268; **70**-142; **71**-274; **73**-130, 450; **78**-418; **81**-16 (aff'd 158 App. Div. 951).

§ **1533.**—**App. Div.**: **128**-834; **138**-358; **147**-432. **Misc.**: **41**-207 (aff'd 96 App. Div. 625); **42**-256.

§ **1534.**—**Misc.**: **42**-10.

§ **1537.**—**App. Div.**: **115**-575; **132**-435; **132**-179; **139**-659; **162**-268. **Misc.**: **39**-364 (aff'd 87 App. Div. 632, 633); **53**-114.

§ **1538.**—**N. Y.**: **176**-424. **App. Div.**: **89**-170 (aff'd 188 N. Y. 590); **96**-36; **128**-53; **130**-180; **135**-706; **144**-243; **147**-432; **151**-112 (aff'd 206 N. Y. 689); **152**-758; **156**-328, 533, 667 (see 209 N. Y. 564); **165**-25. **Misc.**: **43**-289 (aff'd 107 App. Div. 445); **47**-474; **68**-411; **78**-418; **81**-16 (aff'd 158 App. Div. 951), 379.

§ **1539.**—**N. Y.**: **209**-490; **210**-463; **214**-351. **App. Div.**: **89**-170 (aff'd 188 N. Y. 590); **130**-180; **156**-328, 667 (see 209 N. Y. 564).

§ **1540.**—**App. Div.**: **101**-360; **156**-328. **Misc.**: **42**-633.

§ **1542.**—N. Y.: 210-464. App. Div.: 86-170 (aff'd 188 N. Y. 590); 139-658; 141-526; 154-945. Misc.: 47-20.

§ **1543.**—N. Y.: 210-464. App. Div.: 86-169 (aff'd 188 N. Y. 590); 139-243; 153-558. Misc.: 38-655 (rev'd 89 App. Div. 603); 93-202.

§ **1544.**—N. Y.: 181-119; 210-464. App. Div.: 86-170 (see 188 N. Y. 590); 102-585; 166-306; 166-863. Misc.: 38-656 (rev'd 89 App. Div. 603); 69-214; 92-99.

§ **1545.**—N. Y.: 181-119. App. Div.: 134-545.

§ **1546.**—N. Y.: 204-238. App. Div.: 101-195; 132-516; 156-667 (see 209 N. Y. 564); 168-154. Misc.: 71-286; 73-452.

§ **1547.**—App. Div.: 139-658.

§ **1557.**—App. Div.: 111-617. Misc.: 73-452.

subd. 3.—App. Div.: 111-617.

§ **1560.**—App. Div.: 156-668 (see 209 N. Y. 564).

§ **1561.**—App. Div.: 156-668 (see 209 N. Y. 564). Misc.: 71-267; 74-38.

§ **1562.**—App. Div.: 153-758. Misc.: 86-670 (aff'd 165 App. Div. 858, mod. 216 N. Y. 430).

§ **1564.**—N. Y.: 184-376. Misc.: 86-670 (aff'd 165 App. Div. 858, mod. 216 N. Y. 430).

§ **1565.**—App. Div.: 153-758.

§ **1569.**—App. Div.: 106-148. Misc.: 71-285.

§ **1570.**—App. Div.: 125-706. Misc.: 73-452.

§ **1577.**—App. Div.: 111-617; 139-452 (aff'd 198 N. Y. 591); 133-516.

§ **1578.**—N. Y.: 174-384.

§ **1579.**—N. Y.: 190-339. Misc.: 77-19.

§ **1582.**—App. Div.: 106-293; 153-758.

§ **1583.**—App. Div.: 146-451.

§ **1589.**—App. Div.: 126-664 (aff'd 196 N. Y. 510); 140-434; 156-215.

§ **1594.**—N. Y.: 190-339; 210-465; 212-426. App. Div.: 117-409 (aff'd 188 N. Y. 587).

§ **1595.**—N. Y.: 212-493.

§ **1596.**—N. Y.: 178-227; 200-83. App. Div.: 118-21; 166-148. Misc.: 81-17 (aff'd 158 App. Div. 951).

§ **1597.**—N. Y.: 178-232. Misc.: 51-467.

§ **1599.**—App. Div.: 89-259 (aff'd 179 N. Y. 549); 129-558; 163-358.

§ **1606.**—App. Div.: 151-516.

§ **1607.**—App. Div.: 128-189.

§ **1609.**—App. Div.: 129-558.

§ **1613.**—N. Y.: 190-48.

§ **1614.**—N. Y.: 190-48.

§ **1617.**—N. Y.: 188-520. App. Div.: 106-149.

§ **1624.**— N. Y.: 188-521. App. Div.: 144-683 (aff'd 205 N. Y. 551); 166-140.

§ **1625.**—App. Div.: 144-683 (aff'd 205 N. Y. 551).

§ **1626.**—App. Div.: 81-168; 107-110 (see 185 N. Y. 532). Misc.: 38-289 (rev'd 76 App. Div. 174).

§ **1627.**—N. Y.: 198-33. App. Div.: 117-409 (aff'd 188 N. Y. 587); 135-416; 144-402 (aff'd 205 N. Y. 577). Misc.: 41-317; 62-82.

subd. 1.—N. Y.: 217-526. App. Div.: 102-403; 107-109 (see 185 N. Y. 532); 111-476 (aff'd 188 N. Y. 638); 113-302; 150-126 (aff'd 208 N. Y. 513). Misc.: 50-411.

§ **1628.**—App. Div.: 75-454 (aff'd 177 N. Y. 527); 77-322 (see 173 N. Y. 638); 81-75; 107-109 (see 185 N. Y. 532;) 109-516; 111-476; 128-468; 144-250; 150-126 (aff'd 208 N. Y. 513); 154-226; 156-671 (see 209 N. Y. 564); 166-531; 161-742; 169-576. Misc.: 41-319; 62-82; 63-60.

§ **1629.**—App. Div.: 77-322 (see 173 N. Y. 638); 116-415 (aff'd 194 N. Y. 600); 122-276; 140-858 (aff'd 210 N. Y. 581); 164-726. Misc.: 79-367.

§ **1630.**—App. Div.: 81-76; 156-671 (see 209 N. Y. 564).

§ **1632.**—N. Y.: 204-518. App. Div.: 85-294; 92-262 (rev'd 180 N. Y. 516); 96-297; 117-402 (aff'd 188 N. Y. 587); 123-539; 134-839; 135-738 (see 198 N. Y. 595); 137-91 (aff'd 204 N. Y. 563); 169-313; 161-902; 167-102. Misc.: 66-639; 69-320.

§ **1633.**—App. Div.: 169-460; 163-292 (aff'd 187 N. Y. 563). Misc.: 69-562.

§ **1636.**—App. Div.: 102-403.

§ **1638.**—N. Y.: 174-343; 185-387; 196-319; 199-326; 200-107; 201-11. App. Div.: 68-119 (rev'd 174 N. Y. 102); 85-471; 90-455 (aff'd 181 N. Y. 515); 105-414 (rev'g 42 Misc. 358); 115-401; 116-243 (see 149 App. Div. 923, 205 N. Y. 595), 775; 132-867; 128-828 (see 194 N. Y. 542); 130-218; 132-146; 133-205, 598 (aff'd 197 N. Y. 578); 135-606; 138-4; 140-716; 141-11; 146-503; 148-312 (rev'd 209 N. Y. 186); 151-394, 740; 153-255, 579; 155-351; 158-433; 163-17; 166-95; 167-100, 257 (aff'd 215 N. Y. 708); 170-547. Misc.: 54-151; 56-148; 61-484; 62-388; 64-589; 73-417; 78-576; 86-642; 88-221; 89-114, 189; 90-431; 92-597.

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§ **1641.**—N. Y.: 201-11. App. Div.: 116-245.

§ **1642.**—N. Y.: 201-11. App. Div.: 116-243 (see 149 App. Div. 923, 205 N. Y. 595); 128-8; 163-579. Misc.: 56-148.

§ **1645.**—App. Div.: 85-474; 116-245; 133-146. Misc.: 62-429.

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§ **1650.**—N. Y.: 190-326. App. Div.: 135-696; 128-4; 166-95. Misc.: 54-151; 61-484.

§ **1651.**—N. Y.: 213-255. App. Div.: 162-928; 171-176.

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§ 1658.—App. Div.: 119-926 (see 193 N. Y. 197).
§ 1659.—App. Div.: 98-360.
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§ 1663.—App. Div.: 103-133.
§ 1665.—N. Y.: 213-254. App. Div.: 94-557, 561; 124-298 (aff'd 195 N. Y. 539), 649 (see 196 N. Y. 500).
§ 1666.—App. Div.: 135-906.
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§ 1668.—N. Y.: 191-328. App. Div.: 109-392; 136-190; 145-604; 146-631. Misc.: 56-161.
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§ 1670.—N. Y.: 189-64. App. Div.: 84-398 (aff'd 178 N. Y. 630); 106-553; 108-302; 111-276; 113-58, 408; 114-796; 115-509; 119-517; 121-261; 122-398; 123-529; 124-382; 125-380; 131-679; 133-278; 134-839; 136-455; 140-149; 144-334; 155-466; 159-61; 163-659. Misc.: 44-24; 53-6; 55-45; 57-147; 60-542, 557; 64-467.
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§ 1757.—N. Y.: 211-169; 214-210. App. Div.: 103-588; 116-424; 122-874; 137-138; 147-915; 151-525 (rev'd 209 N. Y. 440); 158-32; 159-575; 160-240, 478; 165-28. Misc.: 57-140; 64-124; 74-567; 92-99, 100.
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subd. 2.—N. Y.: 200-443. App. Div.: 111-240; 124-784; 155-418; 156-379. Misc.: 66-577; 77-344; 92-564.
§ 1758.—N. Y.: 200-76. App. Div.: 126-404 (aff'd 196 N. Y. 546); 127-298; 144-847. Misc.: 60-574; 69-433; 93-318.
subd. 1.—Misc.: 45-262.
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§ 1759.—N. Y.: 182-413; 183-263; 200-77. App. Div.: 83-67; 127-741; 138-839 (see 201 N. Y. 358); 154-252; 155-231. Misc.: 48-274; 67-405; 74-585 (rev'd 150 App. Div. 842).
subd. 2.—App. Div.: 101-590; 106-297. Misc.: 46-159 (aff'd 107 App. Div. 625); 49-600; 74-537 (rev'd 150 App. Div. 842); 92-582.
subd. 4.—N. Y.: 205-259.
§ 1760.—subd. 3.—N. Y.: 205-359.
§ 1761.—Misc.: 45-156 (rev'd 105 App. Div. 312); 84-671.
§ 1763.—N. Y.: 132-410. App. Div.: 86-341; 99-285; 123-385; 125-839, 841; 126-622; 148-567; 156-692. Misc.: 52-10; 60-574; 66-309; 77-674.
subd. 1.—App. Div.: 74-592 (aff'd 178 N. Y. 621); 92-443; 168-215.
subd. 2.—App. Div.: 74-592 (aff'd 178 N. Y. 621); 92-443; 168-215.
subd. 3.—App. Div.: 86-353. Misc.: 53-38.
subd. 4.—N. Y.: 193-417. Misc.: 53-38.
§ 1763.—App. Div.: 123-385; 124-785; 154-497; 170-67. Misc.: 54-292; 70-62; 80-111 (aff'd 156 App. Div. 913).
subd. 2.—Misc.: 89-523.
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§ 1764.—App. Div.: 79-631; 90-284.
§ 1765.—N. Y.: 193-410. App. Div.: 84-589; 110-42; 121-897; 134-788. Misc.: 60-200; 77-674; 80-112 (aff'd 156 App. Div. 913).
§ 1766.—App. Div.: 101-590; 124-568; 126-622; 140-535; 149-485; 164-49; 167-425. Misc.: 55-406; 74-535 (rev'd 150 App. Div. 842); 92-580.
§ 1767.—App. Div.: 81-349. Misc.: 74-538 (rev'd 150 App. Div. 842).
§ 1768.—N. Y.: 140-456; 154-495; 200-77. App. Div.: 96-288. Misc.: 59-317; 64-366; 65-175; 80-523.
§ 1769.—N. Y.: 182-258; 194-183; 200-566; 208-100. App. Div.: 88-77; 89-138 (rev'g 40 Misc. 92); 93-151; 95-274; 102-44, 75; 109-503; 110-20; 124-423 (aff'd 195 N. Y. 540); 130-874; 143-484; 147-465; 164-215. Misc.: 44-323 (aff'd 103 App. Div. 74); 48-149; 55-406; 57-200; 63-522; 74-535 (rev'd 150 App. Div. 842); 85-254 (aff'd 165 App. Div. 988).
§ 1770.—App. Div.: 99-452; 124-783 (aff'g 56 Misc. 376); 126-622; 155-576. Misc.: 46-362.
§ 1771.—App. Div.: 87-156; 89-98; 93-151; 99-41 (rev'd 182 N. Y. 408); 101-589; 105-63; 124-568; 126-622; 127-741, 743; 129-283; 136-514; 138-759; 150-336, 792; 151-421; 154-253; 169-599; 165-071. Misc.: 49-600; 55-406; 81-512; 86-561; 92-580.
§ 1772.—N. Y.: 182-413; 208-99. App. Div.: 89-139 (rev'g 40 Misc. 92); 92-176; 93-152; 119-767; 125-724; 132-464; 142-462; 169-599. Misc.: 66-316; 85-254 (aff'd 165 App. Div. 988).
§ 1773.—App. Div.: 89-139 (rev'g 40 Misc. 92); 93-152; 99-308; 100-331; 116-544; 122-789; 125-281, 859; 127-725; 132-464; 140-256; 142-464; 145-846. Misc.: 54-27; 60-239; 64-436; 74-537 (rev'd 150 App. Div. 842); 85-255 (aff'd 165 App. Div. 988).
§ 1774.—N. Y.: 196-129. App. Div.: 75-130 (see 175 N. Y. 497); 90-285; 105-313; 122-544; 134-321; 143-485; 144-847; 154-324; 162-603; 167-717. Misc.: 40-102, 103; 45-233; 50-278; 57-150; 63-110, 183; 91-152.
§ 1775.—App. Div.: 125-208; 130-566.
§ 1776.—App. Div.: 89-85; 93-423; 129-17; 139-567; 145-570; 151-409; 164-372, 635. Misc.: 40-685; 53-369; 57-166 (aff'd 123 App. Div. 655).
§ 1777.—App. Div.: 113-14.
§ 1778.—App. Div.: 96-25; 101-11; 119-657 (see 189 N. Y. 447). Misc.: 43-248; 63-385; 64-66.
§ 1779.—N. Y.: 190-227. App. Div.: 89-285 (rev'd 180 N. Y. 346); 104-248 (aff'g 45 Misc. 180); 113-384 (rev'd

190 N. Y. 240); 121-781; 122-783; 127-40; 162-212; 164-372; 166-66. Misc.: 48-367; 52-101, 659; 60-369.

§ 1780.—N. Y.: 180-247; 190-227; 193-309; 197-437; 205-436; 206-510; 217-437. App. Div.: 80-41; 81-213; 91-17; 93-609; 104-248 (aff'g 45 Misc. 180); 105-305 (aff'd 182 N. Y 568); 113-361; 117-832; 120-736; 122-782; 130-411; 166-184; 142-641; 144-93; 147-524 (aff'd 205 N. Y. 576); 148-786; 150-654; 157-254, 303 (see 211 N. Y. 557), 603; 159-852; 161-753, 834; 162-641; 169-212; 176-595. Misc.: 45-107; 56-671; 60-549; 62-541; 65-334; 66-619; 71-238, 255 (aff'd 144 App. Div. 928).

subd. 1.—App. Div.: 93-139. Misc.: 30-818.

subd. 2.—App. Div.: 93-139.

subd. 3.—N. Y.: 209-180. App. Div.: 71-236 (aff'd 175 N. Y. 463); 140-443 (rev'd 206 N. Y. 506); 150-854; 164-372. Misc.: 45-60; 64-141.

subd. 4.—App. Div.: 166-66; 169-212.

§ 1796.—Misc.: 67-578 (aff'd 140 App. Div. 611).

§ 1800.—N. Y.: 179-300; 187-543. App. Div.: 127-438; 133-124.

§ 1810.—N. Y.: 204-516.

subd. 3.—App. Div.: 144-483 (see 204 N. Y. 638); 155-328.

§ 1812.—N. Y.: 179-300. Misc.: 55-627.

§ 1814.—N. Y.: 210-107. App. Div.: 148-83; 153-42 (see 209 N. Y. 521); 159-752; 170-605. Misc.: 57-525.

§ 1815.—N. Y.: 213-238. App. Div.: 89-442; 95-498.

subd. 1.—App. Div.: 84-233. Misc.: 39-801.

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§ 1817.—App. Div.: 153-56; 157-255. Misc.: 76-579.

§ 1818.—Misc.: 50-399.

§ 1819.—App. Div.: 89-568; 96-586 (aff'd 181 N. Y. 258); 99-100; 126-775; 128-21; 138-165. Misc.: 51-382; 84-322.

§ 1873.—N. Y.: 176-527; 178-234; 182-276; 191-12; 200-82; 205-222; 206-182; 208-231; 211-331. App. Div.: 79-632; 88-303; 95-209; 98-430; 99-295; 101-556; 104-72; 106-181; 109-107 (aff'd 185 N. Y. 534), 203; 111-36 (see 185 N. Y. 541); 112-550; 119-760 (see 195 N. Y. 143); 125-747; 143-106; 146-60; 147-218; 150-39; 153-492; 155-849; 158-825; 159-927. Misc.: 40-516; 53-214; 55-180; 58-495; 62-170, 599; 65-440; 71-104; 75-438, 527; 80-468; 85-537 (aff'd 163 App. Div. 50); 87-469; 97-598.

§ 1823.—App. Div.: 153-42 (see 209 N. Y. 521).

§ 1824.—App. Div.: 96-100.

§ 1825.—App. Div.: 88-142; 101-555; 105-587; 163-44. Misc.: 64-117.

§ 1826.—App. Div.: 105-587; 116-68; 163-43. Misc.: 64-117.

§ 1830.—Misc.: 73-24.

§ 1835.—App. Div.: 93-281 (aff'd 182 N. Y. 538); 95-210; 119-829; 126-14 (see 194 N. Y. 587); 134-60; 143-105; 156-689.

§ 1836.—App. Div.: 79-632; 85-2; 93-281 (aff'd 182 N. Y. 538); 95-209; 99-295; 109-111 (aff'd 185 N. Y. 534); 119-829; 126-14 (see 194 N. Y. 587); 134-60; 143-105; 153-493; 156-689. Misc.: 41-505.

§ 1836a.—App. Div.: 152-84 (aff'd 208 N. Y. 635); 159-802; 165-55; 168-31.

§ 1837.—N. Y.: 199-161. App. Div.: 78-367 (aff'd 178 N. Y. 551); 96-266; 110-165; 152-788; 160-633; 160-485 (aff'd 212 N. Y. 600); 161-890.

§ 1838.—App. Div.: 160-486 (aff'd 212 N. Y. 600).

§ 1839.—App. Div.: 160-486 (aff'd 212 N. Y. 600). Misc.: 58-356.

§ 1841.—App. Div.: 110-165; 160-487 (aff'd 212 N. Y. 600).

§ 1842.—App. Div.: 160-487 (aff'd 212 N. Y. 600).

§ 1843.—N. Y.: 176-528; 199-160; 200-508. App. Div.: 110-163; 112-243; 131-366 (aff'd 198 N. Y. 633); 136-118; 138-76; 140-630; 141-907. Misc.: 47-317; 44-129; 52-298.

§ 1844.—App. Div.: 131-366 (aff'd 198 N. Y. 633).

§ 1846.—N. Y.: 176-528.

§ 1847.—Misc.: 41-318.

§ 1848.—App. Div.: 110-165; 112-243.

§ 1849.—N. Y.: 176-528. App. Div.: 110-165; 112-243; 160-487 (aff'd 212 N. Y. 600).

§ 1851.—N. Y.: 176-528.

§ 1852.—App. Div.: 112-245; 119-699; 140-632.

§ 1853.—App. Div.: 135-416.

§ 1854.—N. Y.: 199-160. App. Div.: 112-245; 140-631. Misc.: 42-335; 52-298.

§ 1860.—N. Y.: 199-161. App. Div.: 110-165; 112-245; 132-788; 160-485 (aff'd 212 N. Y. 600).

§ 1861.—Misc.: 62-171; 64-603; 75-434.

subd. 1.—App. Div.: 80-75 (aff'd 175 N. Y. 471); 160-802.

§ 1862.—Misc.: 61-206.

§ 1865.—N. Y.: 201-123. App. Div.: 74-569 (aff'd 174 N. Y. 504); 104-325 (see 185 N. Y. 559); 109-862 (see 185 N. Y. 542); 131-876; 153-845. Misc.: 51-543; 61-208; 75-434; 80-21.

§ 1866.—N. Y.: 195-442; 202-92; 205-238. App. Div.: 101-124; 132-139; 131-270; 144-23. Misc.: 60-123; 88-427; 89-54.

§ 1867.—Misc.: 64-603.

§ 1868.—App. Div.: 125-198. Misc.: 80-105.

§ 1869.—App. Div.: 153-156 (aff'd 214 N. Y. 635).

§ 1870.—N. Y.: 213-104. App. Div.: 106-251; 146-68 (see 203 N. Y. 553), 706; 160-405. Misc.: 57-502.

§ 1871.—N. Y.: 194-72; 199-63, 501; 201-362. App. Div.: 80-345; 84-218 (aff'd 177 N. Y. 530); 96-256; 107-466;

110-95; 113-900; 131-238 (aff'd 203 N. Y. 639); 134-815; 137-642; 144-540 (aff'd 203 N. Y. 556); 159-129; 161-132. Misc.: 46-348; 51-210, 215 (aff'd 113 App. Div. 899); 59-59; 62-540; 71-27; 78-687; 82-182 (aff'd 163 App. Div. 971); 89-467; 90-306.

§ 1872.—N. Y.: 194-73. App. Div.: 135-422; 159-429.

§ 1873.—N. Y.: 194-78. App. Div.: 98-256; 113-900; 137-642. Misc.: 51-215 (aff'd 113 App. Div. 899); 82-182 (aff'd 163 App. Div. 971); 89-560.

§ 1874.—App. Div.: 137-642.

§ 1879.—N. Y.: 194-72; 201-362. App. Div.: 84-218 (aff'd 177 N. Y. 530); 102-370; 113-900; 144-551 (see 203 N. Y. 556). Misc.: 51-214 (aff'd 113 App. Div. 899); 62-540.

§ 1887.—App. Div.: 81-307.

§ 1888.—N. Y.: 183-372. App. Div.: 81-307; 89-6.

§ 1889.—App. Div.: 89-6.

§ 1897.—App. Div.: 75-129 (see 175 N. Y. 497). Misc.: 40-30.

§ 1899.—N. Y.: 175-413; 208-22. App. Div.: 90-424.

§ 1900.—App. Div.: 136-629.

§ 1901.—App. Div.: 136-629.

§ 1902.—N. Y.: 182-394; 183-397; 197-318; 204-139; 208-362; 212-210; 213-103, 655; 214-35, 103. App. Div.: 70-495 (see 174 N. Y. 1); 71-290 (aff'd 173 N. Y. 621); 73-369 (rev'd 173 N. Y. 435); 80-343; 84-550; 86-342; 88-252; 89-254; 91-584; 94-35; 95-150; 98-169, 182; 99-604; 102-507; 105-439 (aff'd 182 N. Y. 555); 109-612, 728, 794; 112-143, 356, 747; 113-70 (aff'd 192 N. Y. 580), 90; 115-143; 121-128 (aff'd 197 N. Y. 517); 122-589; 123-153, 391; 130-387; 131-832 (aff'd 197 N. Y. 434); 135-325 (aff'd 201 N. Y. 221); 137-408; 139-449; 142-54; 144-93; 146-68 (see 203 N. Y. 553); 152-84 (aff'd 208 N. Y. 635), 742; 153-345, 618; 155-374; 156-433; 157-253; 160-404; 163-50, 823; 165-623; 169-30, 468. Misc.: 42-615; 59-482; 61-502 (aff'd 135 App. Div. 178); 70-341; 82-482; 87-82; 93-467, 476.

§ 1903.—N. Y.: 182-397; 197-318; 201-487; 202-244; 204-139; 212-211; 213-104. App. Div.: 81-620; 85-477; 88-252; 89-252; 94-35; 95-150; 98-382 (rev'd 183 N. Y. 395); 108-250; 115-668; 121-128 (aff'd 197 N. Y. 517); 131-832 (aff'd 197 N. Y. 434); 139-452; 146-68 (see 203 N. Y. 553); 152-86 (see 208 N. Y. 635), 742; 156-431; 160-404; 163-854; 165-623. Misc.: 49-403; 51-320; 70-341; 82-482; 88-340, 460; 92-470, 476.

§ 1904.—N. Y.: 177-384; 182-397; 183-407; 201-487; 202-244; 208-363. App. Div.: 73-495 (aff'd 174 N. Y. 512); 75-603 (aff'd 176 N. Y. 607); 81-620; 84-359; 85-477; 89-252; 94-35; 98-390 (rev'd 183 N. Y. 395); 99-185 (aff'd 185 N. Y. 529), 551; 108-251; 121-128 (aff'd 197 N. Y. 517), 714; 122-568; 139-387; 144-635 (aff'd 204 N. Y. 135); 148-71; 149-804; 152-742; 155-374, 656 (aff'd 213 N. Y. 101); 160-404; 163-469. Misc.: 83-161; 88-460; 92-476.

§ 1905.—N. Y.: 182-397; 213-104. App. Div.: 89-252; 108-250; 144-635 (aff'd 204 N. Y. 135); 146-68 (see 203 N. Y. 553); 152-742; 160-404. Misc.: 92-476.

§ 1906.—App. Div.: 138-308.

§ 1907.—N. Y.: 200-248. App. Div.: 82-474; 91-99 (aff'g 42 Misc. 74); 110-13; 150-918; 154-460; 165-531. Misc.: 45-166.

§ 1908.—N. Y.: 186-364. App. Div.: 110-671 (aff'd 186 N. Y. 606); 114-97; 157-389; 160-478; 164-471; 165-38. Misc.: 39-100 (aff'd 81 App. Div. 635, 178 N. Y. 208); 44-17; 48-223.

§ 1910.—N. Y.: 204-363. App. Div.: 112-744; 122-411; 165-38. Misc.: 45-214, 508; 48-223.

subd. 1.—App. Div.: 114-97; 167-137.

subd. 3.—App. Div.: 101-11.

§ 1913.—App. Div.: 117-288 (rev'g 50 Misc. 328); 126-774; 133-277; 137-191; 139-420. Misc.: 46-94 (rev'd 89 App. Div. 137); 46-152; 51-419 (aff'd 117 App. Div. 924).

subd. 1.—N. Y.: 186-405. Misc.: 51-420 (aff'd 117 App. Div. 924).

§ 1914.—Misc.: 64-454.

§ 1915.—N. Y.: 217-30. App. Div.: 72-66 (aff'd 177 N. Y. 551); 102-404; 112-501; 118-243. Misc.: 62-86; 65-17; 73-280.

§ 1917.—App. Div.: 86-591. Misc.: 39-99 (aff'd 81 App. Div. 635, 178 N. Y. 208); 56-573; 62-376.

§ 1919.—N. Y.: 190-178; 215-232; 217-518. App. Div.: 82-457; 84-240 (aff'd 176 N. Y. 562); 87-344; 97-188; 131-332; 135-39; 138-135; 149-164; 166-255. Misc.: 43-76, 612; 44-490; 45-411 (aff'd 104 App. Div. 630); 54-283; 55-276; 57-99; 60-75 (aff'd 129 App. Div. 905); 66-221; 67-246; 68-532; 77-32; 82-272; 88-313; 93-339.

§ 1921.—Misc.: 66-221; 93-341.

§ 1922.—Misc.: 66-221; 93-341.

§ 1923.—Misc.: 93-341.

§ 1924.—N. Y.: 190-178.

§ 1925.—N. Y.: 175-434; 177-509; 180-195; 193-341; 198-411; 202-440; 204-9; 205-87, 155; 206-500; 216-463. App. Div.: 68-233 (aff'd 174 N. Y. 519); 83-107; 102-338; 104-54; 112-607; 113-534; 117-666; 134-272; 140-606; 147-149; 163-235; 166-728; 167-863; 168-104, 306 (aff'd 217 N. Y. 129). Misc.: 48-83; 57-368; 67-214, 300; 70-317; 76-348 (aff'd 206 N. Y. 110); 77-362; 78-220; 82-497; 91-587.

§ 1926.—App. Div.: 76-361 (aff'd 179 N. Y. 556); 88-586. Misc.: 66-140; 88-156.

§ 1927.—App. Div.: 88-586. Misc.: 66-140.

§ 1928.—App. Div.: 76-361 (see 176 N. Y. 555).

§ **1929.—Misc.: 66-140.**
§ **1930.—N. Y.: 187-8; 200-147. App. Div.: 87-6 (see 177 N. Y. 558); 88-585.**
§ **1931.—Misc.: 66-140.**
§ **1932.—Misc.: 50-329, 408; 58-234; 79-615.**
§ **1933.—App. Div.: 84-564 (aff'd 178 N. Y. 631); 117-291 (rev'g 50 Misc. 328). Misc.: 62-256; 63-456.**
§ **1935.—Misc.: 50-406 (aff'd 116 App. Div. 914).**
§ **1936.—Misc.: 50-330.**
§ **1937.—N. Y.: 191-448. App. Div.: 84-564 (aff'd 178 N. Y. 631); 117-285 (rev'g 50 Misc. 328).**
§ **1938.—App. Div.: 117-286 (rev'g 50 Misc. 328).**
§ **1939.—App. Div.: 84-564 (aff'd 178 N. Y. 631); 117-286 (rev'g 50 Misc. 328.)**
§ **1940.—App. Div.: 117-288 (rev'g 50 Misc. 328).**
§ **1941.—App. Div.: 117-288 (rev'g 50 Misc. 328).**
§ **1942.—App. Div.: 79-640; 82-305; 83-502. Misc.: 40-634; 53-576, 610; 62-554.**
§ **1946.—Misc.: 40-634; 53-611.**
§ **1947.—N. Y.: 178-616. App. Div.: 132-951.**
§ **1948.—N. Y.: 201-203. App. Div.: 127-603; 134-69 (aff'd 197 N. Y. 539); 140-613 (aff'd 201 N. Y. 594). Misc.: 42-185; 53-350.**
subd. 1.—App. Div.: 76-408 (aff'd 175 N. Y. 433); 106-565; 118-179; 119-419 (rev'g 54 Misc. 130); 130-627; 140-617 (aff'd 201 N. Y. 594). Misc.: 62-92; 80-423.
subd. 3.—App. Div.: 130-628; Misc.: 78-97.
subd. 4.—App. Div.: 130-628; 135-183; 140-620 (aff'd 201 N. Y. 594).
§ **1949.—App. Div.: 119-420 (rev'g 54 Misc. 130). Misc.: 53-470.**
§ **1950.—N. Y.: 189-469. Misc.: 92-99.**
§ **1951.—App. Div.: 134-69 (aff'd 197 N. Y. 539).**
§ **1954.—App. Div.: 119-422 (rev'g 54 Misc. 130). Misc.: 42-188.**
§ **1955.—App. Div.: 130-628; 135-184.**
§ **1957.—App. Div.: 123-37. Misc.: 86-84.**
§ **1958.—Misc.: 92-99.**
§ **1961.—App. Div.: 137-865.**
§ **1962.—App. Div.: 114-225 (aff'd 186 N. Y. 209).**
§ **1960.—N. Y.: 207-25; 209-371; 213-4. App. Div.: 161-438 (aff'd 213 N. Y. 629); 176-475.**
§ **1973.—N. Y.: 213-9.**
§ **1974.—App. Div.: 161-438 (aff'd 213 N. Y. 629).**
§ **1977.—App. Div.: 171-6.**
§ **1978.—App. Div.: 171-3.**
§ **1979.—App. Div.: 171-9.**
§ **1980.—App. Div.: 171-9.**
§ **1983.—App. Div.: 140-617 (aff'd 201 N. Y. 594). Misc.: 80-424.**
§ **1984.—App. Div.: 171-6. Misc.: 54-132 (rev'd 119 App. Div. 416); 80-424.**
§ **1986.—App. Div.: 118-179; 119-419 (rev'g 54 Misc. 130).**

§ **1990.—App. Div.: 127-647.**
§ **1992.—App. Div.: 137-909 (see 195 N. Y. 610).**
§ **1994.—App. Div.: 85-409 (see 177 N. Y. 297). Misc.: 40-134 (aff'd 83 App. Div. 643); 58-305.**
§ **1997.—App. Div.: 88-586. Misc.: 62-315.**
§ **1998.—App. Div.: 157-301.**
§ **2000.—Misc.: 57-34 (aff'd 127 App. Div. 907).**
§ **2004.—App. Div.: 157-301. Misc.: 57-35 (aff'd 127 App. Div. 907).**
§ **2006.—Misc.: 57-35 (aff'd 127 App. Div. 907).**
§ **2007.—App. Div.: 123-274.**
§ **2015.—N. Y.: 187-418; 194-556; 202-152. App. Div.: 86-12 (see 183 N. Y. 569); 129-64 (rev'd 195 N. Y. 1); 132-171 (aff'd 196 N. Y. 525); 136-824; 139-472; 155-484.**
§ **2016.—N. Y.: 202-152; 216-539. App. Div.: 86-12 (see 183 N. Y. 569); 93-197; 123-499; 150-552 (aff'd 206 N. Y. 46); 151-562. Misc.: 78-484; 83-309; 91-618.**
subd. 2.—N. Y.: 206-49. App. Div.: 153-369.
§ **2017.—N. Y.: 186-176. App. Div.: 68-322 (see 170 N. Y. 7); 132-187; 150-777; 157-301; 168-557. Misc.: 71-354.**
§ **2019.—N. Y.: 187-418. App. Div.: 86-12 (see 183 N. Y. 569); 151-562. Misc.: 57-34 (aff'd 127 App. Div. 907).**
§ **2020.—N. Y.: 215-345. App. Div.: 94-402. Misc.: 57-32 (aff'd 127 App. Div. 907); 91-617.**
§ **2021.—App. Div.: 94-403.**
§ **2022.—App. Div.: 94-403.**
§ **2024.—Misc.: 57-33 (aff'd 127 App. Div. 907).**
§ **2025.—App. Div.: 157-301.**
§ **2026.—App. Div.: 160-481.**
§ **2027.—Misc.: 57-35 (aff'd 127 App. Div. 907).**
§ **2028.—App. Div.: 127-910 (see 195 N. Y. 610).**
§ **2031.—App. Div.: 129-64 (rev'd 195 N. Y. 1); 139-500 (aff'd 202 N. Y. 138); 140-479; 160-481. Misc.: 72-425.**
§ **2032.—N. Y.: 206-49. App. Div.: 86-12 (see 183 N. Y. 569); 135-185; 151-562; 163-616. Misc.: 68-308; 69-190; 74-496 (rev'd 151 App. Div. 1).**
subd. 2.—N. Y.: 176-471. App. Div.: 85-194 (aff'd 176 N. Y. 606); 139-501 (aff'd 202 N. Y. 138); 150-552 (aff'd 206 N. Y. 46). Misc.: 71-353.
§ **2033.—N. Y.: 187-27.**
subd. 4.—App. Div.: 85-194 (aff'd 176 N. Y. 606).
subd. 6.—App. Div.: 85-194 (aff'd 176 N. Y. 606).
§ **2034.—N. Y.: 187-28; 206-30. Misc.: 68-309.**
§ **2035.—N. Y.: 207-359. Misc.: 51-396.**
§ **2036.—Misc.: 71-354.**
§ **2038.—App. Div.: 91-570; 140-93; 157-301; 160-480. Misc.: 50-510.**
subd. 1.—App. Div.: 91-570.

§ **2039.**—N. Y.: **196**-116; **206**-50; **215**-343. App. Div.: **133**-186; **151**-261.
§ **2043.**—N. Y.: **202**-152.
§ **2050.**—Misc.: **74**-252 (aff'd 151 App. Div. 894).
§ **2051.**—Misc.: **74**-253 (aff'd 151 App. Div. 894).
§ **2058.**—N. Y.: **188**-444; **206**-54; **215**-350. App. Div.: **104**-48; **120**-817 (rev'd 189 N. Y. 460); **139**-472; **168**-558.
§ **2059.**—App. Div.: **145**-862 (aff'd 206 N. Y. 632); **150**-779.
§ **2060.**—App. Div.: **139**-472; **150**-916.
§ **2061.**—App. Div.: **150**-916.
§ **2062.**—App. Div.: **150**-915.
§ **2066.**—App. Div.: **104**-48; **160**-482.
§ **2067.**—N. Y.: **177**-395; **186**-2; **203**-1; **205**-24; **212**-565; **217**-100. App. Div.: **84**-235 (aff'd 176 N. Y. 562); **107**-229; **120**-98; **156**-388; **160**-895. Misc.: **76**-337; **81**-342.
§ **2068.**—N. Y.: **194**-187. App. Div.: **126**-87; **138**-561. Misc.: **61**-113.
§ **2069.**—App. Div.: **126**-87; **138**-561.
§ **2070.**—N. Y.: **177**-296; **200**-452. App. Div.: **79**-43 (rev'd 173 N. Y. 524); **88**-185; **99**-94; **107**-229; **120**-98; **138**-46; **145**-654; **167**-441; **168**-416, 558; **176**-583. Misc.: **69**-205.
§ **2071.**—Misc.: **54**-344.
§ **2072.**—App. Div.: **156**-388; **160**-895.
§ **2073.**—N. Y.: **177**-302.
§ **2074.**—App. Div.: **156**-388; **160**-895.
§ **2075.**—App. Div.: **196**-566; **114**-171; **138**-561; **156**-388; **160**-895.
§ **2076.**—App. Div.: **114**-171; **138**-560.
§ **2077.**—App. Div.: **89**-92; **138**-560.
§ **2078.**—App. Div.: **89**-92; **156**-388; **160**-895.
§ **2082.**—N. Y.: **178**-414. App. Div.: **112**-316; **123**-278; **126**-88; **138**-560. Misc.: **45**-183.
§ **2083.**—N. Y.: **178**-414. App. Div.: **122**-278; **126**-87; **132**-50; **139**-92 (see 200 N. Y. 146). Misc.: **45**-183; **92**-99.
§ **2084.**—N. Y.: **194**-187. App. Div.: **126**-87. Misc.: **45**-182; **61**-113.
§ **2086.**—App. Div.: **95**-77; **129**-81 (aff'd 195 N. Y. 529). Misc.: **73**-255.
§ **2087.**—N. Y.: **186**-263. App. Div.: **98**-253; **127**-77; **138**-562. Misc.: **73**-271.
§ **2088.**—App. Div.: **116**-850 (see 190 N. Y. 519); **139**-91 (see 200 N. Y. 146); **160**-597.
§ **2089.**—Misc.: **73**-271.
§ **2091.**—N. Y.: **184**-32, 96; **185**-35; **186**-394. App. Div.: **113**-111 (aff'd 186 N. Y. 383); **145**-531; **168**-553. Misc.: **58**-305.
§ **2092.**—N. Y.: **185**-506. App. Div.: **112**-429 (aff'd 185 N. Y. 504).
§ **2093.**—App. Div: **150**-181.
§ **2097.**—Misc.: **41**-290; **54**-31.
§ **2099.**—Misc.: **41**-290, 431.
§ **2100.**—Misc.: **53**-367.
§ **2101.**—App. Div.: **120**-818 (rev'd 189 N. Y. 460).
§ **2102.**—N. Y.: **186**-394. App. Div.: **120**-818 (rev'd 189 N. Y. 460).
§ **2120.**—N. Y.: **199**-382. App. Div.: **81**-122; **86**-276 (rev'd 176 N. Y. 463); **95**-44; **101**-296, 427 (aff'd 183 N. Y. 540); **110**-371; **116**-891 (aff'g 51 Misc. 190); **123**-594; **124**-155; **127**-853 (rev'd 193 N. Y. 248); **166**-540. Misc.: **76**-46.
§ **2121.**—App. Div.: **160**-666.
subd. 2.—App. Div.: **107**-274.
§ **2122.**—N. Y.: **207**-110; **217**-75. App. Div.: **101**-427 (aff'd 183 N. Y. 540); **106**-46, 92 (aff'd 182 N. Y. 558); **152**-577; **160**-666. Misc.: **82**-308 (aff'd 160 App. Div. 914).
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subd. 3.—Misc.: **82**-310 (aff'd 160 App. Div. 914).
§ **2123.**—App. Div.: **161**-734.
§ **2125.**—N. Y.: **185**-105; **195**-162. App. Div.: **83**-61 (see 176 N. Y. 60); **87**-59; **100**-184 (see 185 N. Y. 92); **103**-334; **106**-46; **160**-790; **164**-249. Misc.: **42**-118 (aff'd 95 App. Div. 620, 180 N. Y. 542); **82**-307 (aff'd 160 App. Div. 914); **84**-202 (aff'd 164 App. Div. 911).
§ **2126.**—Misc.: **82**-307 (aff'd 160 App. Div. 914).
§ **2127.**—N. Y.: **207**-90. App. Div.: **87**-59; **90**-414; **100**-190 (see 185 N. Y. 92); **131**-162; **161**-195 (aff'd 212 N. Y. 170). Misc.: **40**-134 (aff'd 83 App. Div. 643); **57**-16; **76**-47.
§ **2129.**—Misc.: **40**-135 (aff'd 83 App. Div. 643).
§ **2133.**—N. Y.: **181**-306; **214**-602. Misc.: **82**-315.
§ **2134.**—N. Y.: **176**-519; **199**-433. App. Div.: **90**-415; **103**-395; **111**-395; **146**-134; **149**-672. Misc.: **82**-143.
§ **2135.**—App. Div.: **78**-434 (aff'd 174 N. Y. 533); **86**-282; **90**-415; **103**-395; **111**-396; **134**-565 (rev'd 198 N. Y. 433); **146**-134; **149**-672; **160**-667. Misc.: **57**-30; **82**-311 (aff'd 160 App. Div. 914).
§ **2136.**—App. Div.: **78**-434 (aff'd 174 N. Y. 533); **146**-135.
§ **2137.**—N. Y.: **181**-306; **149**-672. Misc.: **40**-135 (aff'd 83 App. Div. 643).
§ **2138.**—N. Y.: **176**-518. App. Div.: **83**-52; **86**-280; **97**-285; **90**-415; **114**-169; **129**-268 (aff'd 194 N. Y. 383); **132**-609; **149**-672; **160**-667.
§ **2139.**—App. Div.: **90**-415; **146**-135.
§ **2140.**—N. Y.: **212**-177; **214**-600. App. Div.: **74**-612 (see 173 N. Y. 582); **78**-259 (aff'd 175 N. Y. 510); **81**-122; **109**-750; **124**-155; **127**-853 (rev'd 193 N. Y. 248); **132**-668; **134**-604; **144**-451; **157**-702; **160**-558 (aff'd 215 N. Y. 241). Misc.: **57**-27 (aff'd 131 N. Y. 545); **66**-484.
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§ **2141.—N. Y.: 153-570; 208-440; 214-599; 216-97. App. Div.: 80-283** (rev'd 175 N. Y. 394); **124-155; 165-934.**

§ **2142.—App. Div.: 82-193.**

§ **2143.—N. Y.: 183-570. App. Div.: 114-170; 162-349.**

§ **2144.—N. Y.: 214-601.**

§ **2145.—N. Y.: 214-601.**

§ **2148.—App. Div.: 86-12** (see 183 N. Y. 569); **129-499; 160-666.**

§ **2223.—N. Y.: 202-40.**

§ **2231.—N. Y.: 183-229; 202-300. App. Div.: 129-496; 134-267; 149-567. Misc.: 50-641; 58-216,** 546; **62-498; 67-545.**

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subd. 2.—App. Div.: 91-433; 112-114 (rev'd 188 N. Y. 103); **116-855; 127-79,** 812. **Misc.: 40-205,** 548; **41-632** (rev'd 105 App. Div. 542); **43-153,** 383; **44-241; 51-598; 59-487; 62-230; 74-409; 80-640.**

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§ **2232.—Misc.: 58-546; 62-517.**

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§ **2233.—App. Div.: 162-271; 169-617; 148-476. Misc.: 58-546; 61-230.**

§ **2234.—N. Y.: 183-229. App. Div.: 165-809. Misc.: 58-549; 63-247.**

§ **2235.—N. Y.: 201-453; 206-105. App. Div.: 83-157; 90-615; 105-553; 113-721; 122-585; 132-391; 144-701. Misc.: 40-206; 42-405; 52-159; 55-249; 56-461; 58-216; 61-83,** 228, 234, 628; **63-23; 67-126; 69-320.**

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§ **2237.—App. Div.: 169-303. Misc.: 58-546.**

§ **2238.—App. Div.: 165-553.**

§ **2240.—Misc.: 40-207; 47-633** (see 112 App. Div. 114, rev'd 188 N. Y. 103).

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§ **2241.—App. Div.: 165-554. Misc.: 68-353.**

§ **2242.—N. Y.: 182-237.**

§ **2243.—App. Div.: 165-554.**

§ **2244.—N. Y.: 182-237; 210-272. App. Div.: 83-151; 121-799; 128-864; 137-627; 139-745; 144-701; 147-236; 156-272; 165-473. Misc.: 38-125** (rev'd 78 App. Div. 107); **39-785; 41-664; 58-537; 59-483; 60-60; 61-46; 62-498; 68-353; 72-359; 82-491; 84-430; 92-399.**

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§ **2247.—App. Div.: 102-587; 112-120** (rev'd 188 N. Y. 103). **Misc.: 58-547; 93-99.**

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§ **2249.—App. Div.: 106-342** (rev'd 183 N. Y. 227); **123-570; 139-746. Misc.: 43-81; 82,** 383; **59-641; 92-315.**

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§ **2254.—N. Y.: 188-107; 210-272. App. Div.: 91-432; 140-506. Misc.: 43-383; 75-652; 92-316.**

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§ **2257.—Misc.: 53-461; 58-546.**

§ **2258.—App. Div.: 152-556** (see 207 N. Y. 479); **165-802. Misc.: 58-551.**

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§ **2260.—N. Y.: 183-229. App. Div.: 169-635; 142-206. Misc.: 50-641; 72-153; 92-316.**

§ **2261.—N. Y.: 183-230. App. Div.: 169-635. Misc.: 92-316.**

§ **2262.—App. Div.: 134-504. Misc.: 92-316.**

§ **2263.—App. Div.: 84-627; 158-26. Misc.: 57-444.**

§ **2264.—App. Div.: 127-82. Misc.: 37-389** (aff'd 79 App. Div. 249, 178 N. Y. 451); **46-437; 55-249.**

§ **2265.—Misc.: 41-664; 50-641; 61-46.**

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§ **2266.—App. Div.: 91-267** (aff'd 179 N. Y. 571); **95-409** (aff'd 180 N. Y. 505); **100-328; 109-890; 118-343; 123-789; 126-116; 132-464; 139-554; 144-659.**

§ **2267.—N. Y.: 179-284. App. Div.: 100-328; 147-397** (aff'd 204 N. Y. 108).

§ **2268.—App. Div.: 88-500; 91-268** (aff'd 179 N. Y. 571); **100-328; 113-743; 127-725; 145-846. Misc.: 54-27; 56-277; 65-165; 74-177** (see 204 N. Y. 108).

§ **2269.—App. Div.: 88-500; 91-268** (aff'd 179 N. Y. 571); **100-328; 102-369** (aff'd 181 N. Y. 558); **119-295;**

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§ 2284.—N. Y.: 185-68. App. Div.: 95-409 (aff'd 180 N. Y. 505); 112-55 (aff'd 185 N. Y. 602); 158-421. Misc.: 45-357; 56-462; 64-618 (rev'd 67 Misc. 90); 72-161; 74-405; 76-212; 85-57; 91-421; 93-528.

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§ 2286.—App. Div.: 111-285 (aff'd 186 N. Y. 584); 154-586; 161-529. Misc.: 60-64; 72-429; 74-331; 92-452.

§ 2289.—N. Y.: 192-30; 214-203. App. Div.: 90-327; 100-668 (aff'd 187 N. Y. 178); 124-423 (aff'd 195 N. Y. 540); 126-464 (rev'd 192 N. Y. 514), 890 (see 194 N. Y. 541); 126-801; 129-587; 134-552 (aff'd 197 N. Y. 583); 162-889; 176-291. Misc.: 46-47; 76-289; 84-568.

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§ 2310.—N. Y. 217-442. App. Div.: 90-60; 137-341; 156-292. Misc.: 60-377.

§ 2311.—App. Div.: 130-367. Misc.: 76-584.

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§ 2318.—App. Div.: 104-118; 117-754 (aff'd 192 N. Y. 557). Misc.: 73-138.
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§ 2365.—N. Y.: 175-264. App. Div.: 122-399; 158-626.

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§ 2367.—App. Div.: 67-165 (rev'd 175 N. Y. 256).

§ 2368.—N. Y.: 175-264.

§ 2368.—N. Y.: 175-264; 184-116. App. Div.: 168-361.

§ **2370.**—**App. Div.: 150-897.**
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§ **2400.**—**N. Y.: 211-88. App. Div.: 135-757.**
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§ **2627.**—**App. Div.: 100-243.**

§ **2628.**—**N. Y.: 214-465. App. Div.: 90-328; 165-168. Misc.: 37-585** (rev'd 77 App. Div. 155).

§ **2629.**—**N. Y.: 182-60; 217-370. App. Div.: 96-12; 98-414; 124-332; 153-655** (rev'd 209 N. Y. 375). **Misc.: 72-146; 89-704; 92-326.**

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§ **2643.**—**N. Y.: 201-498. App. Div.: 96-397. Misc.: 75-423.**

§ **2645.**—**App. Div.: 73-526** (aff'd 176 N. Y. 377). **Misc.: 47-30; 67-4; 75-424.**

§ **2646.**—**App. Div.:** 73-526 (aff'd 176 N. Y. 377). **Misc.:** 47-30; 56-417; 67-2; 75-424.
§ **2647.**—**Misc.:** 56-417.
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§ **2650.**—**App. Div.:** 67-71 (aff'd 175 N. Y. 150); 86-529; 156-752. **Misc.:** 58-630 (aff'd 129 App. Div. 907); 67-67, 567; 88-399; 92-509; 93-408.
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(2) *Mode of taking and entering.*
(3) *Form of; interlocutory or final.*
(4) *Judgment roll.*
(5) *Docketing and lien of judgment; satisfaction and discharge of judgments.*
(6) *Vacating or setting aside a judgment.*
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(3) *Provisional remedies.*
(4) *Pleadings.*
(5) *Proceedings between joinder of issue and trial.*
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CONSTITUTION OF THE STATE OF NEW YORK

CONSTITUTION OF NEW YORK.

We, the People of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessing, do establish this Constitution:

ARTICLE I.

§ 1. Persons not to be disfranchised.

No member of this State shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

From Const. of 1846, Art. I, § 1.

§ 2. Trial by jury.

The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law.

From Id., Art. I, § 2.

§ 3. Freedom of worship; religious liberty.

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this State to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

From Id., Art. I, § 3.

§ 4. Habeas corpus.

The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension.

From Id., Art. I, § 4.

§ 5. Excessive bail and fines.

Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

From Id., Art. I, § 5.

§ 6. Grand jury; bill of rights.

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of military when in actual service, and the land and naval forces in time of war, or which this State may keep with the consent of Congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on presentment or indict-

ment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

From Id., Art. I, § 6.

§ 7. [Am'd, 1913.] Compensation for taking private property; private roads; drainage of agricultural lands; right to take additional land for building sites.

When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by the supreme court with or without a jury, but not with a referee, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited. General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes.

The legislature may authorize cities to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased.

From Id., Art. I, § 7. Am'd in 1913.

§ 8. Freedom of speech and press; criminal prosecutions for libel.

Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech

or of the press. In all criminal prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

From Id., Art. I, § 8.

§ 9. Right to assemble and petition; divorce; lotteries, pool-selling and gambling, laws to prevent.

No law shall be passed abridging the right of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; nor shall any lottery or the sale of lottery tickets, pool selling, bookmaking, or any other kind of gambling hereafter be authorized or allowed within this State; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

From Id., Art. I, § 10.

§ 10. Escheats.

The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat to the people.

From Id., Art. I, § 11.

§ 11. Feudal tenures abolished.

All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain which at any time heretofore have been lawfully created or reserved.

From Id., Art. I, § 12.

§ 12. Allodial tenures.

All lands within this State are declared to be allodial, so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates.

From Id., Art. I, § 13.

13. Leases of agricultural lands.

No lease or grant of agricultural land, for a longer period than ilve years, hereafter made, in which shall be reserved any rent ervice of any kind, shall be valid.
rom Id., Art. I, § 14.

14. Fines and quarter-sales abolished.

All fines, quarter-sales, or other like restraints upon alienation, erved in any grant of land hereafter to be made, shall be void.
rom Id., Art. I, § 15.

15. Purchase of lands of Indians.

No purchase or contract for the sale of lands in this State, made ce the fourteenth day of October, 1775; or which may hereafter made, of, or with the Indians, shall be valid, unless made under authority, and with the consent of the legislature.
rom Id., Art. I, § 16.

16. Common law and acts of the colonial and state legislatures.

Such parts of the common law, and of the acts of the legislature the colony of New York, as together did form the law of the l colony, on the nineteenth day of April, 1775, and the resolu- ns of the congress of the said colony, and of the convention of state of New York, in force on the twentieth day of April, 1777, ich have not since expired, or been repealed or altered; and such s of the legislature of this State as are now in force, shall be l continue the law of this State, subject to such alterations as legislature shall make concerning the same. But all such parts the common law, and such of the said acts, or parts thereof, as repugnant to this constitution, are hereby abrogated.
rom Id., Art. I, § 17.

17. Grants of land made by the king of Great Britain since 1775; prior nts.

All grants of land within this State, made by the king of Great tain, or persons acting under his authority, after the fourteenth r of October, 1775, shall be null and void; but nothing contained this constitution shall affect any grants of land within this State, de by the authority of the said king or his predecessors, or shall nul any charters to bodies politic and corporate, by him or them de, before that day; or shall affect any such grants or charters de by this State, or by persons acting under its authority; or ll impair the obligation of any debts contracted by the State or

individuals, or bodies corporate, or any other rights of property, or any suits, actions, rights of action, or other proceedings in courts of justice.

From Id., Art. I, § 18.

§ 18. Damages for injuries causing death.

The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

New.

§ 19. [Added, 1913.] Employees' compensation laws.

Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer.

New. Added 1913.

ARTICLE II.

§ 1. Qualification of voters.

Every male citizen of the age of twenty-one years, who shall have been a citizen for ninety days, and an inhabitant of this State one year next preceding an election, and for the last four months a resident of the county and for the last thirty days a resident of the election district in which he may offer his vote, shall be entitled to vote

at such election in the election district of which he shall at the time be a resident, and not elsewhere, for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to the vote of the people, provided that in time of war no elector in the actual military service of the State, or of the United States, in the army or navy thereof, shall be deprived of his vote by reason of his absence from such election district; and the legislature shall have power to provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election districts in which they respectively reside.

From Const. of 1846, Art. II, § 1, as am'd in 1874.

§ 2. Persons excluded from the right of suffrage.

No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, contribute, offer or promise to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at an election, or who shall make any promise to influence the giving or withholding any such vote, or who shall make or become directly or indirectly interested in any bet or wager depending upon the result of any election, shall vote at such election; and upon challenge for such cause, the person so challenged, before the officers authorized for that purpose shall receive his vote, shall swear or affirm before such officers that he has not received or offered, does not expect to receive, has not paid, offered or promised to pay, contributed, offered or promised to contribute to another, to be paid or used, any money or other valuable thing as a compensation or reward for the giving or withholding a vote at such election, and has not made any promise to influence the giving or withholding of any such vote, nor made or become directly or indirectly interested in any bet or wager depending upon the result of such election. The legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime.

From Id., Art. II, § 2, as am'd in 1874.

§ 3. Certain occupations and conditions not to affect residence.

For the purpose of voting, no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this State, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or other asylum, or insti-

tution wholly or partly supported at public expense or by charity; nor while confined in any public prison.

From Id., Art. II, § 3.

§ 4. Registration and election laws to be passed.

Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the right of suffrage hereby established, and for the registration of voters; which registration shall be completed at least ten days before each election. Such registration shall not be required for town and village elections except by express provision of law. In cities and villages having five thousand inhabitants or more, according to the last preceding state enumeration of inhabitants, voters shall be registered upon personal application only; but voters not residing in such cities or villages shall not be required to apply in person for registration at the first meeting of the officers having charge of the registry of voters.

From Id., § 4.

§ 5. Manner of voting.

All elections by the citizens, except for such town officers as may by law be directed to be otherwise chosen, shall be by ballot, or by such other method as may be prescribed by law, provided that secrecy in voting be preserved.

From Id., § 5.

§ 6. Registration and election boards to be bi-partisan, except at town and village elections.

All laws creating, regulating or affecting boards of officers charged with the duty of registering voters, or of distributing ballots at the polls to voters, or of receiving, recording or counting votes at elections, shall secure equal representation of the two political parties which, at the general election next preceding that for which such boards or officers are to serve, cast the highest and the next highest number of votes. All such boards and officers shall be appointed or elected in such manner, and upon the nomination of such representatives of said parties respectively, as the legislature may direct. Existing laws on this subject shall continue until the legislature shall otherwise provide. This section shall not apply to town meetings, or to village elections.

New.

ARTICLE III.

§ 1. Legislative powers.

The legislative power of this State shall be vested in the senate and assembly.

From Const. of 1846, Art., III § 1.

§ 2. Number and terms of senators and assemblymen.

The senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year 1895 shall hold their offices for three years, and their successors shall be chosen for two years. The assembly shall consist of one hundred and fifty members, who shall be chosen for one year.

From Id., Art. III, § 2.

§ 3. Senate districts.

The State shall be divided into fifty districts to be called senate districts, each of which shall choose one senator. The districts shall be numbered from one to fifty, inclusive.

District number one (1) shall consist of the counties of Suffolk and Richmond.

District number two (2) shall consist of the county of Queens.

District number three (3) shall consist of that part of the county of Kings comprising the first, second, third, fourth, fifth and sixth wards of the city of Brooklyn.

District number four (4) shall consist of that part of the county of Kings comprising the seventh, thirteenth, nineteenth and twenty-first wards of the city of Brooklyn.

District number five (5) shall consist of that part of the county of Kings comprising the eighth, tenth, twelfth and thirtieth wards of the city of Brooklyn, and the ward of the city of Brooklyn which was formerly the town of Gravesend.

District number six (6) shall consist of that part of the county of Kings comprising the ninth, eleventh, twentieth and twenty-second wards of the city of Brooklyn.

District number seven (7) shall consist of that part of the county of Kings comprising the fourteenth, fifteenth, sixteenth and seventeenth wards of the city of Brooklyn.

District number eight (8) shall consist of that part of the county of Kings comprising the twenty-third, twenty-fourth, twenty-fifth and twenty-ninth wards of the city of Brooklyn, and the town of Flatlands.

District number nine (9) shall consist of that part of the county of Kings comprising the eighteenth, twenty-sixth, twenty-seventh and twenty-eighth wards of the city of Brooklyn.

District number ten (10) shall consist of that part of the county of New York within and bounded by a line beginning at Canal street and the Hudson river, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Canal street, the Bowery, Division street, Grand street, and Jackson street, to the East river and thence around the southern end of Manhattan island, to the place of beginning, and also Governor's, Bedloe's and Ellis islands.

District number eleven (11) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the junction of Broadway and Canal street, and running thence along Broadway, Fourth street, the Bowery and Third avenue, St. Mark's place, Avenue A, Seventh street, Avenue B, Clinton street, Rivington street, Norfolk street, Division street, Bowery and Canal street, to the place of beginning.

District number (12) shall consist of that part of the county of New York lying north of districts numbers ten and eleven, and within and bounded by a line beginning at Jackson street and the East river and running thence through Jackson street, Grand

street, Division street, Norfolk street, Rivington street, Clinton street, Avenue B, Seventh street, Avenue A, St. Mark's place, Third avenue, East Fourteenth street to the East river and along the East river to the place of beginning.

District number thirteen (13) shall consist of that part of the county of New York lying north of district number ten, and within and bounded by a line beginning at the Hudson river at the foot of Canal street, and running thence along Canal street, Hudson street, Dominick street, Varick street, Broome street, Sullivan street, Spring street, Broadway, Fourth street, the Bowery and Third avenue, Fourteenth street, Sixth avenue, West Fifteenth street, Seventh avenue, West Nineteenth street, Eighth avenue, West Twentieth street and the Hudson river to the place of beginning.

District number fourteen (14) shall consist of that part of the county of New York lying north of district numbers twelve and thirteen, and within and bounded by a line beginning at East Fourteenth street and the East river, and running thence along East Fourteenth street, Irving place, East Nineteenth street, Third avenue, East Twenty-third street, Lexington avenue, East Fifty-third street, Third avenue, East Fifty-second street, and the East river, to the place of beginning.

District number fifteen (15) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at the junction of West Fourteenth street and Sixth avenue, and running thence along Sixth avenue, West Fifteenth street, Seventh avenue, West Fortieth street, Eighth avenue, and the transverse road across Central park at Ninety-seventh street, Fifth avenue, East Ninety-sixth street, Lexington avenue, East Twenty-third street, Third avenue, East Nineteenth street, Irving place and Fourteenth street, to the place of beginning.

District number sixteen (16) shall consist of that part of the county of New York lying north of district number thirteen, and within and bounded by a line beginning at Seventh avenue and West Nineteenth street, and running thence along West Nineteenth street, Eighth avenue, West Twentieth street, the Hudson river, West Forty-sixth street, Tenth avenue, West Forty-third street, Eighth avenue, West Fortieth street and Seventh avenue, to the place of beginning.

District number seventeen (17) shall consist of that part of the county of New York lying north of district number sixteen, and within and bounded by a line beginning at the junction of Eighth avenue and West Forty-third street, and running thence along West Forty-third street, Tenth avenue, West Forty-sixth street, the Hudson river, West Eighty-ninth street, Tenth or Amsterdam avenue, West Eighty-sixth street, Ninth or Columbus avenue, West Eighty-first street and Eighth avenue, to the place of beginning.

District number eighteen (18) shall consist of that part of the county of New York lying north of district number fourteen, and within and bounded by a line beginning at the junction of East Fifty-second street and the East river, and running thence along East Fifty-second street, Third avenue, East Fifty-third street, Lexington avenue, East Eighty-fourth street, Second avenue, East Eighty-third street and the East river, to the place of beginning; and also Blackwell's island.

District number nineteen (19) shall consist of that part of the county of New York lying north of district number seventeen, and within and bounded by a line beginning at West Eighty-ninth

street and the Hudson river, and running thence along the Hudson river and Spuyten Duyvil creek around the northern end of Manhattan island; thence southerly along the Harlem river to the north end of Fifth avenue; thence along Fifth avenue, East One Hundred and Twenty-ninth street, Fourth or Park avenue, East One Hundred and Tenth street, Fifth avenue, the transverse road across Central park at Ninety-seventh street, Eighth avenue, West Eighty-first street, Ninth or Columbus avenue, West Eighty-sixth street, Tenth or Amsterdam avenue, and West Eighty-ninth street, to the place of beginning.

District number twenty (20) shall consist of that part of the county of New York lying north of districts numbers eighteen and fifteen, and within and bounded by a line beginning at East Eighty-third street and the East river, running thence through East Eighty-third street, Second avenue, East Eighty-fourth street, Lexington avenue, East Ninety-sixth street, Fifth avenue, East One Hundred and Tenth street, Fourth or Park avenue, East One Hundred and Nineteenth street to the Harlem river, and along the Harlem and East rivers to the place of beginning; and also Randall's island and Ward's island.

All of the above districts in the county of New York bounded upon or along the boundary waters of the county, shall be deemed to extend to the county line.

District number twenty-one (21) shall consist of that part of the county of New York lying north of districts numbers nineteen and twenty, within and bounded by a line beginning at East One Hundred and Nineteenth street and the Harlem river, and running thence along East One Hundred and Nineteenth street, Fourth or Park avenue, One Hundred and Twenty-ninth street, Fifth avenue and the Harlem river, to the place of beginning; and all that part of the county of New York not hereinbefore described.

District number twenty-two (22) shall consist of the county of Westchester.

District number twenty-three (23) shall consist of the counties of Orange and Rockland.

District number twenty-four (24) shall consist of the counties of Dutchess, Columbia and Putnam.

District number twenty-five (25) shall consist of the counties of Ulster and Greene.

District number twenty-six (26) shall consist of the counties of Delaware, Chenango and Sullivan.

District number twenty-seven (27) shall consist of the counties of Montgomery, Fulton, Hamilton and Schoharie.

District number twenty-eight (28) shall consist of the counties of Saratoga, Schenectady and Washington.

District number twenty-nine (29) shall consist of the county of Albany.

District number thirty (30) shall consist of the county of Rensselaer.

District number thirty-one (31) shall consist of the counties of Clinton, Essex and Warren.

District number thirty-two (32) shall consist of the counties of St. Lawrence and Franklin.

District number thirty-three (33) shall consist of the counties of Otsego and Herkimer.

District number thirty-four (34) shall consist of the county of Oneida.

District number thirty-five (35) shall consist of the counties of Jefferson and Lewis.

District number thirty-six (36) shall consist of the county Onondaga.

District number thirty-seven (37) shall consist of the coun of Oswego and Madison.

District number thirty-eight (38) shall consist of the coun of Broome, Cortland and Tioga.

District number thirty-nine (39) shall consist of the coun of Cayuga and Seneca.

District number forty (40) shall consist of the counties Chemung, Tompkins and Schuyler.

District number forty-one (41) shall consist of the counties Steuben and Yates.

District number forty-two (42) shall consist of the counties Ontario and Wayne.

District number forty-three (43) shall consist of that part the county of Monroe comprising the towns of Brighton, Henrie Irondequoit, Mendon, Penfield, Perinton, Pittsford, Rush Webster, and the fourth, sixth, seventh, eighth, twelfth, thirtee fourteenth, sixteenth, seventeenth and eighteenth wards of city of Rochester, as at present constituted.

District number forty-four (44) shall consist of that part the county of Monroe comprising the towns of Chili, Clark Gates, Greece, Hamlin, Ogden, Parma, Riga, Sweden and Wh land, and the first, second, third, fifth, ninth, tenth, eleventh, teenth, nineteenth and twentieth wards of the city of Rochester at present constituted.

District number forty-five (45) shall consist of the counties Niagara, Genesee and Orleans.

District number forty-six (46) shall consist of the counties Allegany, Livingston and Wyoming.

District number forty-seven (47) shall consist of that part the county of Erie comprising the first, second, third, sixth, teenth, nineteenth, twentieth, twenty-first, twenty-second, twe third and twenty-fourth wards of the city of Buffalo, as at pre constituted.

District number forty-eight (48) shall consist of that part the county of Erie comprising the fourth, fifth, seventh, eig ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and teenth wards of the city of Buffalo, as at present constituted.

District number forty-nine (49) shall consist of that part the county of Erie comprising the seventeenth, eighteenth twenty-fifth wards of the city of Buffalo, as at present constitut and all the remainder of the said county of Erie not hereinbe described.

District number fifty (50) shall consist of the counties Chautauqua and Cattaraugus.

From Id., Art. III, § 3.

§ 4. Enumerations and reapportionments.

An enumeration of the inhabitants of the state shall be ta under the direction of the secretary of state, during the mo of May and June, in the year 1905, and in the same months e tenth year thereafter; and the said districts shall be so altered the legislature at the first regular session after the return of e enumeration, that each senate district shall contain as nearly may be an equal number of inhabitants, excluding aliens, and in as compact form as practicable, and shall remain unaltered u the return of another enumeration, and shall, at all times, con of contiguous territory, and no county shall be divided in formation of a senate district except to make two or more se

districts wholly in such county. No town, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

From Id., Art. III, § 4.

§ 5. Apportionment of assemblymen; creation of assembly districts.

The members of the assembly shall be chosen by single districts, and shall be apportioned by the legislature at the first regular session after the return of every enumeration among the several counties of the State, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the State, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders on the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

Until after the next enumeration, members of the assembly shall be apportioned to the several counties as follows: Albany county, four members; Allegany county, one member; Broome county, two members; Cattaraugus county, two members; Cayuga county, two members; Chautauqua county, two members; Chemung county, one member; Chenango county, one member; Clinton county, one

member; Columbia county, one member; Cortland county, one member; Delaware county, one member; Dutchess county, two members; Erie county, eight members; Essex county, one member; Franklin county, one member; Fulton and Hamilton counties, one member; Genesee county, one member; Greene county, one member; Herkimer county, one member; Jefferson county, two members; Kings county, twenty-one members; Lewis county, one member; Livingston county, one member; Madison county, one member; Monroe county, four members; Montgomery county, one member; New York county, thirty-five members; Niagara county, two members; Oneida county, three members; Onondaga county, four members; Ontario county, one member; Orange county, two members; Orleans county, one member; Oswego county, two members; Otsego county, one member; Putnam county, one member; Queens county, three members; Rensselaer county, three members; Richmond county, one member; Rockland county, one member; St. Lawrence county, two members; Saratoga county, one member; Schenectady county, one member; Schoharie county, one member; Schuyler county, one member; Seneca county, one member; Steuben county, two members; Suffolk county, two members; Sullivan county, one member; Tioga county, one member; Tompkins county, one member; Ulster county, two members; Warren county, one member; Washington county, one member; Wayne county, one member; Westchester county, three members; Wyoming county, one member, and Yates county, one member.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble on the second Tuesday of June, 1895, and at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district, and of the inhabitants thereof, excluding aliens, according to the last preceding enumeration; and such apportionment and districts shall remain unaltered until another enumeration shall be made, as herein provided: but said division of the city of Brooklyn and the county of Kings to be made on the second Tuesday of June, 1895, shall be made by the common council of the said city and the board of supervisors of said county, assembled in joint session. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town, and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts nor shall any district contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location, may be in-

cluded in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens; but in the division of cities under the first apportionment, regard shall be had to the number of inhabitants, excluding aliens, of the election districts according to the state enumeration of 1892, so far as may be, instead of blocks. Nothing in this section shall prevent the division, at any time, of counties and towns, and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same.

New.

§ 6. Compensation of members.

Each member of the legislature shall receive for his services an annual salary of one thousand five hundred dollars. The members of either house shall also receive the sum of one dollar for every ten miles they shall travel in going to or returning from their place of meeting, once in each session, on the most usual route. Senators, when the senate alone is convened in extraordinary session, or when serving as members of the court for the trial of impeachments, and such members of the assembly, not exceeding nine in number, as shall be appointed managers of an impeachment, shall receive an additional allowance of ten dollars a day.

From Id., Art. III, § 6, as am'd in 1874.

§ 7. Civil appointments of members void.

No member of the legislature shall receive any civil appointment within this State, or the senate of the United States, from the governor, the governor and senate, or from the legislature, or from any city government, during the time for which he shall have been elected; and all such appointments and all votes given for any such member for any such office or appointment shall be void.

From Id., Art. III, § 7, as am'd in 1874.

§ 8. Persons disqualified from being members.

No person shall be eligible to the legislature, who at the time of his election, is, or within one hundred days previous thereto has been, a member of congress, a civil or military officer under the United States, or an officer under any city government. And if any person shall, after his election as a member of the legislature, be elected to congress, or appointed to any office, civil or military, under the government of the United States, or under any city government, his acceptance thereof shall vacate his seat.

From Id., Art. III, § 8, as am'd in 1874.

§ 9. Time of elections.

The elections of senators and members of assembly, pursuant to the provisions of this constitution, shall be held on the Tuesday succeeding the first Monday of November, unless otherwise directed by the legislature.

From Id., art. III, § 9.

§ 10. Powers of each house.

A majority of each house shall constitute a quorum to do business. Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members; shall choose its own officers; and the senate shall choose a temporary president to preside in case of the absence or impeachment of the lieutenant-governor, or when he shall refuse to act as president, or shall act as governor.

From Id., Art. III, § 10.

§ 11. Journals; open sessions; adjournments.

Each house shall keep a journal of its proceedings, and publish the same, except such parts as may require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall, without the consent of the other, adjourn for more than two days.

From Id., Art. III, § 11.

§ 12. Members not to be questioned for speeches.

For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.

From Id., Art. III, § 12.

§ 13. Bills may originate in either house.

Any bill may originate in either house of the legislature, and all bills passed by one house may be amended by the other.

From Id., Art. III, § 13.

§ 14. Enacting clause of bills.

The enacting clause of all bills shall be "The People of the State of New York, represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill.

From Id., Art. III, § 14.

§ 15. Manner of passing bills.

No bill shall be passed or become a law unless it shall have been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified to the necessity of its immediate passage, under his hand and the seal of the State; nor shall any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and the question upon its final passage shall be taken immediately thereafter, and the yeas and nays entered on the journal.

From Id., Art. III, § 15.

§ 16. Private and local bills not to embrace more than one subject.

No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.

From Id., Art. III, § 16.

§ 17. Existing law made applicable to be inserted.

No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said

:t, or which shall enact that any existing law, or part thereof, iall be applicable, except by inserting it in such act.
From Id., Art. III, § 17.

§ 18. [Am'd, 1901.] Cases in which private and local bills iall not be passed; restrictions as to laws authorizing street ilroads.

The legislature shall not pass a private or local bill in any of ie following cases: — Changing the names of persons. Laying it, opening, altering, working or discontinuing roads, highways or leys, or for draining swamps or other low lands.
Locating or changing county seats. Providing for changes of enue in civil or criminal cases.
Incorporating villages. Providing for election of members of oards of supervisors. Selecting, drawing, summoning or emaneling grand or petit jurors. Regulating the rate of interest money.
The opening and conducting of elections or designating places voting.
Creating, increasing or decreasing fees, percentage or allowances public officers, during the term for which said officers are ected or appointed.
Granting to any corporation, association or individual the right lay down railroad tracks.
Granting to any private corporation, association or individual ny exclusive privilege, immunity or franchise whatever.
Granting to any person, association, firm or corporation, an emption from taxation on real or personal property.
Providing for building bridges, and chartering companies for ich purposes, except on the Hudson river below Waterford, and n the East river, or over the waters forming a part of the oundaries of the State.
The legislature shall pass general laws providing for the cases numerated in this section, and for all other cases which in its idgment, may be provided for by general laws. But no law shall uthorize the construction or operation of a street railroad except pon the condition that the consent of the owners of one-half in alue of the property bounded on, and the consent also of the ocal authorities having the control of, that portion of a street or ighway upon which it is proposed to construct or operate such ailroad be first obtained, or in case the consent of such property wners cannot be obtained, the appellate division of the supreme ourt, in the department in which it is proposed to be constructed, iay, upon application, appoint three commissioners who shall etermine, after a hearing of all parties interested, whether such ailroad ought to be constructed or operated, and their determinaon, confirmed by the court, may be taken in lieu of the consent f the property owners.
From Id., Art. III, § 18, as am'd in 1874. Am'd in 1901 (see L. 1901, p. 08).

§ 19. Private claims not to be audited by legislature.

The legislature shall neither audit nor allow any private claim r account against the State, but may appropriate money to pay ich claims as shall have been audited and allowed according o law.
From Id., Art. III, § 19, as am'd in 1874.

§ 20. Two-thirds bills.

The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes.

From Id., Art. I, § 9.

§ 21. Appropriation bills.

No money shall ever be paid out of the treasury of this State, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years next after the passage of such appropriation act; and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient for such law to refer to any other law to fix such sum.

From Id., Art. VII, § 8.

§ 22. Restrictions as to provisions in the appropriation or supply bills.

No provision or enactment shall be embraced in the annual appropriation or supply bill, unless it relates specifically to some particular appropriation in the bill; and any such provision or enactment shall be limited in its operation to such appropriation.

New.

§ 23. Certain sections not to apply to commission bills.

Sections seventeen and eighteen of this article shall not apply to any bill, or the amendments to any bill, which shall be reported to the legislature by commissioners who have been appointed pursuant to law to revise the statutes.

From Id., Art. III, § 25, as am'd in 1874.

§ 24. Tax bills to state tax distinctly.

Every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object.

From Id., Art. III, § 20, as am'd in 1874.

§ 25. When ayes and nays necessary; three-fifths to constitute quorum.

On the final passage, in either house of the legislature, of any act which imposes, continues or revives a tax, or creates a debt or charge, or makes, continues or revives any appropriation of public or trust money or property, or releases, discharges or commutes any claim or demand of the State, the question shall be taken by yeas and nays, which shall be duly entered upon the journals, and three-fifths of all the members elected to either house shall, in all such cases, be necessary to constitute a quorum therein.

From Id., Art. III, § 21, as am'd in 1874.

§ 26. [Am'd, 1900.] Boards of supervisors.

There shall be in each county, except in a county wholly included in a city, a board of supervisors, to be composed of such members and elected in such manner and for such period as is or may be provided by law. In a city which includes an entire

county, or two or more entire counties, the powers and duties of a board of supervisors may be devolved upon the municipal assembly, common council, board of aldermen or other legislative body of the city.

From Id., Art. III, § 22, as am'd in 1874. Am'd in 1900 (see L. 1899, p. 1603).

§ 27. [Am'd, 1909.] Local legislative powers.

The legislature shall, by general laws, confer upon the boards of supervisors of the several counties of the State such further powers of local legislation and administration as the legislature may, from time to time, deem expedient, and in counties which now have, or may hereafter have, county auditors or other fiscal officers, authorized to audit bills, accounts, charges, claims or demands against the county, the legislature may confer such powers upon said auditors, or fiscal officers, as the legislature may, from time to time deem expedient.

From Id., Art. III, § 23, as am'd in 1874 and 1909.

§ 28. Extra compensation prohibited.

The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor.

From Id., Art. III, § 24, as am'd in 1874.

§ 29. Prison labor; contract system abolished.

The legislature shall, by law, provide for the occupation and employment of prisoners sentenced to the several state prisons, penitentiaries, jails and reformatories in the State; and on and after the first day of January, in the year 1897, no person in any such prison, penitentiary, jail or reformatory, shall be required or allowed to work, while under sentence thereto, at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation. This section shall not be construed to prevent the legislature from providing that convicts may work for, and that the products of their labor may be disposed of to, the State or any political division thereof, or for or to any public institution owned or managed and controlled by the State, or any political division thereof.

New.

ARTICLE IV.

§ 1. Executive power.

The executive power shall be vested in a governor, who shall hold his office for two years; a lieutenant-governor shall be chosen at the same time, and for the same term. The governor and lieutenant-governor elected next preceding the time when this section shall take effect, shall hold office until and including the thirty-first day of December, 1896, and their successors shall be chosen at the general election in that year.

From Const. of 1846, Art. IV, § 1, as am'd in 1874.

§ 2. Qualifications of governor and lieutenant-governor.

No person shall be eligible to the office of governor or lieutenant-governor, except a citizen of the United States, of the age of not less than thirty years, and who shall have been five years next preceding his election a resident of this State.

From Id., Art. IV, § 2.

§ 3. Election of governor and lieutenant-governor.

The governor and lieutenant-governor shall be elected at the times and places of choosing members of the assembly. The persons respectively having the highest number of votes for governor and lieutenant-governor shall be elected; but in case two or more shall have an equal and the highest number of votes for governor, or for lieutenant-governor, the two houses of the legislature at its next annual session shall forthwith, by joint ballot, choose one of the said persons so having an equal and the highest number of votes for governor or lieutenant-governor.

From Id., Art. IV, § 3.

§ 4. Duties and powers of governor; compensation.

The governor shall be commander-in-chief of the military and naval forces of the state. He shall have power to convene the legislature, or the senate only, on extraordinary occasions. At extraordinary sessions no subject shall be acted upon, except such as the governor may recommend for consideration. He shall communicate by message to the legislature at every session the condition of the State, and recommend such matters to it as he shall judge expedient. He shall transact all necessary business with the officers of government, civil and military. He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed. He shall receive for his services an annual salary of ten thousand dollars, and there shall be provided for his use a suitable and furnished executive residence.

From Id., Art. IV, § 4.

§ 5. Reprieves, commutations, and pardons to be granted by governor.

The governor shall have the power to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. Upon conviction for treason, he shall have power to suspend the execution of the sentence, until the case shall be reported to the legislature at its next meeting, when the legislature shall either pardon, or commute the sentence, direct the execution of the sentence, or grant a further reprieve. He shall annually communicate to the legislature each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, and the date of the commutation, pardon or reprieve.

From Id., Art. IV, § 5.

§ 6. When lieutenant-governor to act as governor.

In case of the impeachment of the governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the State, the powers and duties of the office shall devolve upon the lieutenant-governor for the residue of the term, or until the disability shall cease. But when the governor shall, with the consent of the legislature, be out of the State, in time of war, at the head of a military force thereof, he shall continue commander-in-chief of all the military force of the State.

From Id., Art. IV, § 6.

§ 7. Qualifications and duties of lieutenant-governor; succession to the governorship.

The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. He shall be president of the senate, but shall have only a casting vote therein. If during a vacancy of the office of governor, the lieutenant-governor shall be impeached, displaced, resign, die, or become incapable of performing the duties of his office, or be absent from the State, the president of the senate shall act as governor until the vacancy be filled or the disability shall cease; and if the president of the senate for any of the above causes shall become incapable of performing the duties pertaining to the office of governor, the speaker of the assembly shall act as governor until the vacancy be filled or the disability shall cease.

From Id., Art. IV, § 7.

§ 8. Salary of lieutenant-governor.

The lieutenant-governor shall receive for his services an annual salary of five thousand dollars, and shall not receive or be entitled to any other compensation, fee or perquisite, for any duty or service he may be required to perform by the constitution or by law.

From Id., Art. IV, § 8, as am'd in 1874.

§ 9. Bills to be presented to governor; approval; passage of bill by legislature if not approved.

Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it. If after such reconsideration, two-thirds of the members elected to that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered; and if approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the governor. In all such cases, the votes in both houses shall be determined by yeas and nays, and the names of the members voting shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not become a law without the approval of the governor. No bill shall become a law after the final adjournment of the legislature, unless approved by the governor within thirty days after such adjournment. If any bill presented to the governor contain several items of appropriation of money, he may object to one or more of such items while approving of the other portion of the bill. In such case, he shall append to the bill, at the time of signing it, a statement of the items to which he objects; and the appropriation so objected to shall not take effect. If the legislature be in session, he shall transmit to the house in which the bill originated a copy of such statement, and the items objected to shall be separately reconsidered. If on reconsideration one or more of such items be approved by two-thirds of the members elected to each house, the same shall be part of the law, notwithstanding the objections of the governor. All the provisions of this section, in relation to bills not approved by the governor, shall

apply in cases in which he shall withhold his approval from any item or items contained in a bill appropriating money.

From Id., Art. IV, § 9, as am'd in 1874.

ARTICLE V.

§ 1. State officers.

The secretary of state, comptroller, treasurer, attorney-general and state engineer and surveyor shall be chosen at a general election, at the times and places of electing the governor and lieutenant-governor, and shall hold their offices for two years, except as provided in section two of this article. Each of the officers in this article named, excepting the speaker of the assembly, shall, at stated times during his continuance in office, receive for his services a compensation which shall not be increased or diminished during the term for which he shall have been elected; nor shall he receive to his use any fees or perquisites of office or other compensation. No person shall be elected to the office of state engineer and surveyor who is not a practical civil engineer.

From Const. of 1846, Art. V, §§ 1, 2.

§ 2. First election of state officers.

The first election of the secretary of state, comptroller, treasurer, attorney-general and state engineer and surveyor, pursuant to this article, shall be held in the year 1895, and their terms of office shall begin on the first day of January following, and shall be for three years. At the general election in the year 1898, and every two years thereafter, their successors shall be chosen for the term of two years.

New.

§ 3. Superintendent of public works; appointment; powers and duties of.

A superintendent of public works shall be appointed by the governor, by and with the advice and consent of the senate, and hold his office until the end of the term of the governor by whom he was nominated, and until his successor is appointed and qualified. He shall receive a compensation to be fixed by law. He shall be required by law to give security for the faithful execution of his office before entering upon the duties thereof. He shall be charged with the execution of all laws relating to the repair and navigation of the canals, and also of those relating to the construction and improvement of the canals, except so far as the execution of the laws relating to such construction or improvement shall be confided to the state engineer and surveyor; subject to the control of the legislature, he shall make the rules and regulations for the navigation or use of the canals. He may be suspended or removed from office by the governor, whenever, in his judgment, the public interest shall so require; but in case of the removal of such superintendent of public works from office, the governor shall file with the secretary of state a statement of the cause of such removal, and shall report such removal and the cause thereof to the legislature at its next session. The superintendent of public works shall appoint not more than three assistant superintendents, whose duties shall be prescribed by him, subject to modification by the legislature, and who shall receive for their services a compensation to be fixed by law. They shall hold their office for three years, subject to suspension or removal by the

superintendent of public works, whenever, in his judgment, the public interest shall so require. Any vacancy in the office of any such assistant superintendent shall be filled for the remainder of the term for which he was appointed, by the superintendent of public works; but in case of the suspension or removal of any such assistant superintendent by him, he shall at once report to the governor, in writing, the cause of such removal. All other persons employed in the care and management of the canals, except collectors of tolls, and those in the department of the state engineer and surveyor, shall be appointed by the superintendent of public works, and be subject to suspension or removal by him. The superintendent of public works shall perform all the duties of the former canal commissioners and board of canal commissioners, as now declared by law, until otherwise provided by the legislature. The governor, by and with the advice and consent of the senate, shall have power to fill vacancies in the office of superintendent of public works; if the senate be not in session, he may grant commissions which shall expire at the end of the next succeeding session of the senate.

From Id., Art. V, § 3, as am'd in 1876.

§ 4. Superintendent of state prisons; appointment; powers and duties of.

A superintendent of state prisons shall be appointed by the governor, by and with the advice and consent of the senate, and hold his office for five years, unless sooner removed; he shall give security in such amount, and with such sureties as shall be required by law for the faithful discharge of his duties; he shall have the superintendence, management and control of state prisons, subject to such laws as now exist or may hereafter be enacted; he shall appoint the agents, wardens, physicians and chaplains of the prisons. The agent and warden of each prison shall appoint all other officers of such prison, except the clerk, subject to the approval of the same by the superintendent. The comptroller shall appoint the clerks of the prisons. The superintendent shall have all the powers and perform all the duties not inconsistent herewith, which were formerly had and performed by the inspectors of state prisons. The governor may remove the superintendent for cause at any time, giving to him a copy of the charges against him, and an opportunity to be heard in his defense.

From Id., Art. V, § 4, as am'd in 1876.

§ 5. Commissioners of the land office; of the canal fund; canal board.

The lieutenant-governor, speaker of the assembly, secretary of state, comptroller, treasurer, attorney-general and state engineer and surveyor shall be the commissioners of the land office. The lieutenant-governor, secretary of state, comptroller, treasurer and attorney-general shall be the commissioners of the canal fund. The canal board shall consist of the commissioners of the canal fund, the state engineer and surveyor and the superintendent of public works.

From Id., Art. V, § 5.

§ 6. Powers and duties of boards.

The powers and duties of the respective boards, and of the several officers in this article mentioned, shall be such as now are or hereafter may be prescribed by law.

From Id., Art V, § 6.

§ 7. State treasurer; suspension by governor.

The treasurer may be suspended from office by the governor, during the recess of the legislature, and until thirty days after the commencement of the next session of the legislature, whenever it shall appear to him that such treasurer has, in any particular, violated his duty. The governor shall appoint a competent person to discharge the duties of the office during such suspension of the treasurer.

From Id., Art. V, § 7.

§ 8. Certain offices abolished.

All offices for the weighing, gauging, measuring, culling or inspecting any merchandise, produce, manufacture or commodity whatever, are hereby abolished; and no such office shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health or the interests of the state in its property, revenue, tolls or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purposes hereafter.

From Id., Art. V, § 8.

§ 9. Civil service appointments and promotions.

Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

New.

ARTICLE VI.

(Judiciary Article.*)

§ 1. [Am'd, 1905.] Supreme court; how constituted; judicial districts.

The supreme court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the court of appeals as now is or may be prescribed by law not inconsistent with this article. The existing judicial districts of the State are continued until changed as hereinafter provided. The supreme court shall consist of the justices now in office, and of the judges transferred thereto by the fifth section of this article, all of whom shall continue to be justices of the supreme court during their respective terms, and of twelve additional justices who shall reside in and be chosen by the electors of, the several existing judicial districts, three in the first district, three in the second, and one in each of the other districts; and of their successors. The successors of said justices shall be chosen by the electors of their respective judicial districts. The legislature may alter the judicial districts once after every enumeration under the constitution, of the inhabitants of the State, and thereupon reapportion the justices to be thereafter elected in the districts so altered.

* For Table of Cited Cases relating to this Article, see *post*, pages 1402, 1408.

The legislature may from time to time increase the number of justices in any judicial district except that the number of justices in the first and second district or in any of the districts into which the second district may be divided, shall not be increased to exceed one justice for each eighty thousand, or fraction over forty thousand of the population thereof, as shown by the last state, or federal census or enumeration, and except that the number of justices in any other district shall not be increased to exceed one justice for each sixty thousand or fraction over thirty-five thousand of the population thereof as shown by the last state or federal census or enumeration. The legislature may erect out of the second judicial district as now constituted, another judicial district and apportion the justices in office between the districts, and provide for the election of additional justices in the new district not exceeding the limit herein provided.

From Const. of 1846, Art. VI, § 6. Am'd in 1905 (see L. 1903, p. 1452).

§ 2. [Am'd, 1900, 1905.] Judicial departments; appellate division, how constituted; governor to designate justices; reporter; time and place of holding courts.

The legislature shall divide the State into four judicial departments. The first department shall consist of the county of New York; the others shall be bounded by county lines, and be compact and equal in population as nearly as may be. Once every ten years the legislature may alter the judicial departments, but without increasing the number thereof. There shall be an appellate division of the supreme court, consisting of seven justices in the first department, and of five justices in each of the other departments. In each department four shall constitute a quorum, and the concurrence of three shall be necessary to a decision. No more than five justices shall sit in any case. From all the justices elected to the supreme court the governor shall designate those who shall constitute the appellate division in each department; and he shall designate the presiding justice thereof, who shall act as such during his term of office, and shall be a resident of the department. The other justices shall be designated for terms of five years or the unexpired portions of their respective terms of office, if less than five years. From time to time as the terms of such designations expire, or vacancies occur, he shall make new designations. A majority of the justices so designated to sit in the appellate division in each department shall be residents of the department. He may also make temporary designations in case of the absence or inability to act of any justice in the appellate division, or in case the presiding justice of any appellate division shall certify to him that one or more additional justices are needed for the speedy disposition of the business before it. Whenever the appellate division in any department shall be unable to dispose of its business within a reasonable time, a majority of the presiding justices of the several departments at a meeting called by the presiding justice of the department in arrears may transfer any pending appeals from such department to any other department for hearing and determination. No justice of the appellate division shall, within the department to which he may be designated to perform the duties of an appellate justice, exercise any of the powers of a justice of the supreme court, other than those of a justice out of court, and those pertaining to the appellate division, or to the hearing and decision of motions submitted by consent of counsel, but any such justice, when not actually engaged in performing the duties of such appel-

late justices in the department to which he is designated, may hold any term of the supreme court and exercise any of the powers of a justice of the supreme court in any county or judicial district in any other department of the State. From and after the last day of December, 1895, the appellate division shall have the jurisdiction now exercised by the supreme court at its general terms, and by the general terms of the court of common pleas for the city and county of New York, the superior court of the city of New York, the superior court of Buffalo and the city of Brooklyn, and such additional jurisdiction as may be conferred by the legislature. It shall have power to appoint and remove a reporter. The justices of the appellate division in each department shall have power to fix the times and places for holding special terms therein, and to assign the justices in the departments to hold such terms; or to make rules therefor.

From Id., Art. VI, §§ 7, 28. Am'd in 1900 and 1905 (see L. 1899, p. 1600; L. 1904, p. 1931).

§ 3. Judges not to sit in review of their own decisions; testimony in equity cases.

No judge or justice shall sit in the appellate division or in the court of appeals in review of a decision made by him or by any court of which he was at the time a sitting member. The testimony in equity cases shall be taken in like manner as in cases at law; and, except as herein otherwise provided, the legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised.

From Id., Art. VI, § 8.

§ 4. Official terms of justices of supreme court.

The official terms of the justices of the supreme court shall be fourteen years from and including the first day of January next after their election. When a vacancy shall occur otherwise than by expiration of term in the office of justice of the supreme court the same shall be filled for a full term, at the next general election, happening not less than three months after such vacancy occurs; and, until the vacancy shall be so filled, the governor by and with the advice and consent of the senate, if the senate shall be in session, or if not in session the governor, may fill such vacancy by appointment, which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

From Id., Art. VI, §§ 13 and 9.

§ 5. Superior city courts abolished.

The superior court of the city of New York, the court of common pleas for the city and county of New York, the superior court of Buffalo, and the city court of Brooklyn, are abolished from and after the first day of January, 1896, and thereupon the seals, records, papers and documents of or belonging to such courts, shall be deposited in the offices of the clerks of the several counties in which said courts now exist; and all actions and proceedings then pending in such courts shall be transferred to the supreme court for hearing and determination. The judges of said courts in office on the first day of January, 1896, shall, for the remainder of the terms for which they were elected or appointed, be justices of the supreme court; but they shall sit only in the counties in which they were elected or appointed. Their salaries shall be paid by the said counties respectively, and shall

be the same as the salaries of the other justices of the supreme court residing in the same counties. Their successors shall be elected as justices of the supreme court by the electors of the judicial districts in which they respectively reside.

The jurisdiction now exercised by the several courts hereby abolished, shall be vested in the supreme court. Appeals from inferior and local courts now heard in the court of common pleas for the city and county of New York and the superior court of Buffalo, shall be heard in the supreme court in such manner and by such justice or justices as the appellate divisions in the respective departments which include New York and Buffalo shall direct, unless otherwise provided by the legislature.

New.

§ 6. Circuit courts and courts of oyer and terminer abolished.

Circuit courts and courts of oyer and terminer are abolished from and after the last day of December, 1895. All their jurisdiction shall thereupon be vested in the supreme court, and all actions and proceedings then pending in such courts shall be transferred to the supreme court for hearing and determination. Any justice of the supreme court, except as otherwise provided in this article, may hold court in any county.

New.

§ 7. [Am'd, 1900.] Court of appeals.

The court of appeals is continued. It shall consist of the chief judge and associate judges now in office, who shall hold their offices until the expiration of their respective terms, and their successors, who shall be chosen by the electors of the State. The official terms of the chief judge and associate judges shall be fourteen years from and including the first day of January next after their election. Five members of the court shall form a quorum, and the concurrence of four shall be necessary to a decision. The court shall have power to appoint and to remove its reporter, clerk and attendants. Whenever and as often as a majority of the judges of the court of appeals shall certify to the governor that said court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the governor shall designate not more than four justices of the supreme court to serve as associate judges of the court of appeals. The justices so designated shall be relieved from their duties as justices of the supreme court and shall serve as associate judges of the court of appeals until the causes undisposed of in said court are reduced to two hundred, when they shall return to the supreme court. The governor may designate justices of the supreme court to fill vacancies. No justice shall serve as associate judge of the court of appeals except while holding the office of justice of the supreme court, and no more than seven judges shall sit in any case.

From Id., Art. VI, § 2, as am'd in 1869. Am'd in 1900 (see L. 1899, p. 1604).

§ 8. Vacancies in court of appeals.

When a vacancy shall occur otherwise than by expiration of term, in the office of chief or associate judge of the court of appeals, the same shall be filled, for a full term, at the next general election happening not less than three months after such vacancy occurs; and until the vacancy shall be so filled, the governor, by and with the advice and consent of the senate, if the senate shall

be in session, or if not in session the governor, may fill such vacancy by appointment. If any such appointment of chief judge shall be made from among the associate judges, a temporary appointment of associate judge shall be made in like manner; but in such case, the person appointed chief judge shall not be deemed to vacate his office of associate judge any longer than until the expiration of his appointment as chief judge. The powers and jurisdiction of the court shall not be suspended for want of appointment or election, when the number of judges is sufficient to constitute a quorum. All appointments under this section shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

From Id., Art. VI, § 3, as am'd in 1869.

§ 9. Jurisdiction of court of appeals.

After the last day of December, 1895, the jurisdiction of the court of appeals, except where the judgment is of death, shall be limited to the review of questions of law. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals. Except where the judgment is of death, appeals may be taken, as of right, to said court only from judgments or orders entered upon decisions of the appellate division of the supreme court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them. The appellate division in any department may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the court of appeals. The legislature may further restrict the jurisdiction of the court of appeals and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved.

The provisions of this section shall not apply to orders made or judgments rendered by any general term before the last day of December, 1895, but appeals therefrom may be taken under existing provisions of law.

New.

§ 10. Judges not to hold any other office.

The judges of the court of appeals and the justices of the supreme court shall not hold any other office or public trust. All votes for any of them, for any other than a judicial office, given by the legislature or the people, shall be void.

From Id., Art. VI, § 10, as am'd in 1869.

§ 11. Removal of judges.

Judges of the court of appeals and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein. All other judicial officers, except justices of the peace and judges or justices of inferior courts not of record, may be removed by the senate, on the recommendation of the governor, if two-thirds of all the members elected to the senate concur therein. But no officer shall be removed by virtue of this section except for cause, which shall be entered on the journals, nor unless he shall have been served with a statement of the cause alleged, and shall have had an opportunity to be heard. On the question of removal, the yeas and nays shall be entered on the journal.

From Id., Art. VI, § 11, as am'd in 1869.

§ 12. [Am'd, 1909.] Compensation of judges; tenure of office.

No person shall hold the office of judge or justice of any court longer than until and including the last day of December next after he shall be seventy years of age. Each justice of the supreme court shall receive from the state the sum of $10,000 per year. Those assigned to the appellate divisions in the third and fourth departments shall each receive in addition the sum of $2,000, and the presiding justices thereof the sum of $2,500 per year. Those justices elected in the first and second judicial departments shall continue to receive from their respective cities, counties or districts, as now provided by law, such additional compensation as will make their aggregate compensation what they are now receiving. These justices elected in any judicial department other than the first or second, and assigned to the appellate divisions of the first or second departments shall, while so assigned, receive from those departments respectively, as now provided by law, such additional sum as is paid to the justices of those departments. A justice elected in the third or fourth department assigned by the appellate division or designated by the governor to hold a trial or special term in a judicial district other than that in which he is elected shall receive in addition ten dollars per day for expenses while actually so engaged in holding such term, which shall be paid by the state and charged upon the judicial district where the service is rendered. The compensation herein provided shall be in lieu of and shall exclude all other compensation and allowance to said justices for expenses of every kind and nature whatsoever. The provisions of this section shall apply to the judges and justices now in office and to those hereafter elected.

From Id., Art. VI, § 14, as am'd in 1869 and 1909.

§ 13. Trial of impeachments.

The assembly shall have the power of impeachment by a vote of a majority of all the members elected. The court for the trial of impeachments shall be composed of the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them. On the trial of an impeachment against the governor or lieutenant-governor, the lieutenant-governor shall not act as a member of the court. No judicial officer shall exercise his office, after articles of impeachment against him shall have been preferred to the senate, until he shall have been acquitted. Before the trial of an impeachment the members of the court shall take an oath or affirmation truly and impartially to try the impeachment according to the evidence, and no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this State; but the party impeached shall be liable to indictment and punishment according to law.

From Id., Art. VI, § 1, as am'd in 1869.

§ 14. [Am'd, 1913.] County courts.

The existing county courts are continued, and the judges thereof now in office shall hold their offices until the expiration of their respective terms. In the county of Kings there shall be four county judges. The number of county judges in any county may also be increased, from time to time, by the legislature, to such number that the total number of county judges in any one county shall not exceed one for every two hundred thousand, or major fraction thereof, of the population of such county. The additional county judges in the county of Kings shall be chosen at the general election held in the first odd-numbered year after the adoption of this amendment. The additional county judges whose

offices may be created by the legislature shall be chosen at the general election held in the first odd-numbered year after the creation of such office. All county judges, including successors to existing judges, shall be chosen by the electors of the counties for the term of six years from and including the first day of January following their election. County courts shall have the powers and jurisdiction they now possess, and also original jurisdiction in actions for the recovery of money only, where the defendants reside in the county, and in which the complaint demands judgment for a sum not exceeding $2,000. The legislature may hereafter enlarge or restrict the jurisdiction of the county courts, provided, however, that their jurisdiction shall not be so extended as to authorize an action therein for the recovery of money only, in which the sum demanded exceeds $2,000, or in which any person not a resident of the county is a defendant. Courts of sessions, except in the county of New York, are abolished from and after the last day of December, 1895. All the jurisdiction of the court of sessions in each county, except the county of New York, shall thereupon be vested in the county court thereof, and all actions and proceedings then pending in such courts of sessions shall be transferred to said county courts for hearing and determination. Every county judge shall perform such duties as they may be required by law. His salary shall be established by law, payable out of the county treasury. A county judge of any county may hold county courts in any other county when requested by the judge of such other county.

From Id., Art. VI, § 15, as am'd in 1869. Further am'd in 1913.

§ 15. Surrogates' courts.

The existing surrogates' courts are continued, and the surrogates now in office shall hold their offices until the expiration of their terms. Their successors shall be chosen by the electors of their respective counties, and their terms of office shall be six years, except in the county of New York, where they shall continue to be fourteen years. Surrogates and surrogates' courts shall have the jurisdiction and powers which the surrogates and existing surrogates' courts now possess, until otherwise provided by the legislature. The county judge shall be surrogate of his county, except where a separate surrogate has been or shall be elected. In counties having a population exceeding forty thousand, wherein there is no separate surrogate, the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be six years. When the surrogate shall be elected as a separate officer his salary shall be established by law, payable out of the county treasury. No county judge or surrogate shall hold office longer than until and including the last day of December next after he shall be seventy years of age. Vacancies occurring in the office of county judge or surrogate shall be filled in the same manner as like vacancies occurring in the supreme court. The compensation of any county judge or surrogate shall not be increased or diminished during his term of office. For the relief of surrogates' courts the legislature may confer upon the supreme court in any county having a population exceeding four hundred thousand, the powers and jurisdiction of surrogates, with authority to try issues of fact by jury in probate cases.

In part from Id., Art. VI, § 15.

§ 16. Local judicial officers.

The legislature may, on application of the board of supervisors, provide for the election of local officers, not to exceed two in any county, to discharge the duties of county judge and of surrogate, in cases of their inability or of a vacancy, and in such other cases as may be provided by law, and to exercise such other powers in special cases as are or may be provided by law.

From Id., Art. VI, § 16, as am'd in 1869.

§ 17. Justices of the peace; how elected; how removed; other judicial officers in cities.

The electors of the several towns shall, at their annual town meetings, or at such other time and in such manner as the legislature may direct, elect justices of the peace, whose term of office shall be four years. In case of an election to fill a vacancy occurring before the expiration of a full term, they shall hold for the residue of the unexpired term. Their number and classification may be regulated by law. Justices of the peace and judges or justices of inferior courts not of record, and their clerks may be removed for cause, after due notice and an opportunity of being heard, by such courts as are or may be prescribed by law. Justices of the peace and district court justices may be elected in the different cities of this State in such manner, and with such powers, and for such terms, respectively, as are or shall be prescribed by law; all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article, shall be chosen by the electors of such cities, or appointed by some local authorities thereof.

From Id., Art. VI, § 18, as am'd in 1869.

§ 18. Inferior local courts.

Inferior local courts of civil and criminal jurisdiction may be established by the legislature, but no inferior local court hereafter created shall be a court of record. The legislature shall not hereafter confer upon any inferior or local court of its creation any equity jurisdiction or any greater jurisdiction in other respects than is conferred upon county courts by or under this article. Except as herein otherwise provided, all judicial officers shall be elected or appointed at such times and in such manner as the legislature may direct.

From Id., Art. VI, § 19, as am'd in 1869.

§ 19. Clerks of courts.

Clerks of the several counties shall be clerks of the supreme court, with such powers and duties as shall be prescribed by law. The justices of the appellate division in each department shall have power to appoint and to remove a clerk, who shall keep his office at a place to be designated by said justices. The clerk of the court of appeals shall keep his office at the seat of government. The clerk of the court of appeals and the clerks of the appellate division shall receive compensation to be established by law and paid out of the public treasury.

From Id., Art. VI, § 20, as am'd in 1869.

§ 20. Superior judges not to receive fees nor to practice as attorneys and counsellors.

No judicial officer, except justices of the peace, shall receive to his own use any fees or perquisites of office; nor shall any judge of the court of appeals, or justice of the supreme court, or any county judge or surrogate hereafter elected in a county having a population exceeding one hundred and twenty thousand, practice as an attorney or counsellor in any court of record in this State, or act as referee. The legislature may impose a similar prohibition upon county judges and surrogates in other counties. No one shall be eligible to the office of judge of the court of appeals, justice of the supreme court, or, except in the county

of Hamilton, to the office of county judge or surrogate, who is not an attorney and counsellor of this State.

From Id., Art. VI, § 21.

§ 21. Publication of statutes and reports.

The legislature shall provide for the speedy publication of all statutes, and shall regulate the reporting of the decisions of the courts; but all laws and judicial decisions shall be free for publication by any person.

From Id., Art. VI, § 23.

§ 22. Justices of the peace, etc., now in office, to hold till term expires.

Justices of the peace and other local judicial officers provided for in sections seventeen and eighteen, in office when this article takes effect, shall hold their offices until the expiration of their respective terms.

From Id., Art. VI, § 25, as am'd in 1869.

§ 23. Courts of special sessions.

Courts of special sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law.

From Id., Art. VI, § 26, as am'd in 1869.

ARTICLE VII.

§ 1. State credit not to be given.

The credit of the State shall not in any manner be given or loaned to or in aid of any individual, association or corporation.

From Const. of 1846, Art. VII, § 9.

§ 2. State debts; power to contract.

The State may, to meet casual deficits or failures in revenues, or for expenses not provided for, contract debts; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed one million of dollars; and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debt so contracted, and to no other purpose whatever.

From Id., Art. VII, § 10.

§ 3. State debts to repel invasions.

In addition to the above limited power to contract debts, the State may contract debts to repel invasion, suppress insurrection, or defend the State in war; but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever.

From Id., Art. VII, § 11.

§ 4. [Am'd, 1905, 1909.] Limitation of legislative power to create debts.

Except the debts specified in sections two and three of this article, no debts shall be hereafter contracted by or in behalf of this State, unless such debt shall be authorized by law, for some single work or object, to be distinctly specified therein; and such law shall impose and provide for the collection of a direct annual tax to pay, and sufficient to pay, the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election have been submitted to the people, and have received a majority of all the votes cast for and against it at such election. On the final passage of such bill in either house of the legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be: "Shall this bill pass, and ought the same to receive the sanction of the people?" The legislature may at any time, after the approval of such law by the people, if no debt shall have been contracted in pursuance thereof, repeal the same; and may at any time, by law, forbid the contracting of any further debt or liability under such law; but the tax imposed by such act, in proportion to the debt and liability which may have been contracted in pursuance of such law, shall remain in force and be irrepealable, and be annually collected, until the proceeds thereof shall have made the provision hereinbefore specified to pay and discharge the interest and principal of such debt and liability. The money arising from any loan or stock creating such debt or liability shall be applied to the work or object specified in the act authorising such debt or liability, or for the payment of such debt or liability, and for no other purpose whatever. No such law shall be submitted to be voted on, within three months after its passage or at any general election when any other law, or any bill shall be submitted to be voted for or against. The legislature may provide for the issue of bonds of the State to run for a period not exceeding fifty years in lieu of bonds heretofore authorized but not

issued and shall impose and provide for the collection of a direct annual tax for the payment of the same as hereinbefore required. When any sinking fund created under this section shall equal in amount the debt for which it was created, no further direct tax shall be levied on account of said sinking fund and the legislature shall reduce the tax to an amount equal to the accruing interest on such debt. The legislature may from time to time alter the rate of interest to be paid upon any state debt, which has been or may be authorized pursuant to the provisions of this section, or upon any part of such debt, provided, however, that the rate of interest shall not be altered upon any part of such debt or upon any bond or other evidence thereof, which has been, or shall be created or issued before such alteration. In case the legislature increase the rate of interest upon any such debt, or part thereof, it shall impose and provide for the collection of a direct annual tax to pay and sufficient to pay the increased or altered interest on such debt as it falls due and also to pay and discharge the principal of such debt within fifty years from the time of the contracting thereof, and shall appropriate annually to the sinking fund moneys in amount sufficient to pay such interest and pay and discharge the principal of such debt when it shall become due and payable.

From Id., Art. VII, § 12. Am'd in 1905 (see L. 1903, pp. 1455) and 1909.

§ 5. Sinking Fund, how kept and invested.

The sinking funds provided for the payment of interest and the extinguishment of the principal of the debts of the State shall be separately kept and safely invested, and neither of them shall be appropriated or used in any manner other than for the specific purpose for which it shall have been provided.

From Id., Art. VII, § 13, as am'd in 1874.

§ 6. Claims barred by statute of limitations.

Neither the legislature, canal board, nor any person or persons acting in behalf of the State, shall audit, allow, or pay any claim which, as between citizens of the State, would be barred by lapse of time. This provision shall not be construed to repeal any statute fixing the time within which claims shall be presented or allowed, nor shall it extend to any claim duly presented within the time allowed by law, and prosecuted with due diligence from the time of such presentment. But if the claimant shall be under legal dis-

ability, the claim may be presented within two years after such disability is removed.

From Id., Art. VII, § 14, as am'd in 1874.

§ 7. [Am'd, 1913.] Forest preserve.

The lands of the state, now owned or hereafter acquired constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. But the legislature may by general laws provide for the use of not exceeding three per centum of such lands for the construction and maintenance of reservoirs for municipal water supply, for the canals of the state and to regulate the flow of streams. Such reservoirs shall be constructed, owned and controlled by the state, but such work shall not be undertaken until after the boundaries and high flow lines thereof shall have been accurately surveyed and fixed, and after public notice, hearing and determination that such lands are required for such public use. The expense of any such improvements shall be apportioned on the public and private property and municipalities benefited to the extent of the benefits received. Any such reservoir shall always be operated by the state and the legislature shall provide for a charge upon the property and municipalities benefited for a reasonable return to the state upon the value of the rights and property of the state used and the services of the state rendered, which shall be fixed for terms of not exceeding ten years and be readjustable at the end of any term. Unsanitary conditions shall not be created or continued by any such public works. A violation of any of the provisions of this section may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen.

New. Am'd in 1913.

§ 8. Canals, not to be sold; not applied to certain canals; disposition of funds.

The legislature shall not sell, lease or otherwise dispose of the Erie canal, the Oswego canal, the Champlain canal, the Cayuga and Seneca canal, or the Black river canal; but they shall remain the property of the State and under its management forever. The prohibition of lease, sale or other disposition herein contained, shall not apply to the canal known as the Main and Hamburg street canal, situated in the city of Buffalo, and which extends easterly

from the westerly line of Main street to the westerly line of Hamburg street. All funds that may be derived from any lease, sale or other disposition of any canal shall be applied to the improvement, superintendence or repair of the remaining portion of the canals.

From Id., Art. VII, § 6, as am'd in 1882.

§ 9. No tolls to be imposed; contracts for work and materials; no extra compensation.

No tolls shall hereafter be imposed on persons or property transported on the canals, but all boats navigating the canals and the owners and masters thereof, shall be subject to such laws and regulations as have been or may hereafter be enacted concerning the navigation of the canals. The legislature shall annually, by equitable taxes, make provision for the expenses of the superintendence and repairs of the canals. All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price, with adequate security for their performance. No extra compensation shall be made to any contractor; but, if, from any unforeseen cause, the terms of any contract shall prove to be unjust and oppressive, the canal board may, upon the application of the contractor, cancel such contract.

From Id., Art. VII, § 3, as am'd in 1882.

§ 10. Canal improvement, and cost thereof.

The canals may be improved in such manner as the legislature shall provide by law. A debt may be authorized for that purpose in the mode prescribed by section four of this article, or the cost of such improvement may be defrayed by the appropriation of funds from the state treasury, or by equitable annual tax.

New.

§ 11. [Added, 1905.] Payment of principal and interest of debt.

The legislature may appropriate out of any funds in the treasury, moneys to pay the accruing interest and principal of any debt heretofore or hereafter created, or any part thereof and may set apart in each fiscal year, moneys in the state treasury as a sinking fund to pay the interest as it falls due and to pay and discharge the principal of any debt heretofore or hereafter created under section four of article seven of the constitution until the same shall be wholly paid, and the principal and income of such sinking fund shall be

applied to the purpose for which said sinking fund is created and to no other purpose whatever; and, in the event such moneys so set apart in any fiscal year be sufficient to provide such sinking fund, a direct annual tax for such year need not be imposed and collected, as required by the provisions of said section four of article seven, or of any law enacted in pursuance thereof.

Added in 1905 (see L. 1903, p. 1451.)

§ 12. [Added, 1905.] Improvement of highways.

A debt or debts of the State may be authorized by law for the improvement of highways. Such highways shall be determined under general laws, which shall also provide for the equitable apportionment thereof among the counties. The aggregate of the debts authorized by this section shall not at any one time exceed the sum of fifty millions of dollars. The payment of the annual interest on such debt and the creation of a sinking fund of at least two per centum per annum to discharge the principal at maturity shall be provided by general laws whose force and effect shall not be diminished during the existence of any debt created thereunder. The legislature may by general laws require the county or town or both to pay to the sinking fund the proportionate part of the cost of any such highway within the boundaries of such county or town and the proportionate part of the interest thereon, but no county shall at any time for any highway be required to pay more than thirty-five hundredths of the cost of such highway, and no town more than fifteen hundredths. None of the provisions of the fourth section of this article shall apply to debts for the improvement of highways hereby authorized.

Added in 1905 (see L. 1903, p. 1454).

ARTICLE VIII.

§ 1. Corporations, formation of.

Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

From Const. of 1846, Art. VIII, § 1.

§ 2. Dues of corporations.

Dues from corporations shall be secured by such individual liability of the corporators and other means as may be prescribed by law.

From Id., Art. VIII, § 2.

§ 3. Corporation, definition of term.

The term corporations as used in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.

From Id., Art. VIII, § 3.

§ 4. Savings bank charters; restrictions upon trustees; special charters not to be granted.

The legislature shall, by general law, conform all charters of savings banks, or institutions for savings, to a uniformity of powers, rights and liabilities, and all charters hereafter granted for such corporations shall be made to conform to such general law, and to such amendments as may be made thereto. And no such corporation shall have any capital stock, nor shall the trustees thereof, or any of them, have any interest whatever, direct or indirect, in the profits of such corporation; and no director or trustee of any such bank or institution shall be interested in any loan or use of any money or property of such bank or institution for savings. The legislature shall have no power to pass any act granting any special charter for banking purposes; but corporations or associations may be formed for such purposes under general laws.

From Id., Art. VIII, § 4, as am'd in 1874.

§ 5. Specie payment.

The legislature shall have no power to pass any law sanctioning in any manner, directly or indirectly, the suspension of specie payments, by any person, association or corporation, issuing bank notes of any description.

From Id., Art. VIII, § 5.

§ 6. Registry of bills or notes.

The legislature shall provide by law for the registry of all bills or notes, issued or put in circulation as money, and shall require ample security for the redemption of the same in specie.

From Id., Art. VIII, § 6.

§ 7. Liability of stockholders of banks.

The stockholders of every corporation and joint stock association for banking purposes, shall be individually responsible to the amount of their respective share or shares of stock in any such corporation or association, for all its debts and liabilities of every kind.

From Id., Art. VIII, § 7.

§ 8. Billholders of insolvent bank, preferred creditors.

In case of the insolvency of any bank or banking association, the billholders thereof shall be entitled to preference in payment, over all other creditors of such bank or association.

From Id., Art. VIII, § 8.

§ 9. Credit or money of the State not to be given.

Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking. This section shall not, however, prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper. Nor shall it apply to any fund or property now held, or which may hereafter be held, by the State for educational purposes.

From Id., Art. VIII, § 10, as am'd in 1874.

§ 10. [Am'd, 1900, 1905, 1907, 1909.] Counties, cities and towns not to give or loan money or credit; limitation of indebtedness.

No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for

the aid or support of its poor as may be authorized by law. No county or city shall be allowed to become indebted for any purpose or in any manner to an amount which, including existing indebtedness, shall exceed ten per centum of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment rolls of said county or city on the last assessment for state or county taxes prior to the incurring of such indebtedness; and all indebtedness in excess of such limitation, except such as now may exist, shall be absolutely void, except as herein otherwise provided. No county or city whose present indebtedness exceeds ten per centum of the assessed valuation of its real estate subject to taxation, shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limit. This section shall not be construed to prevent the issuing of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes; nor to prevent the city of New York from issuing bonds to be redeemed out of the tax levy for the year next succeeding the year of their issue, provided that the amount of such bonds which may be issued in any one year in excess of the limitations herein contained shall not exceed one-tenth of one per centum of the assessed valuation of the real estate of said city subject to taxation. Nor shall this section be construed to prevent the issue of bonds to provide for the supply of water; but the term of the bonds issued to provide the supply of water, in excess of the limitation of indebtedness fixed herein, shall not exceed twenty years, and a sinking fund shall be created on the issuing of the said bonds for their redemption, by raising annually a sum which will produce an amount equal to the sum of the principal and interest of said bonds at their maturity. All certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, which are not retired within five years after their date of issue, and bonds issued to provide for the supply of water, and any debt hereafter incurred by any portion or part of a city if there shall be any such debt, shall be included in ascertaining the power of the city to become otherwise indebted; except that debts incurred by the city of New York after the first day of January, 1904, and debts incurred by any city of the second class after the first day of January, 1908, and debts incurred by any city of the third class after the first day of January, 1910, to provide for the supply of water, shall not be so included; and except further that any debt hereafter incurred by the city of New York for a public improvement owned or to be owned by the city, which yields to the city current net revenue, after making any necessary allowance for repairs and maintenance for which the city is liable, in excess of the interest on said debt and of the annual instalments necessary for its amortization may be excluded in ascertaining the power of said city to become otherwise indebted, provided that a sinking fund for its amortization shall have been established and maintained and that the indebtedness shall not be so excluded during any period of time when the revenue aforesaid shall not be sufficient to equal the said interest and amortization instalments, and except further that any indebtedness heretofore incurred by the city of New York for any rapid transit or dock investment may be so excluded proportionately to the extent to which the current net revenue received by said city therefrom shall meet the interest and amortization instalments thereof, provided that any increase in the debt incurring power of the city of New York which shall result from the exclusion of debts heretofore incurred shall be available only for the acquisition or construction of properties to be used for rapid transit or dock purposes. The legislature shall prescribe the method by which and the terms and conditions under which the amount of any debt to be so excluded shall be determined, and no such debt shall be excluded except in accordance with the determination so prescribed. The legislature may in its discretion confer appropriate jurisdiction on the appellate division of the supreme court in the first judicial department for the purpose of determining the amount of any debt to be so excluded. No in-

debtedness of a city valid at the time of its inception shall thereafter become invalid by reason of the operation of any of the provisions of this section. Whenever the boundaries of any city are the same as those of a county, or when any city shall include within its boundaries more than one county, the power of any county wholly included within such city to become indebted shall cease, but the debt of the county, heretofore existing, shall not, for the purposes of this section, be reckoned as a part of the city debt. The amount hereafter to be raised by tax for county or city purposes, in any county containing a city of over 100,000 inhabitants, or any such city of this state, in addition to providing for the principal and interest of existing debt, shall not in the aggregate exceed in any one year two per centum of the assessed valuation of the real and personal estate of such county or cty, to be ascertained as prescribed in this section in respect to county or city debt.

From Id., Art. VIII, § 11, as am'd in 1884. Am'd in 1900, 1905, 1907, and 1909 (see L. 1899, p. 1601; L. 1903, p. 1456; L. 1907, p. 2501).

§ 11. State board of charities; state commission in lunacy; state commission of prisons.

The legislature shall provide for a state board of charities, which shall visit and inspect all institutions, whether state, county, municipal, incorporated or not incorporated, which are of a charitable, eleemosynary, correctional or reformatory character, excepting only such institutions as are hereby made subject to the visitation and inspection of either of the commissions, hereinafter mentioned, but including all reformatories except those in which adult males convicted of felony shall be confined; a state commission in lunacy which shall visit and inspect all institutions, either public or private, used for the care and treatment of the insane (not including institutions for epileptics or idiots); a state commission of prisons which shall visit and inspect all institutions used for the detention of sane adults charged with or convicted of crime, or detained as witnesses or debtors.

New.

§ 12. Boards appointed by governor.

The members of the said board and of the said commissions shall be appointed by the governor, by and with the advice and consent of the senate; and any member may be removed from office by the governor for cause, an opportunity having been given him to be heard in his defense.

New.

§ 13. Existing laws to remain in force.

Existing laws relating to institutions referred to in the foregoing sections and to their supervision and inspection, in so far as such laws are not inconsistent with the provisions of the constitution, shall remain in force until amended or repealed by the legislature. The visitation and inspection herein provided for shall not be exclusive of other visitation and inspection now authorized by law.

New.

§ 14. Maintenance and support of inmates of charitable institutions.

Nothing in this constitution contained shall prevent the legislature from making such provision for the education and support of the blind, the deaf and dumb, and juvenile delinquents, as to it may seem proper; or prevent any county, city, town or village from providing for the care, support, maintenance and secular education, of inmates of orphan asylums, homes for dependent children or correctional institutions, whether under public or private control. Payments by counties, cities, towns and villages to charitable, eleemosynary, correctional and reformatory institutions, wholly or partly under private control, for care, support and maintenance, may be authorized, but shall not be required by the legislature. No such payments shall be made for any inmate of such institutions who is not received and retained therein pursuant to rules established by the state

board of charities. Such rules shall be subject to the control of the legislature by general laws.

New.

§ 15. Commissioners continued in office.

Commissioners of the state board of charities and commissioners of the state commission in lunacy, now holding office, shall be continued in office for the term for which they were appointed, respectively, unless the legislature shall otherwise provide. The legislature may confer upon the commissions and upon the board mentioned in the foregoing sections any additional powers that are not inconsistent with other provisions of the constitution.

New.

ARTICLE IX.

§ 1. Common schools.

The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated.

New.

§ 2. Regents of the university.

The corporation created in the year 1784, under the name of The Regents of the University of the State of New York, is hereby continued under the name of The University of the State of New York. It shall be governed and its corporate powers, which may be increased, modified or diminished by the legislature, shall be exercised by not less than nine regents.

New.

§ 3. Common school, literature, and the United States deposit funds.

The capital of the common school fund, the capital of the literature fund, and the capital of the United States deposit fund, shall be respectively preserved inviolate. The revenue of the said common school fund shall be applied to the support of common schools; the revenue of the said literature fund shall be applied to the support of academies; and the sum of twenty-five thousand dollars of the revenues of the United States deposit fund shall each year be appropriated to and made part of the capital of the said common school fund.

From Const. of 1846, Art. IX, § 1.

§ 4. No aid to denominational schools.

Neither the State nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.

New.

ARTICLE X.

§ 1. Sheriffs, clerks of counties, district attorneys, and registers; governor may remove.

Sheriffs, clerks of counties, district attorneys, and registers in counties having registers, shall be chosen by the electors of the respective counties, once in every three years and as often as vacancies shall happen, except in the counties of New York and Kings, and in counties whose boundaries are the same as those of a city, where such officers shall be chosen by the electors once

in every two or four years as the legislature shall direct. Sheriffs shall hold no other office, and be ineligible for the next term after the termination of their offices. They may be required by law to renew their security, from time to time; and in default of giving such new security, their offices shall be deemed vacant. But the county shall never be made responsible for the acts of the sheriff. The governor may remove any officer, in this section mentioned, within the term for which he shall have been elected; giving to such officer a copy of the charges against him, and an opportunity of being heard in his defense.

From Const. of 1846, Art. X, § 1.

§ 2. Appointment or election of officers, not provided for by this constitution.

All county officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. All city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct.

From Id., Art. X, § 2.

§ 3. Duration of term.

When the duration of any office is not provided by this constitution, it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment.

From Id., Art. X, § 3.

§ 4. Time of election.

The time of electing all officers named in this article shall be prescribed by law.

From Id., Art. X, § 4.

§ 5. Vacancies in office, how filled.

The legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy.

From Id., Art. X, § 5.

§ 6. Political year.

The political year and legislative term shall begin on the first day of January; and the legislature shall, every year, assemble on the first Wednesday in January.

From Id., Art. X, § 6.

§ 7. Removal from office for misconduct, etc.

Provision shall be made by law for the removal for misconduct or malversation in office of all officers, except judicial, whose

powers and duties are not local or legislative and who shall be elected at general elections, and also for supplying vacancies created by such removal.

From id., Art. X, § 7.

§ 8. Office deemed vacant.

The legislature may declare the cases in which any office shall be deemed vacant when no provision is made for that purpose in this constitution.

From Id., Art. X, § 8.

§ 9. Compensation of officers.

No officer whose salary is fixed by the constitution shall receive any additional compensation. Each of the other state officers named in the constitution shall, during his continuance in office, receive a compensation, to be fixed by law, which shall not be increased or diminished during the term for which he shall have been elected or appointed; nor shall he receive to his use any fees, or perquisites of office or other compensation.

From Id., Art. X, § 9, as am'd in 1874.

ARTICLE XI.

§ 1. State militia.

All able-bodied male citizens between the ages of eighteen and forty-five years, who are residents of the State, shall constitute the militia, subject however, to such exemptions as are now, or may be hereafter created by the laws of the United States, or by the legislature of this State.

From Const. of 1846, Art. XI, § 1.

§ 2. Enlistment.

The legislature may provide for the enlistment into the active force of such other persons as may make application to be so enlisted.

New.

§ 3. Organization of militia.

The militia shall be organized and divided into such land and naval, and active and reserve forces, as the legislature may deem proper, provided however that there shall be maintained at all times a force of not less than ten thousand enlisted men, fully uniformed, armed, equipped, disciplined and ready for active service. And it shall be the duty of the legislature at each session to make sufficient appropriation for the maintenance thereof.

New.

§ 4. Appointment of military officers by the governor.

The governor shall appoint the chiefs of the several staff departments, his aides-de-camp and military secretary, all of whom shall hold office during his pleasure, their commissions to expire with the term for which the governor shall have been elected; he shall also nominate, and with the consent of the senate appoint, all major-generals.

From Id., Art. XI, § 3.

§ 5. Manner of election of military officers prescribed by legislature.

All other commissioned and noncommissioned officers shall be chosen or appointed in such manner as the legislature may deem most conducive to the improvement of the militia, provided, however, that no law shall be passed changing the existing mode of election and appointment unless two-thirds of the members present in each house shall concur therein.

From Id., Art. XI, §§ 4, 6.

§ 6. Commissioned officers; their removal.

The commissioned officers shall be commissioned by the governor as commander-in-chief. No commissioned officer shall be removed from office during the term for which he shall have been appointed or elected, unless by the senate on the recommendation of the governor, stating the grounds on which such removal is recommended, or by the sentence of a court-martial, or upon the findings of an examining board organized pursuant to law, or for absence without leave for a period of six months or more.

From Id., Art. XI, § 5.

ARTICLE XII.

§ 1. [Am'd, 190..] Organization of cities and villages.

It shall be the duty of the legislature to provide for the organization of cities and incorporated villages; and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations; and the legislature may regulate and fix the wages or salaries, the hours of work or labor, and make provision for the protection, welfare, and safety of persons employed by the State or by any county, town, village or other civil division of the State, or by any contractor or sub-contractor performing work, labor or services for the State, or for any county, city, town, village or other civil division thereof.

From Const. of 1846, Art. VIII, § 9. Am'd in 1905 (see L. 1903, p. 1463).

§ 2. [Am'd, 1907.] Classification of cities; general and special city laws; special city laws; how passed by legislature and acceptance by cities.

All cities are classified according to the latest state enumeration, as from time to time made, as follows: The first class includes all cities having a population of one hundred and seventy-five thousand or more; the second class, all cities having a population of fifty thousand and less than one hundred and seventy-five thousand; the third class, all other cities. Laws relating to the property, affairs or government of cities, and the several departments thereof, are divided into general and special city laws; general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a class. Special city laws shall not be passed except in conformity with the provisions of this section. After any bill for a special city law, relating to a city, has been passed by both branches of the legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of

the legislature at which such bill was passed has terminated, to the governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same. In every city of the first class, the mayor, and in every other city, the mayor and the legislative body thereof concurrently, shall act for such city as to such bill; but the legislature may provide for the concurrence of the legislative body in cities of the first class. The legislature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon. Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted unless accepted as herein provided, by every such city. Whenever any such bill is accepted as herein provided, it shall be subject, as are other bills, to the action of the governor. Whenever, during the session at which it was passed, any such bill is returned without the acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the legislature, and it shall then be subject as are other bills, to the action of the governor. In every special city law which has been accepted by the city or cities to which it relates, the title shall be followed by the words "accepted by the city," or "cities," as the case may be; in every such law which is passed without such acceptance, by the words "passed without the acceptance of the city," or "cities," as the case may be.

New. Am'd in 1907 (see L. 1907, p. 2508).

§ 3. Election of city officers, when to be held; extension and abridgment of terms.

All elections of city officers, including supervisors and judicial officers of inferior local courts, elected in any city or part of a city, and of county officers elected in the counties of New York and Kings, and in all counties whose boundaries are the same as those of a city, except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of an odd-numbered year. The terms of office of all such officers elected before the first day of January, 1895, whose successors have not then been elected, which under existing laws would expire with an even-numbered year, or in an odd-numbered year and before the end thereof, are extended to and including the last day of December next following the time when such terms would otherwise expire; the terms of office of all such officers, which under existing laws would expire in an even-numbered year, and before the end thereof, are abridged so as to expire at the end of the preceding year. This section shall not apply to any city of the third class, or to elections of any judicial officer, except judges and justices of inferior local courts.

New.

ARTICLE XIII.

§ 1. Oath of office.

Members of the legislature and all officers executive and judicial, except such inferior officers as shall be by law exempted shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I

will faithfully discharge the duties of the office of ————, according to the best of my ability;" and all such officers who shall have been chosen at any election shall, before they enter on the duties of their respective offices, take and subscribe the oath or affirmation above prescribed, together with the following addition thereto, as part thereof:

"And I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute any money or other valuable thing as a consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, and have not made any promise to influence the giving or withholding any such vote," and no other oath, declaration or test shall be required as a qualification for any office of public trust.

From Const. of 1846, Art. XII, § 1, as am'd in 1874.

§ 2. Official bribery and corruption.

Any person holding office under the laws of this State who, except in payment of his legal salary, fees or perquisites, shall receive or consent to receive, directly or indirectly, anything of value or of personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action or omission to act is to be in any degree influenced thereby, shall be deemed guilty of a felony. This section shall not affect the validity of any existing statute in relation to the offense of bribery.

From Id., Art. XV, § 1, as am'd in 1874.

§ 3. Offer or promise to bribe.

Any person who shall offer or promise a bribe to an officer, if it shall be received, shall be deemed guilty of a felony and liable to punishment, except as herein provided. No person offering a bribe shall, upon any prosecution of the officer for receiving such bribe, be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor, if he shall testify to the giving or offering of such bribe. Any person who shall offer or promise a bribe, if it be rejected by the officer to whom it was tendered, shall be deemed guilty of an attempt to bribe, which is hereby declared to be a felony.

From Id., Art. XV, § 2, as am'd in 1874.

§ 4. Person bribed or offering a bribe may be a witness.

Any person charged with receiving a bribe, or with offering or promising a bribe, shall be permitted to testify in his own behalf in any civil or criminal prosecution therefor.

From Id., Art. XV, § 3, as am'd in 1874.

§ 5. Free passes, franking privileges, etc., not to be received by public officers; penalty.

No public officer, or person elected or appointed to a public office, under the laws of this State, shall directly or indirectly ask, demand, accept, receive or consent to receive for his own use or benefit, or for the use or benefit of another, any free pass, free transportation, franking privilege or discrimination in passenger, telegraph or telephone rates, from any person or corporation, or make use of the same himself or in conjunction with another. A person who violates any provision of this section, shall be deemed guilty of a misdemeanor, and shall forfeit his office at the suit of

the attorney general. Any corporation, or officer or agent thereof, who shall offer or promise to a public officer, or person elected or appointed to a public office, any such free pass, free transportation, franking privilege or discrimination, shall also be deemed guilty of a misdemeanor and liable to punishment except as herein provided. No person, or officer or agent of a corporation giving any such free pass, free transportation, franking privilege or discrimination hereby prohibited, shall be privileged from testifying in relation thereto, and he shall not be liable to civil or criminal prosecution therefor if he shall testify to the giving of the same.

New.

§ 6. Removal of district attorney for failure to prosecute; expenses of prosecutions for bribery.

Any district attorney who shall fail faithfully to prosecute a person charged with the violation in his county of any provision of this article which may come to his knowledge, shall be removed from office by the governor, after due notice and an opportunity of being heard in his defense. The expenses which shall be incurred by any county, in investigating and prosecuting any charge of bribery or attempting to bribe any person holding office under the laws of this State, within such county, or of receiving bribes by any such person in said county, shall be a charge against the State, and their payment by the State shall be provided for by law.

From Id., Art. XV, § 4, as am'd in 1874.

ARTICLE XIV.

§ 1. Amendments to constitution, how proposed, voted upon and ratified.

Any amendment or amendments to this constitution may be proposed in the senate and assembly; and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, and the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election of senators, and shall be published for three months previous to the time of making such choice; and if in the legislature so next chosen, as aforesaid, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval in such manner and at such times as the legislature shall prescribe; and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution from and after the first day of January next after such approval.

From Const. of 1846, Art. XIII, § 1.

§ 2. Future constitutional conventions; how called; election of delegates; compensation; quorum; submission of amendments; officers; rules; vacancies; taking effect.

At the general election to be held in the year 1916, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question, "Shall there be a convention to revise the constitution and amend the same?" shall be decided by the electors of the State; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the State, as then

organized, shall elect three delegates at the next ensuing general election at which members of the assembly shall be chosen, and the electors of the State voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his services the same compensation and the same mileage as shall then be annually payable to the members of the assembly. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal to be kept. The convention shall have the power to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal and proceedings. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the State at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendments, shall go into effect on the first day of January next after such approval.

In part from Id., Art. XIII, § 2.

§ 2. Amendments of convention and legislature submitted coincidentally.

Any amendment proposed by a constitutional convention relating to the same subject as an amendment proposed by the legislature, coincidently submitted to the people for approval at the general election held in the year 1894, or at any subsequent election, shall, if approved, be deemed to supersede the amendment so proposed by the legislature.

New.

ARTICLE XV.

§ 1. Time of taking effect.

This constitution shall be in force from and including the first day of January, 1895, except as herein otherwise provided.

Done in convention at the capitol in the city of Albany, the twenty-ninth day of September, in the year 1894, and of the independence of the United States of America the one hundred and nineteenth.

In witness whereof, we have hereunto subscribed our names.

JOSEPH HODGES CHOATE,
President and Delegate-at-Large.

CHARLES ELLIOTT FITCH,
Secretary.

Table of Cited Cases to the Judiciary Article (Article VI) of the Constitution of New York.

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§ 14.—N. Y.: 176-4; 198-462; 201-165; 207-293; 212-238. App. Div.: 95-25; 109-266; 109-305; 121-516; 126-131; 141-39; 146-358; 152-580; 157-426, 491, 589 (rev'd 212 N. Y. 565); 160-72; 161-846; 162-287; 163-737 (aff'd 212 N. Y. 457); 164-278; 169-46. Misc.: 41-168; 43-41; 44-84; 68-424; 76-213; 78-190.

§ 15.—N. Y.: 200-460; 212-239. App. Div.: 98-126 (see 182 N. Y. 552); 111-28; 146-352.

§ 17.—N. Y.: 197-49; 204-494. App. Div.: 82-557; 97-568; 112-101; 124-563; 127-642; 129-879 (see 197 N. Y. 45); 141-641; 146-354. Misc.: 40-374 (aff'd 84 App. Div. 633); 44-357; 50-155; 52-330; 70-180; 75-366; 82-631.

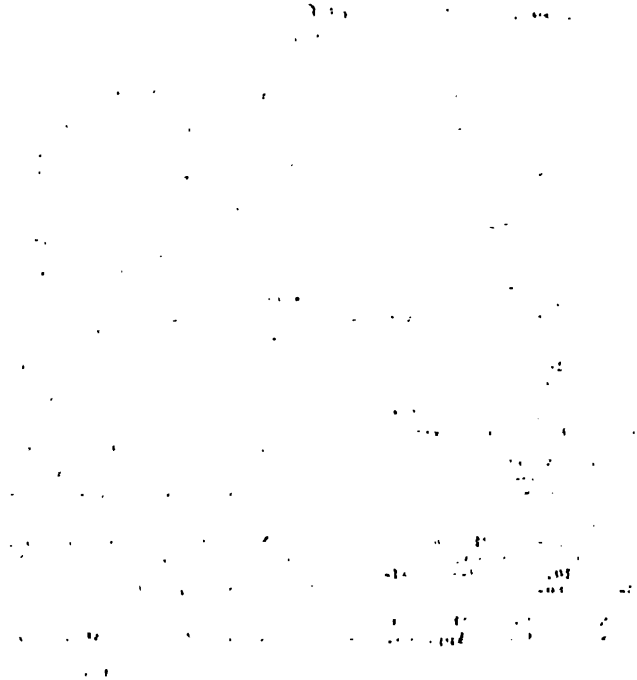
§ 18.—N. Y.: 207-293; 212-428. App. Div.: 124-564; 127-627; 146-101; 146-358; 157-425, 589 (rev'd 212 N. Y. 565), 850; 161-846; 165-813. Misc.: 44-358; 51-561; 58-550; 67-368; 70-180; 76-213; 79-361; 80-422; 82-631; 89-125.

§ 19.—N. Y.: 208-461; 216-136. App. Div.: 109-720; 155-595 (see 210 N. Y. 557).

§ 20.—N. Y.: 176-110. App. Div.: 88-103; 142-490. Misc.: 73-565.

§ 21.—App. Div.: 106-188.

§ 22.—N. Y.: 208-394. Misc.: 87-466.



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RULES OF THE COURT OF APPEALS.

NOTICE.

The first Monday of each session only will be a motion day, on which *oral* arguments will be heard in original motions. Original motions may be *submitted*, without oral argument, on *any* Monday when the court is in session, provided they are submitted by *both sides*.

After the day calendar is made up — at 6 o'clock P. M. — stipulations are too late. The clerk has then no power to leave a number off.

The full number of cases and points (18) are required, without which appeals may not be heard.

The "Order Calendar" is composed of preferred causes, and the notice of argument must claim the preference as an appeal "entitled to be heard under Rule XI." Appeals from orders should be noticed for the first Monday of a session.

The county clerk's certificate, or waiver thereof under section 3301, Code of Civil Procedure, are necessary parts of the printed case on appeal.

When a new calendar is ordered, it is desirable to notice causes in which the returns are filed, *at once*.

Counsel residing in New York city and its vicinity who intend to argue causes on the general calendar, should send their *residence* addresses to the clerk, and should promptly notify him of changes in their *office* addresses.

The daily sessions of the court are held from 2 o'clock P. M. to 6 o'clock P. M., except Fridays only, when it will sit from 10 A. M. to 2 P. M

Every exhibit presented to the court should be plainly marked with the address of the counsel presenting the same, as well as the title of the cause.

The clerk always *submits* for counsel who are absent when their cases are called for argument, provided their papers have been filed, as directed by Rule 7.

Requests for copies of opinions should be addressed to the State Reporter, Albany, N. Y.

The eighteen printed copies of the case required by Rule 7 to be filed with the clerk must be bound in light-colored (not dark) paper, and should not be sent to the clerk for filing until after the appeal has received a calendar number.

Each day's calendar and all court notices to the bar are printed in the New York Law Journal, which is the legal publication through which the clerk endeavors to reach the legal profession.

Attention of attorneys is called to Rule 7, which will be strictly enforced.

RULES OF THE COURT OF APPEALS.

(Adopted October 22, 1894; as amended to June, 1911.)

RULE I.

Appellant to file return; effect of omission. — If the appellant shall not cause the proper return to be made and filed with the clerk of this court within the time prescribed by law (Code Civil Pro., § 1315), the respondent may, by notice in writing, require such return to be filed within ten days after the service of the notice, and if the return be not filed in pursuance of such notice, the appellant shall be deemed to have waived the appeal. On an affidavit proving that the appeal was perfected, and the service of such notice, and a certificate of the clerk that no return has been filed, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal.

RULE II.

Further return may be ordered. — If the return made by the clerk of the court below shall be defective, either party may, on an affidavit, specifying the defect, and on notice to the opposite party, apply to one of the judges of this court for an order, that the clerk make a further return without delay.

RULE III.

Attorneys and guardians below to continue to act. — The attorneys and guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties respectively, in this court, until others shall be retained or appointed, and notice thereof shall be served on the adverse party.

RULE IV.

Appellant to make a case; its form. — In all calendar causes a case shall be made by the appellant, which shall consist of a copy of the return, and the reasons of the court below for its judgment, or an affidavit that the same cannot be procured, together with an index to the pleadings, exhibits, depositions and other principal matters. Every opinion in the cause at Special Term, as well as at the Appellate Division of the Supreme Court, relating to the questions involved in the appeal, is included by the foregoing provision.

RULE V.

Cases and points to be printed; mode of printing. — All cases and points, and all other papers furnished to the court in calendar causes, shall be printed on white paper, as provided in section 796 of the Code of Civil Procedure, and, if bound, the covers shall be of light-colored paper, which can be legibly written upon. The

folio, numbering from the commencement to the end of the case, shall be printed on the outer margin of the page. Small pica, leaded, or ten point leaded with four to pica leads, is the smallest letter and most compact mode of composition which is allowed. No charge for printing the papers mentioned in this rule shall be allowed as a disbursement in a cause; unless the requirements of the preceding sentence shall be shown, by affidavit, to have been complied with in all papers printed.

RULE VI.

Appellant to serve copies of case; effect of his default. — Within forty days after the appeal is perfected, the appellant shall serve three printed copies of the case on the attorney of the adverse party. If he fail to do so, the respondent may, by notice in writing, require the service of such copies within ten days after service of the notice, and, if the copies be not served in pursuance of such notice, the appellant shall be deemed to have waived the appeal; and on an affidavit proving the default and the service of such notice, the respondent may enter an order with the clerk dismissing the appeal for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal.

RULE VII.

Copies of cases and points. — At least twenty days before a cause is placed on the day calendar, the appellant shall file with the clerk eighteen printed copies of the case, and shall at the same time file with the clerk eighteen printed copies, and serve on the attorney or counsel for the respondent three printed copies, of the points to be relied on by him, with a reference to the authorities to be cited. Within ten days after such service, the respondent shall file with the clerk eighteen printed copies, and serve on the attorney or counsel for the appellant three printed copies, of the points to be relied on by him, with a reference to the authorities to be cited.

If the appellant desires to present points or authorities in reply, he shall file with the clerk eighteen printed copies thereof and serve three printed copies on the attorney or counsel for the respondent, within five days after receipt of the respondent's points; and no supplemental points will be allowed from either side unless especially requested by the court.

No points will be received by the court on argument or submission, unless they shall have been filed and served as above provided; except that in appeals under Rule XI, noticed for the first Monday of a session, and in causes upon a new general calendar to be heard during the first two weeks of any session at which such new calendar is taken up, the parties shall file the printed cases and file and serve, or exchange, the printed points, at least two days before the commencement of the session.

The cases and points filed with the clerk shall be disposed of as follows: One copy shall be furnished to each of the judges; one copy shall be kept by the clerk, with the records of the court; one copy shall be deposited in the State Library; one copy shall be deposited in each branch of the library of the Court of Appeals; one copy shall be deposited in the library of the New York Law Institute; one copy shall be deposited in the Law Library of Brooklyn; one copy shall be deposited in the Law Library of the Eighth Judicial District, and one copy shall be delivered to the reporter. (As amended October 13, 1910.)

RULE VIII.

Statement and discussion of facts. — In all causes each party shall briefly state upon his printed points, in a separate form, the leading facts which he deems established, with a reference to the folios where the evidence of such facts may be found. And the court will not hear an extended discussion upon any mere question of fact.

Every cause shall be deemed to be submitted to such judges as may be absent at the time of the argument, unless objection to such submission by counsel arguing the cause be then made.

RULE IX.

Criminal causes. — Appeals in criminal causes brought after making up the calendar, or too late to be placed on said calendar, may be put upon the calendar at any time, and brought on for a hearing as preferred causes, upon a notice of ten days; and it shall be the duty of the clerk to place such causes on the calendar for the day for which they shall be noticed or upon which the cause shall be ordered by the court, or stipulated by the parties, to be heard.

RULE X.

Submission and reservation of causes. — Causes will not be received upon submission, until reached in the regular call of the calendar. No reservation will be made of any of the first eight causes, unless on account of sickness, or of an engagement elsewhere in the actual trial, or argument, of another cause, commenced before the term of this court, or of other inevitable necessity, to be shown by affidavit. Other causes may be reserved upon reasonable cause shown, or by stipulation of parties filed with the clerk; but no cause shall be so reserved by stipulation after the same has been placed upon the day calendar.

Causes reserved for a day certain by stipulation, when in order to be called, have priority among each other according to the time of filing the stipulations with the clerk, and shall follow next in order the undisposed of causes of the calendar for the day previous. Default may be taken in them.

No reserved cause, whether reserved generally or for a particular day, will be called before its number is reached on the regular call of the calendar.

RULE XI.

Motions and appeals from orders. — Motions, appeals from final orders in special proceedings, from interlocutory judgments and from orders in actions and special proceedings, certified to this court by the Appellate Division of the Supreme Court, except orders granting a new trial, may be noticed for, and will be heard on, the first Monday of each session of the court, before taking up the general calendar. Notices of argument of appeals within this rule must contain the claim that the appeal is one entitled to be heard under Rule XI of the Court of Appeals.

Motions will be heard orally on the first Monday of a session only; but they may be submitted without oral argument on any Monday when the court is in session; provided they are submitted by both sides and the papers are filed with the clerk on or before the preceding Friday. If either party demands an oral argument of a motion noticed for any other than the first Monday of a session, the motion will go over to the first Monday of the succeeding session.

Where notice has been given of a motion, if no one shall appear to oppose, it will be granted as of course.

If a motion be not made on the day for which it has been noticed, the opposing party will be entitled, on applying to the court at the close of the motions for that day, to a rule denying the motion, with costs.

RULE XII.

Call of calendar. — Eight causes only will be called on any day; but, after such call, causes ready on both sides will be heard in their order. Any cause which is regularly called and passed, without postponement by the court for good cause shown at the time of the call, shall be stricken from the calendar.

Causes upon the calendar may be exchanged one for another, as of course, on filing with the clerk a note of the proposed exchange, with the numbers of the causes, signed by the respective attorneys or counsel. Upon all subsequent calendars, each of said causes will take the place due to the date of the filing of the return in the other.

In like manner, a cause not upon the calendar, in which an appeal to this court has been perfected and the return duly filed with the clerk, may be exchanged, as of course, for another cause upon the calendar, on filing with the clerk a note of the proposed exchange, with the number of the cause on the calendar, and the date of filing return in the cause not upon the calendar, signed by the respective attorneys or counsel, and, also, a stipulation of the attorneys or counsel in the cause not on the calendar setting down the same for argument in place of the calendar cause when reached, with the same effect as if duly noticed.

Upon all subsequent calendars, each of said causes will take the place due to the date of filing the return in the other.

RULE XIII.

Time of argument. — In the argument of a cause not more than two hours shall be occupied by counsel on either side, except by the express permission of the court.

In the argument of an appeal within Rule XI not more than thirty minutes shall be occupied by the appellant's counsel, nor more than twenty-five minutes by the respondent's counsel; unless express permission be given by the court and the cause placed at the foot of the order calendar.

RULE XIV.

Preferred causes. — No causes are entitled to any preference upon the calendar except such as is given by law or the special order of the court.

Any party claiming a preference must so state in his notice of argument to the opposite party and to the clerk; and he must also state the ground of such preference, so as to show to which of the preferred classes the cause belongs.

A preferred cause being once passed loses its preference.

RULE XV.

Defaults. — Judgments of reversal by default will not be allowed. When a cause is called in its order on the calendar, if the appellant fails to appear and furnish the court with the papers required, and argue or submit his cause, judgment of affirmance by default will be ordered on motion of the respondent. If the appellant only appears, he may either argue or submit the cause.

When any cause shall be regularly called for argument, and no other disposition shall be made thereof, the appeal shall be dismissed, without costs, and an order shall be entered accordingly, which shall be absolute unless upon application made and good cause shown, upon notice to the opposite party within ten days, if the court is in session, and if not, on the first motion day of the next session, the court shall revoke said order and restore said appeal.

RULE XVI.

Remittitur. — The remittitur shall contain a copy of the judgment of this court and the return made by the clerk below, and shall be sealed with the seal and signed by the clerk of this court.

RULE XVII.

Affirmance by default. — When a judgment or order shall be affirmed by the default of the appellant, the remittitur shall not be sent to the court below, unless this court shall otherwise direct, until ten days after notice of the affirmance shall have been served by the attorney for the respondent on the attorney for the appellant and proof thereof filed with the clerk. Service of the notice shall be proved to the clerk by affidavit, or by the written admission of the attorney on whom it was served.

RULE XVIII.

Enlarging time; revoking orders. — The time prescribed by these rules for doing any act may be enlarged by the court or by any of the judges thereof; and any of the judges may make orders to stay proceedings, which, when served with papers and notice of motion, shall stay the proceedings according to the terms of the order. Any order may be revoked or modified by the judge who made it; or, in case of his absence or inability to act, by any of the other judges.

RULE XIX.

Calendars. — When a new calendar is ordered by the court, the clerk shall place thereon all causes in which notices of argument, with proof or admission of service, have been filed in his office; and, also, if ordered by the court, all other causes in which the returns have been filed in his office; and the causes so put on the calendar by the direction of the court will be heard in their order as if regularly noticed.

RULE XX.

Motions for reargument. — Motions for reargument must be submitted on printed briefs, without oral argument, on notice to the adverse party, stating briefly the ground upon which a reargument is asked, and the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case and to the authorities relied upon.

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Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law.

(As amended May 17, 1911, to take effect July 1, 1911.)

RULE I.

General regulation as to admission. — No person shall be admitted to practice as an attorney or counselor in any court of record of the State except upon an order of the Appellate Division of the Supreme Court admitting him to the bar and licensing him to practice upon compliance with these rules.

RULE II.

Admission without examination. — The following classes of persons may in the discretion of the Appellate Division be admitted and licensed without examination:

1. Any person admitted to practice and who has practiced five years as a member of the bar in the highest law court in any other State or Territory of the American Union or in the District of Columbia.
2. Any person admitted to practice and who has practiced five years in another country whose jurisprudence is based on the principles of the English common law.
3. Any American citizen domiciled in a foreign country whose jurisprudence is based on the principles of the English common law holding a diploma or degree which would entitle him to practice law in the courts of such foreign country if a citizen thereof.

Any person admitted under this rule must possess the other qualifications required by these rules and must produce a letter of recommendation from one of the judges of the highest law court of such other State or country, or furnish other satisfactory evidence of character and qualifications.

An attorney and counselor from another State or foreign jurisdiction may in the discretion of any court of record be admitted *pro hac vice* to participate in the trial or argument of any cause in which he may be employed.

RULE III.

Admission on examination. — Three classes of persons may be admitted to the bar upon examination:

1. Persons who are not graduates of a college or university;
2. Persons who are graduates of a college or university; and
3. Persons who have been admitted as attorneys and have practiced three years in another State or country.

In each class the applicant must prove by his own affidavit to the satisfaction of the State Board of Law Examiners that he is a citizen of the United States, twenty-one years of age, stating his age, and an actual and not a constructive resident of the State for not less than six months immediately preceding and that he has not been examined for admission to practice and been refused admission within four months, and that he has studied law in the manner and according to the conditions in these rules prescribed.

Applicants in the first class (*i. e.*, persons who are not graduates of a college or university) must have studied law for a period of four years. Such an applicant may pursue his course of law study wholly by serving a clerkship in the office of a practicing attorney: or partly by serving such clerkship and partly by attending a law school; but every such applicant must serve such clerkship for a period of at least one year continuously either before examination by the State Board of Law Examiners or after such examination and prior to admission to the bar.

Applicants in the second class (*i. e.*, persons who are graduates of a college or university) must have studied law for a period of three years. Such an applicant may pursue his course of law study wholly by serving a clerkship in the office of a practicing attorney; or wholly by attending a law school; or partly by serving such clerkship and partly by attending a law school.

Applicants in the third class (*i. e.*, persons who have been admitted as attorneys and have practiced three years in another State or country) must have studied law for a period of one year within this State and pursue such course of study either by serving a clerkship or by attendance upon a law school as the applicant may elect.

Candidates for admission to the bar under this rule (*i. e.*, upon examination) may be admitted and licensed upon producing and filing with the court the certificate of the State Board of Law Examiners that the applicant has satisfactorily passed the examination prescribed by these rules and has complied with their provisions, and upon producing and filing with the court, in the case of applicants in the first class (*i. e.*, persons who are not graduates of a college or university), evidence that he has served a regular clerkship of one year in this State with an attorney or attorneys in regular practice, either before or after having passed such examination. The applicant must also produce and file evidence that he is a person of good moral character which must be shown by the affidavits of two reputable persons of the town or city in which he resides, one of whom must be a practicing attorney of the Supreme Court. Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character, and must set forth in detail the facts upon which such knowledge is based; but such affidavits shall not be conclusive and the court may make further examination and inquiry.

If the applicant be a graduate of a college, or university, he must have pursued the prescribed course of law study after his graduation, and, if he be a person admitted to the bar of another State or country, he must have pursued his prescribed period of law study after having remained as a practicing attorney in such other State or country for the period of three years.

RULE IV.

Regulations concerning preliminary studies. — All candidates for admission to the bar upon examination, except applicants in the third class mentioned in Rule III (*i. e.*, persons who have been admitted and have practiced three years in another State or country), must have pursued a preliminary course of study evidenced by graduation from a college or university, or by passing a Regents' examination or the equivalent, as hereinafter prescribed:

Applicants who are not graduates of a college, or university, subject to the limitations and requirements hereinafter, in this subdivision, expressed, or members of the bar as above described, before entering upon the clerkship or attendance at a law school herein prescribed shall have passed an examination conducted under the authority and in accordance with the ordinances and rules of

the University of the State of New York, in English, three years; mathematics, two years; Latin, two years; science, one year; history, two years; or in their substantial equivalents as defined by the rules of the University, and shall have filed a certificate of such fact, signed by the Commissioner of Education, with the clerk of the Court of Appeals, whose duty it shall be to return to the person named therein a certified copy of the same, showing the date of such filing. The Regents may accept as the equivalent of and substitute for the examination in this rule prescribed, either, first, a certificate, properly authenticated, of having successfully completed a full year's course of study in any college, or university; second, a certificate, properly authenticated, of having satisfactorily completed a four years' course of study in any institution registered by the Regents as maintaining a satisfactory academic standard; or, third, a Regents' diploma.

All graduates of a college or university existing under the government or laws of any foreign country other than those where English is the language of the people, and all applicants who apply for law students' certificates upon equivalents or substitutes, as above provided, all or any part of which are earned or issued in said foreign countries shall pass the Regents' examination in second year English. The Regents' certificate above prescribed shall be deemed to take effect as of the date of the completion of the Regents' examination, as the same shall appear upon said certificate.

RULE V.

Regulations concerning study at law schools. — The provisions of these rules for study at a law school must be fulfilled by good and regular attendance and successfully completing the prescribed course of instruction at an incorporated law school, or a law school connected with an incorporated college or university, having a law department organized with competent instructors and professors, in which instruction as hereinafter provided is regularly given.

Good and regular attendance upon and the successful completion of the prescribed course of instruction at a law school, the school year of which shall consist of not less than thirty-two school weeks, exclusive of vacations, in which not less than ten hours of attendance upon law lectures or recitations of such prescribed course, to be given or conducted by regular members of the faculty, are required in each week, shall be deemed a year's attendance under this rule.

The same period of time shall not be duplicated for different purposes; except that a student attending a law school, as herein provided, and who, during the vacations of such school, not exceeding three months in any one year, shall pursue his studies in the office of a practicing attorney, shall be allowed to count the time so occupied during such vacation or vacations as part of the clerkship in a law office specified in these rules.

RULE VI.

Regulations concerning clerkship. — The provisions of these rules for studying law by the service of a regular clerkship must be fulfilled by serving such clerkship in the office of a practicing attorney of the Supreme Court in this State, after the candidate has attained the age of eighteen years.

It shall be the duty of attorneys, with whom a clerkship shall be commenced, to file a certificate of the same in the office of the clerk of the Court of Appeals, which certificate shall, in each case, state the date of the beginning of the period of clerkship, and such period shall be deemed to commence at the time of such filing and shall be computed by the calendar year.

In computing the period of clerkship a vacation actually taken, not exceeding two months in each year, shall be allowed as a part of such year.

RULE VII.

Proof to entitle candidate to examination. — The State Board of Law Examiners, before admitting an applicant to an examination, shall require proof that the preliminary conditions prescribed by these rules have been fulfilled; which proof shall be made as follows, viz.:

First. That the applicant is a college graduate, by the production of his diploma, or certificate of graduation, under the seal of the college.

Second. That he has been admitted to the bar of another State or country, by the production of his license, or certificate, executed by the proper authorities.

Third. In all cases where the service of a clerkship is required, that he has served a regular clerkship in the office of a practicing attorney of the Supreme Court in this State, after the age of eighteen years, by producing and filing with the Board a certified copy of the attorney's certificate, as filed in the office of the clerk of the Court of Appeals, and producing and filing an affidavit of the attorney or attorneys with whom such clerkship was served, showing the actual service of such a clerkship, the continuance and end thereof, and that not more than two months' vacation was taken in any one year. Both of said affidavits must be to the effect that during the entire period of such clerkship, except during the stated vacation time, the applicant was actually employed by said attorney as a regular law clerk and student in his law office, and under his direction and advice, engaged in the practical work of the office during the usual business hours of the day.

Fourth. The time of study allowed in a law school must be proved by the certificate of the teacher or president of the faculty, under whose instructions the person has studied, under the seal of the school, if such there be, in addition to the affidavit of the applicant, which must, also, state the age at which the applicant began his attendance at such law school. Said certificate and affidavit must, also, show that the law school prescribes the course of instruction contemplated by these rules, and each shall also contain the statement that said applicant took the prescribed course of instruction required at said school for the degree of Bachelor of Laws while in attendance thereat, and bona fide took and successfully passed all examinations in all the subjects required for said degree during such period of attendance, in each case specifying the subjects in which said applicant took and passed his examinations as aforesaid, which proof must be satisfactory to the Board of Examiners.

Fifth. That the applicant has passed the Regents' examination, or its equivalent, must be proved by the production of a certified copy of the Regents' certificate filed in the office of the clerk of the Court of Appeals, as hereinbefore provided.

Sixth. When it satisfactorily appears that any diploma, affidavit, or certificate, required to be produced has been lost, or destroyed, without the fault of the applicant, or has been unjustly refused or withheld, or by the death or absence of the person or officer who should have made it, cannot be obtained, the Board of Law Examiners may accept such other proof of the requisite facts as they shall deem sufficient.

Seventh. A law student whose clerkship, or attendance at a law school, has already begun, as shown by the records of the Court of Appeals, or of any incorporated law school, or law school established in connection with any college or university, may, at his

option, file or produce, instead of the proofs required by these rules, those required by the Rules of the Court of Appeals in force June 1, 1908.

RULE VIII.

Regulations concerning examination. — The examination held by such State Board of Examiners may be conducted by oral or written questions and answers, or partly oral and partly written, but shall be as nearly uniform in the knowledge and capacity which they shall require, as is reasonably possible. Every applicant shall be given and required to pass a satisfactory examination in the canons of ethics adopted by the American Bar Association and by the New York State Bar Association. An applicant who has failed to pass one examination cannot again be examined, until at least four months after such failure.

The State Board of Law Examiners shall be paid as compensation, each, the sum of two thousand dollars per year, and, in addition, such further sum as the court may direct, and an annual sum not exceeding two thousand dollars per year shall be allowed for necessary disbursements of the Board. Every applicant for examination shall pay to the examiners a fee of fifteen dollars, which shall be applied upon the compensation and allowance above provided, and any surplus thereafter remaining shall be held by the treasurer of the State Board of Law Examiners and deposited in some bank, in good standing, in the city of Albany, to his credit and subject to his draft as such treasurer, when approved by the Chief Judge.

RULE IX.

Relief from excusable mistakes. — When the filing of a certificate, as required by these rules, has been omitted by excusable mistake, or without fault, the court may order such filing as of the proper date.

RULE X.

Additional rules by the Appellate Division. — The Justices of the Appellate Division in each department may adopt for their several and respective departments such additional special rules for ascertaining the moral and general fitness of applicants as to such Justices may seem proper.

These rules shall take effect on July 1, 1911.

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GENERAL RULES OF PRACTICE.

GENERAL RULES OF PRACTICE.

(Adopted, pursuant to section 17 of Code of Civil Procedure, in December, 1895, to go into effect January 1, 1896; as amended to March, 1914.)

RULE I. (1)

Application for admission as attorneys. — Within ten days after the 1st day of January in each year the Appellate Division in each department shall appoint a committee on character and fitness of not less than three for the department, or may appoint a committee for each judicial district within the department, to whom shall be referred all applications for admission to practice as attorney and counselor at law, such committee to continue in office until their successors are appointed. To the respective committees shall be referred all applications for admission to practice, either upon the certificate of the State Board of Law Examiners or upon motion under Rule 2 of the Rules of the Court of Appeals for admission of attorneys and counselors at law. The committee shall require the attendance before it or a member thereof of each applicant, with the affidavit of at least two practising attorneys acquainted with such applicant, residing in the judicial district in which the applicant resides, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based, and it shall be the duty of the committee to examine each applicant, and the committee must be satisfied from such examination and other evidence that the applicant shall produce that the applicant has such qualifications as to character and general fitness as in the opinion of the committee justify his admission to practice, and no person shall be admitted to practice except upon the production of a certificate from the committee to that effect unless the court otherwise orders.

No applicant shall be entitled to receive such a certificate who is not able to speak and to write the English language intelligently, nor until he affirmatively establishes to the satisfaction of the committee that he possesses such a character as justifies his admission to the Bar and qualifies him to perform the duties of an attorney and counselor at law.

An applicant for admission to practice as an attorney and counselor at law on motion, under the provisions of Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counselors at law, must present to the court proof that he has been admitted to practice as an attorney and counselor at law in the highest court of law in another State, or in a country whose jurisprudence is based upon the principles of the common law of England; a certificate, executed by the proper authorities that he has been duly admitted to practice in such State or country; that he has actually remained in said State or country, and practised in such court as attorney and counselor at law for at least five years; a certificate from a judge of such court that he has been duly admitted to practice and has actually continuously practised as an attorney and counselor at law for a period of at least five years after he has been admitted, specifying the name of the place or places in which he has so practised and that he has a good character as such attorney. Such certificate must be duly certified by the clerk of the court of which the judge is a member, and the seal of the court must be attached thereto. He must also prove that he is a citizen of the United States and has been an actual resident of the State of New York for at least six months prior to the making of the application, giving the place of his residence by street and number, if such there be, and the length of time he has been such resident. He shall also submit the affidavits of two persons who are residents of the judicial district in which he resides, one of whom must be an attorney and counselor at law, that he is of such character and general fitness as justifies admission to practice, and the affidavit must set forth in detail the facts upon which the affiant's knowledge of the applicant is based. In all cases the applicant must appear in person before the court on the motion for his admission, and also before the committee on character and fitness for the district in which the application is made.

In all cases the applicant for admission must file with the Clerk of the Appellate Division of the proper department the papers required for his admission as hereinbefore specified prior to or at the time of the motion for admission to practice. (As amended June 17, 1913; in effect November 1, 1913.)

RULE II. 115

Papers, where filed; indorsements. — The papers, in cases pending in the Appellate Division, shall be filed with the clerk of such division of the department in which the case is pending. In all other

cases where no provision is made by the Code, papers in the Supreme Court shall be filed in the office of the clerk of the county specified in the complaint as the place of trial. In Surrogate's Courts, in the office of the surrogate; in other courts of record, in the office of the respective clerks thereof. In case the place of trial be changed to another county, all subsequent papers shall be filed in the county to which such change is made. All papers served or filed must be indorsed or subscribed with the name of the attorney or attorneys, or the name of the party if he appears in person, and his or their office address, or place of business.

RULE III. (71) (72) (73)

Motion papers, to be specified in order and filed; effect of non-filing; entry of order. — When any order is entered, all the papers, used or read on the motion on either side, shall be specified in the order, and shall be filed with the clerk, unless already on file or otherwise ordered by the court, or the order may be set aside as irregular, with costs. The clerk shall not enter such order unless the motion papers are filed, and unless the order is signed by the justice presiding at the court at which the motion was heard. When an opinion has been delivered by the court, it shall be filed with the order and shall be considered a part of the record upon which the order was made; and if the order does not state the grounds upon which it was made, the opinion may be considered to ascertain such grounds.

When the affidavits and papers upon a non-enumerated motion are required by law or by the rules of the court to be filed, and the order to be entered in a county other than that in which the motion is made, the clerk shall deliver to the party prevailing in the motion, unless the court shall otherwise direct, a certified copy of the rough minutes, showing what papers were used or read, together with the affidavits and papers used or read upon such motion, with a note of the decision thereon, or the order directed to be entered, properly certified. It shall be the duty of the party to whom such papers are delivered to cause the same to be filed, and the proper order entered in the proper county within ten days thereafter, or the order may be set aside as irregular, with costs. (As amended April 1, 1910; in effect September 1, 1910.)

RULE IV. (26)

Undertaking and affidavit in proceedings for injunction; attachment, order of arrest and writ to be filed. — Except where otherwise expressly provided by law, it shall be the duty of the attorney of the party required to give a bond or undertaking to forthwith file the same with

the proper clerk; and in case such bonds and undertakings shall not be so filed, any party to the action or special proceeding, or other persons interested, shall be at liberty to move the court to vacate the proceedings or order as if no bond or undertaking had been given. It shall also be the duty of the attorney to file the petition or affidavit upon which an injunction, attachment, order of arrest, or writ, has been granted within ten days after the same shall have been served. In case of a failure so to file such petition or affidavit, the opposing party may move to vacate the order, warrant or writ, and the same shall be vacated by the court or judge granting the same, unless for proper cause shown time to file the same shall be extended.

RULE V. (25) (27)

Sureties, justification of bonds to be acknowledged. — Whenever a justice or other officer approves of the security to be given in any case, or reports upon its sufficiency, it shall be his duty to require personal sureties to justify, or, if the security offered is by way of mortgage on real estate, to require proof of the value of such real estate. And all bonds and undertakings, and other securities in writing, shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed.

In no case shall an attorney or counselor be surety on any undertaking or bond required by law, or by these rules, or by any order of a court or judge, in any action or proceeding, or be bail in any civil or criminal case, or proceeding.

RULE VI.

Sheriff's return, how compelled. — At any time after the day when it is the duty of the sheriff, or other officer, to return, deliver, or file any process or other paper, by the provisions of the Code of Civil Procedure, or by these rules of the courts, any party entitled to have such act done, except where otherwise provided by law, may serve on the officer a notice to return, deliver, or file such process, or other paper, as the case may be, within ten days, or show cause, at a Special Term to be designated in said notice, why an attachment should not issue against him.

RULE VII.

Books to be kept by clerks of courts. — The clerk of the Appellate Division in each department shall keep:

1. A book, properly indexed, in which shall be entered the title of all actions and proceedings which are pending in that court, and all actions or special proceedings commenced in the Appellate Divi-

sion, with entries under each, showing the proceedings taken therein and the final disposition thereof.

2. A minute book, showing the proceedings of the court from day to day.

3. A remittitur book, containing the final order made upon the decision of each case, a certified copy of which shall be transmitted to the proper clerk, as required by the Code of Civil Procedure.

4. A book, properly indexed, in which shall be recorded at large each bond or undertaking filed in his office, with a statement of the action or special proceeding in which it is given, and a statement of any disposition or order made of or concerning it.

5. A book, properly indexed, which shall contain the name of each attorney admitted to practice, with the date of his admission, and a book, properly indexed, which shall contain the name of each person who has been refused admission or who has been disbarred or otherwise disciplined or censured by the court. The clerk of each department shall transmit to the clerk of the Court of Appeals and to the clerks of the other departments the names of all attorneys who have been admitted to practice, the names of all applicants who have been refused admission, and the names of all attorneys who have been disbarred, disciplined or censured by the court. The clerk of each department is directed to enter in the proper book the name of each attorney who has been admitted to practice, with date of his admission, and the name of each person who has been refused admission or has been disciplined, with the date of such refusal of admission or discipline, received from the other departments of the State, toegther with the date when and department wherein the order was made. (Subdivision added April 1, 1910; in effect September 1, 1910.)

The clerks of the other courts shall keep in their respective offices, in addition to the "judgment book" required to be kept by the Code of Civil Procedure:

1. A book, properly indexed, in which shall be entered the title of all civil actions and special proceedings, with proper entries under each denoting the papers filed and the orders made and the steps taken therein, with the dates of the several proceedings.

2. A book in which shall be entered at large each bond and undertaking filed in his office, with a statement showing when filed and a statement of any disposition or order made of or concerning it.

3. Such other books, properly indexed, as may be necessary to enter the minutes of the court, docket judgments, enter orders and all other necessary matters and proceedings, and such other books as the Appellate Division in each department shall direct.

RULE VIII.

Judgments, entering and docketing of. — Judgments shall only be entered, or docketed, in the offices of the clerks of the courts of this State, within the hours during which, by law, they are required to keep open their respective offices for the transaction of business, and at no other time.

RULE IX.

Subpœnas duces tecum; not to be issued to library associations, public officers, public departments, etc., except by judge; stipulations of attorneys as substitute therefor. — No subpœnas duces tecum requiring a library association or corporation, a public officer, a department of a municipal corporation, or other public officer or department, to produce on the trial of an action or special proceeding before a court or referee, books, papers or other documents or writings in its or his possession, shall be issued except by a justice of the Supreme Court in the district in which the library or department is located or the public officer is employed, or a judge of the court in which the action or special proceeding is pending, and except upon one day's notice to the library, officer, corporation or head of the department having possession of the books, papers or other documents or writings, and also to the opposing party or his attorney. The justice or the judge to whom the application is made shall not require the production of such books, papers or other documents or writings before a court or referee, when a stipulation between the attorneys or a copy thereof, duly verified, will in his opinion serve the purpose of such production, and he may impose such other conditions as may in his opinion be reasonable. Upon the refusal of a party to such an application to make such stipulation when required so to do, the justice or the judge (to whom the application for a subpœna duces tecum is made) may impose upon such party the actual cost or expense incurred in producing the books, papers or other documents or writings in accordance with the subpœna, in addition to the fees now required by law upon the service of a subpœna. (Added June 17, 1913; in effect November 1, 1913.)

RULE X.

Change of attorneys. — An attorney may be changed by consent of the party and his attorney, or upon application of the client upon cause shown and upon such terms as shall be just, by the order of the court or a judge thereof, and not otherwise.

RULE XI.

Agreements between parties or attorneys to be in writing. — No private agreement or consent between the parties or their attorneys, in respect to the proceedings in a cause, shall be binding, unless the same shall have been reduced to the form of an order by consent, and entered, or unless the evidence thereof shall be in writing, subscribed by the party against whom the same shall be alleged, or by his attorney or counsel..

RULE XII.

Consents to payment of money out of court. — All consents providing for the payment of money out of court shall be acknowledged before an officer authorized to take the acknowledgment of deeds, accompanied with proof of the identity of the applicant from some person other than the applicant, before any order is granted thereon.

RULE XIII.

Orders of arrest, injunction, or attachment. — Every order of arrest, as well as every injunction or attachment, shall briefly state the grounds on which it is granted.

RULE XIV.

Discovery of books, papers and documents. — Applications may be made in the manner provided by law to compel the production and discovery or inspection with copy of books, papers and documents relating to the merits of any civil action pending in court or of any defense of such action, in the following cases:

1. By the plaintiff, to compel the discovery of books, papers or documents in the possession or under the control of the defendant, which may be necessary to enable the plaintiff to frame his complaint or to answer any pleading of the defendant.

2. By the defendant, to compel the like discovery of books, papers or documents in the possession or under the control of the plaintiff, which may be necessary to enable the defendant to answer any pleading of the plaintiff.

3. Either party may be compelled to make a discovery of any book, document, record, article or property in his possession or under his control, or in the possession of his agent or attorney, upon its appearing to the satisfaction of the court that such book, document, record, article or property is material to the decision of the action or special proceeding, or some motion or application

therein, or is competent evidence in the case, or an inspection thereof is necessary to enable a party to prepare for trial.

RULE XV.

Form of application for discovery of books. — The moving papers upon the application for such discovery or inspection shall state the facts and circumstances on which the same is claimed, and shall be verified by affidavit stating that the books, papers, articles, property, and documents whereof discovery or inspection is sought are not in the possession nor under the control of the party applying therefor, but are in the possession or under the control of the party against whom discovery is sought or his agent or attorney. The party applying shall show to the satisfaction of the court or judge the materiality and necessity of the discovery or inspection sought, the particular information which he requires, and in the case of books and papers, that there are entries therein as to the matter of which he seeks a discovery or inspection.

RULE XVI.

Contents of order; stay of proceedings. — The order for granting the application shall specify the mode in which the discovery or inspection is to be made, which may be either by requiring the party to deliver sworn copies of the matters to be discovered, or to allow an inspection with copy, or by requiring him to produce and deposit the same with the clerk, unless otherwise directed in the order. The order shall also specify the time within which the discovery or inspection is to be made, and when papers, articles, or property are required to be deposited or inspected, the order shall specify the time the deposit or the opportunity for inspection shall continue.

The court or judge may direct that the order directing the discovery or inspection shall operate as a stay of all other proceedings in the cause, either in whole or in part, until such order shall have been complied with or vacated.

RULE XVII.

Application for a subpœna to compel the attendance of a witness to obtain testimony under depositions taken within the State for use without the State, and proceedings thereon. — The petition prescribed by section 915 of the Code of Civil Procedure must state generally the nature of the action or proceeding in which the testimony is sought to be taken, and that the testimony of a witness is material to the issues presented in such action or proceeding, and shall set forth the substance of, or have annexed thereto, a copy of, the commission, order, notice, consent or other authority under which the deposition is taken. In case of an application for a subpœna to compel the production of books or papers, the petition shall specify the particular books or papers the production of which is sought, and show that such books or papers are in the possession of or under the control of the witness and are material upon the issues presented in the action or special proceeding in which the deposition of the witness is sought to be taken. Unless the court or judge is satisfied that the application is made in good faith to obtain testimony within sections 914 and 915 of the Code of Civil Procedure, he shall deny the application. Where the subpœna directs the production of books or papers, it shall specify the particular books or papers to be produced, and

shall specify whether the witness is required to deliver sworn copies of such books or papers to the commissioner, or to produce the original thereof and deposit the same with the commissioner. This subpœna must be served upon the witness at least two days, or in case of a subpœna requiring the production of books or papers, at least five days before the day on which the witness shall be commanded to appear. A party to an action or proceeding in which a deposition is sought to be taken, or a witness subpœnaed to attend and give his deposition may apply to the court to vacate or modify such subpœna.

Upon proof by affidavit that a person to whom a subpœna was issued has failed or refused to obey such subpœna; to be duly sworn or affirmed; to testify or answer a question or questions propounded to him; to produce a book or paper which he has been subpœnaed to produce, or to subscribe to his deposition when correctly taken down, a justice of the Supreme Court or a county judge shall grant an order requiring such person to show cause before the Supreme Court, at a time and place specified, why he should not appear; be sworn or affirmed; testify; answer a question or questions propounded; produce a book or paper; or subscribe to his deposition, as the case may be. Such affidavit shall also set forth the nature of the action or special proceeding in which the testimony is sought to be taken, and a copy of the pleadings or other papers defining the issues in such action or special proceeding, or the fact to be proved therein. Upon the return of such order to show cause, the Supreme Court shall upon such affidavit and upon the original petition, and upon such other facts as shall appear, determine whether such person should be required to appear; be sworn or affirmed; testify; answer the question or questions propounded; produce the book or paper, or subscribe to his deposition, as the case may be, and may prescribe such terms and conditions as shall seem proper. Upon proof of a failure or refusal on the part of any person to comply with any order of the court made upon such determination, the court or judge shall make an order requiring such person to show cause before it or him at a time and place therein specified, why such person should not be punished for the offense as for a contempt. Upon the return of the order to show cause the questions which arise must be determined as upon a motion. If such failure or refusal is established to the satisfaction of the court or judge before whom the order to show cause is made returnable, the court or judge shall enforce the order and prescribe the punishment as in the case of a recalcitrant witness in the Supreme Court.

RULE XVIII.

Proof of service of summons by person other than sheriff; in divorce cases. — Where personal service of the summons and of the complaint, or notice, if any accompany the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service his age, or that he is more than twenty-one years of age; when, and at what particular place, and in what manner he served the same, and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and also to state in his affidavit that he left with defendant such copy, as well as delivered it to him. No such service shall be made by any person who is less than eighteen years of age.

In actions for divorce, or to annul a marriage, or for separate maintenance, the affidavit, in addition to the above requirements,

shall state what knowledge the affiant had of the person served being the defendant and proper person to be served, and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto, and when service has been made by the sheriff, the court must require the officer who made the service to appear and be examined in like manner, unless there shall be presented with the certificate of service the affidavit of such officer, that he knew the person served to be the same person named as defendant in the summons, and shall also state the source of his knowledge.

RULE XIX.

Folios to be numbered; waiving objection except as to papers for court. — Every pleading, deposition, affidavit, case, bill, exceptions, report, paper, order or judgment, exceeding two folios in length, shall be distinctly numbered and marked at each folio in the margin thereof, and all copies either for the parties or the court shall be numbered or marked in the margin, so as to conform to the original draft or entry and to each other, and shall be indorsed with the title of the cause. All the pleadings and other proceedings and copies thereof shall be fairly and legibly written or printed, and if not so written or printed and folioed and indorsed as aforesaid, the clerk shall not file the same, nor will the court hear any motion or application founded thereon.

All pleadings or other papers in an action or special proceeding served on a party or an attorney, or filed with the clerk of the court, must comply with section 796 of the Code of Civil Procedure and must be written or printed in black characters; and no clerk of the court shall file or enter the same in his office unless it complies with this rule. The party upon whom the paper is served shall be deemed to have waived the objection for noncompliance with this rule unless within twenty-four hours after the receipt thereof he returns such paper to the party serving the same with a statement of the particular objection to its receipt; but this waiver shall not apply to papers required to be filed or delivered to the court.

It shall be the duty of the attorney by whom the copy pleadings shall be furnished for the use of a court on trial, to plainly designate on each pleading the part or parts thereof claimed to be admitted or controverted by the succeeding pleadings.

RULE XX.

Service and settlement of interrogatories. — Interrogatories to be annexed to a commission issued under article second of title three of chapter nine of the Code of Civil Procedure shall be served within ten days after the entry of the order, allowing the commission. Cross-interrogatories shall be served within ten days after the service of the interrogatories, unless a different time is fixed therefor by the order allowing the commission. In case a party shall fail to serve such cross-interrogatories within the time limited therefor, he shall be deemed to have waived his right to propound cross-interrogatories to the witness to be examined under the commission. Either party may, within two days after the service of the cross-interrogatories or within two days after the time to serve cross-interrogatories has expired, serve upon the opposing party a notice of settlement of the interrogatories and cross-interrogatories before a justice of the court or county judge. The time at which such interrogatories or cross-interrogatories

shall be noticed for settlement shall be not less than two nor more than ten days after the service of the notice. If neither party serves such a notice within the time limited therefor, the interrogatories and cross-interrogatories are to be deemed settled as served and shall be so allowed without notice.

RULE XXI.

Non-enumerated motions; noticing of. — Non-enumerated motions, in the Supreme Court, except in the first and second districts, and motions noticed to be heard in Erie county, shall be noticed for the first day of the term or sitting of the court, accompanied with copies of the affidavits and papers on which the same shall be made, and the notice shall not be for a later day, unless sufficient cause be shown (and contained in the affidavits served), for not giving notice for the first day. In other courts such motions may be made on any day designated by the judges thereof. In the Appellate Division such motions may be noticed for any motion day in the term.

RULE XXII.

Motions to strike out irrelevant matter; notice of. — Motions to strike out of any pleading matter alleged to be irrelevant, redundant or scandalous, and motions to correct a pleading on the ground of its being "so indefinite or uncertain that the precise meaning or application is not apparent," must be noticed before demurring or answering the pleading and within twenty days from the service thereof. The time to make such motion shall not be extended unless notice of an application for such extension, stating the time and place thereof, of at least two days shall be given to the adverse party.

RULE XXIII.

Affidavits of merits. — All motions for relief to which a party is not entitled as matter of right shall be made upon papers showing merits, and the good faith of the prosecution or defense, which may be shown by any proof that shall satisfy the court. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XXIV.

Affidavit for order extending time. — No order extending a defendant's time to answer or demur, or the plaintiff's time to reply to a counterclaim, shall be granted, unless the party applying for such order presents to the judge to whom the application is made an affidavit of the attorney or counsel retained to defend the action that from the statement of the case made to him by the defendant he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, or to some part thereof, or an affidavit of the attorney or counsel for the plaintiff, that from the statement of the case made to him by the plaintiff he verily believes that the plaintiff has a good and substantial defense upon the merits to the cause of action set forth as a counterclaim, or to some part thereof, as the case may be. The affidavit shall also state the cause of action and the relief demanded in the complaint and, where a counterclaim has been interposed, the cause of action alleged as a counterclaim and the relief demanded in the answer;

and whether any and what extension or extensions of time to answer, demur or reply by stipulation or order have been granted.

When the time to serve any pleading has been extended by stipulation or order for twenty days, no further time shall be granted by order, except upon two days' notice to the adverse party of the application for such order. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XXV.

Ex parte application to contain statement as to previous application. — Whenever application is made ex parte on affidavit to a judge or court for an order, the affidavit shall state whether any previous application has been made for such order, and, if made, to what court or judge and what order or decision was made thereon, and what new facts, if any, are claimed to be shown. For failure to comply with this rule, any order made on such application may be revoked or set aside. This rule shall apply to proceedings supplementary to execution, and to every application for an order or judgment made in any action or special proceeding.

RULE XXVI.

Application for judgment on failure to answer. — When the plaintiff in an action in the Supreme Court is entitled to judgment upon the failure of the defendant to answer the complaint, and the relief demanded requires application to be made to the court, such application may be made at any Special Term in the district embracing the county in which the action is triable, or, except in the first district, in an adjoining county; such application, except in the first judicial district, may also be made at a Trial Term in the county in which the action is triable. When a reference or writ of inquiry shall be ordered, the same shall be executed in the county in which the action is triable, unless the court shall otherwise order. In the first judicial district, every motion or application for an order or judgment where notice is necessary, must be made to the Special Term for the hearing of motions, and where notice is not necessary, to the Special Term for the transaction of ex parte business, except where other provision is expressly made by law, or the general or special rules of practice. In the county of Kings all such applications shall be made at the Special Term for the hearing of motions. Any order or judgment granted in violation of this provision shall be vacated by the Special Term at which the application should have been made, or by the Appellate Division of the Supreme Court; and no order or judgment granted in violation of this rule shall be entered by the clerk.

RULE XXVII.

Orders granted on petitions, contents may be docketed. — Orders granted on petitions, or relating thereto, shall refer to such petitions by the names and descriptions of the petitioners, and the date of the petitions, if the same be dated, without reciting or setting forth the tenor or substance thereof unnecessarily. Any order or judgment directing the payment of money, or affecting the title to property, if founded on petition, where no complaint is filed, may, at the request of any party interested, be enrolled and docketed, as other judgments.

RULE XXVIII.

Inquests, when taken. — [Repealed April 1, 1910; in effect September 1, 1910.]

RULE XXIX.

Opening of counsel; examination of witnesses and summing up. — In the trial of civil causes, unless the justice presiding or the referee shall otherwise direct, each party shall open his case before any evidence is introduced, and, except by special permission of the court, no other opening by either party shall thereafter be permitted.

On the trial of issues of fact, one counsel only on each side shall examine or cross-examine a witness, who shall not repeat the answer or answers of such witness at the time he shall be under examination. One counsel only on each side shall sum up the cause, and he shall not occupy more than one hour, and the testimony, if taken down in writing, shall be written by some person other than the examining counsel; but the judge who holds the court may otherwise order, or dispense with this requirement.

While addressing the court, examining witnesses or summing up, counsel shall stand. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XXX.

Non-suit before referee; referee's report; testimony in references other than for trial of issues; exceptions, when filed. — On a hearing before a referee or referees, the plaintiff may submit to a non-suit or dismissal of his complaint, or may be non-suited, or his complaint may be dismissed, in like manner as upon a trial, at any time before the cause has been finally submitted to a referee or the referees for their decision; in which case the referee or referees shall report according to the fact, and judgment may thereupon be perfected by the defendant.

In references other than for the trial of the issues in an action, or for computing the amount due in foreclosure cases, the testimony of the witnesses shall be signed by them; the report of the referee shall be filed with the testimony, and a note of the day of the filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding. At any time after the report is filed either party may bring on the action or proceeding at Special Term on notice to the parties interested therein. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XXXI.

Motion for new trial, where made; case or exceptions, when necessary. — When an order grants or refuses a new trial, except on the exceptions taken during the trial, it shall specify the grounds upon which the motion was made and the ground or grounds upon which it was granted. In all actions where either party is entitled to have an issue or issues of fact settled for trial by a jury, either as a matter of right or by leave of the court if either party desires such a trial, the party must within twenty days after issue joined, give notice of motion that all the issues or one or more specific issues be so tried. If such motion is not made within such time, the right to a trial by jury is waived. With the notice of motion shall be served a copy of the questions of fact proposed to be submitted to the jury for trial, in proper

form to be incorporated in the order; and the court or judge may settle the issues, or may refer it to a referee to settle them. Such issues must be settled in the form prescribed in sections 823 and 970 of the Code of Civil Procedure.

When any specific question of fact involved in an action, or any question of fact not put in issue, is ordered to be tried by a jury, as a substitute for a feigned issue, and has been tried, or a reference other than of the whole issue has been ordered under the Code and a trial had, if either party shall desire to apply for a new trial, on the ground of any error of the judge or referee, or on the ground that the verdict or report is against evidence (except when the judge directs such motion to be made upon his minutes at the same term of the court at which the issues are tried), a case or exceptions shall be made, or a case containing exceptions, as may be required; which case or exceptions must be served and settled in the manner prescribed by the rules of court for the settlement of cases and exceptions in other cases. Such motions must be made, in the first instance, at Special Term. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XXXII.

Cases, exceptions, when served; amendments; settlement, etc. — Whenever it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, the same shall be made, and a copy thereof served on the opposite party within the following times:

If the trial was before the court or referee, including trials by a jury of one or more specific questions of fact in an action triable by the court, within thirty days after service of a copy of the decision or report and of written notice of the entry of the judgment thereon.

In the Surrogate's Court, within thirty days after service of a copy of the decree or order and notice of the entry thereof.

If the trial were before a jury, within thirty days after notice of the decision of a motion for a new trial, if such motion be made and be not decided at the time of the trial, or within thirty days after service of a copy of the judgment and notice of its entry.

The party served may, within ten days thereafter, propose amendments thereto, and serve a copy on the party proposing a case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions with the proposed amendments will be submitted for settlement at a time and place to be specified in the notice, to the judge or referee before whom the cause was tried.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the judge or referee for settlement, mark upon the several amendments his allowance or disallowance thereof, and shall also plainly mark thereon and upon the stenographer's minutes the parts to which the proposed amendments are applicable, together with the number of the amendment. If the party proposing the amendments claims that the case should be made to conform to the minutes of the stenographer he must refer at the end of each amendment to the proper page of such minutes. The judge or referee shall thereupon correct and settle the case. The time for settling the case must be specified in the notice, and it shall not be less than four nor more than ten days after the service of such notice. The lines of the case shall be so numbered that each copy shall correspond. The surrogate, on appeal from

his court, may by order allow further time for the doing of any of the acts above provided to be done on such appeals.

Cases reserved for argument and special verdicts shall be settled in the same manner. The parties may agree on the facts proven to be inserted in the case, instead of the testimony, on the approval of the judge.

No order extending the time to serve a case, or a case containing exceptions, or the time within which amendments thereto may be served, shall be made unless the party applying for such order serve a notice of two days upon the adverse parties of his intention to apply therefor, stating the time and place for making such application.

RULE XXXIII.

Failure to make a case. — If the party shall omit to make a case within the time above limited, he shall be deemed to have waived his right thereto; and when a case is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, and the other to notify an appearance before the judge, or referee, they shall respectively be deemed, the former to have agreed to the case as proposed, and the latter to have agreed to the amendments as proposed.

RULE XXXIV.

Case and bill of exceptions; contents; resettlement; exhibits. — A bill of exceptions shall contain only so much of the evidence as is necessary to present the questions of law upon which exceptions were taken on the trial; and it shall be the duty of the judge upon settlement to strike out all the evidence and other matter which in his opinion have been inserted unnecessarily.

A case and exceptions shall contain all the evidence by question and answer, the rulings of the court and the exceptions of all parties to the record, but shall not contain the opening and summing up or the remarks of counsel unless ordered by the judge or referee before whom the case or exceptions are settled. The Appellate Division on rendering final judgment on appeal, pursuant to the provisions of section 1317 of the Code of Civil Procedure, on reversing or modifying a judgment entered upon the decision of the court or the report of a referee, without granting a new trial, may reverse any finding and shall make such new findings of facts proved upon the trial as shall be necessary to sustain the judgment awarded by the Appellate Division. The facts as found by the Appellate Division shall be inserted in its order for judgment, and the facts as found by the special term or referee before whom the case was tried which are reversed by the Appellate Division shall likewise be specified in such order.

If any case or bill of exceptions does not conform to this rule the court before which the same shall be brought for review may order the same back for resettlement.

Exhibits shall not be printed at length unless the judge or referee so direct.

When, upon non-enumerated motions, voluminous documents have been used which are material only as to the fact of their existence or as to a small part of their contents, the parties may by stipu-

lation or the court or judge below may upon notice settle a statement respecting the same or the parts thereof to be returned upon the appeal from the order to be used in place of the original documents. (As amended June 17, 1913; in effect November 1, 1913.)

RULE XXXV.

Case to be signed; service of copy. — [Repealed April 1, 1910; in effect September 1, 1910.]

RULE XXXVI.

Neglect to bring issue of fact to trial; causes where defendant is under arrest preferred. — Whenever an issue of fact in any action pending in any court has been joined, and the plaintiff therein shall fail to bring the same to trial according to the course and practice of the court, the defendant, at any time after younger issues shall have been tried in their regular order, may move at Special Term for the dismissal of the complaint with costs.

If it be made to appear to the court that the neglect of the plaintiff to bring the action to trial has not been unreasonable, the court may permit the plaintiff, on such terms as may be just, to bring the said action to trial at a future term.

Whenever in any action an issue shall have been joined, if the defendant be imprisoned under an order of arrest, in the action, or if the property of the defendant be held under attachment, the trial of the action shall be preferred. Every cause placed upon the calendar of the Trial Term or Special Term for the trial of equity cases shall be moved for argument or trial when reached in its order, and shall not be reserved or put over except by the consent of the court unless otherwise permitted by special rule; and if passed without being so reserved or put over, it shall be entered on all subsequent calendars as of date when passed, and no term fee shall be taxed thereon for any subsequent term.

RULE XXXVII.

Notice for argument and of motions; order to show cause; where returnable; effect of order staying proceedings when made within ten days of trial term; irregularities to be stated; judgment by default in divorce cases. — All questions for argument, and all motions made at Special or Trial Terms shall be brought before the court on notice of not less than eight days, unless a shorter time is prescribed by a judge or court, under section 780 of the Code, by an order to show cause, except that where the attorneys for the respective parties reside or have their offices in the same city or village, such notice may be a notice of five days; if the opposite party shall not appear to oppose, the party making the motion shall be entitled to the order or judgment moved for, on proof of due service of the notice or order and papers required to be served by him, unless the court shall otherwise direct. If the party making the motion shall not appear, the court shall deny the motion on the filing of the copy notice of motion, or order to show cause.

Such order to show cause shall in no case be granted unless a special and sufficient reason for requiring a shorter notice than eight days shall be stated in the papers presented, nor unless, in a case where the attorneys for the respective parties reside or have their offices in the same city or village, a special and sufficient

reason for requiring a shorter notice than five days shall be stated in the papers presented, and the party shall, in his affidavit, state the present condition of the action, and whether at issue, and, if not yet tried, the time appointed for holding the next Special or Trial Term where the action is triable. An order to show cause shall also (except in the first judicial district) be returnable only before the judge who grants it, or at a Special Term appointed to be held in the district in which the action is triable.

No order, except in the first judicial district, served after the action shall have been noticed for trial, if served within ten days of the Trial Term, shall have the effect to stay the proceedings in the action, unless made at the term where such action is to be tried, or by the judge who is appointed or is to hold such Trial Term, or unless such stay is contained in an order to show cause returnable on the first day of such term, in which case it shall not operate to prevent the subpœnaing of witnesses or placing the cause on the calendar.

When the motion is for irregularity the notice or order shall specify the irregularity complained of.

This rule, so far as it permits a judgment by default, or by the consent of the adverse party, shall not extend to an action for a divorce, or limited separation, or to annul a marriage.

In the first judicial district all motions must be noticed to be heard at and all orders to show cause must be returnable at the Special Term for hearing of litigated motions, except in cases where the special rules of the first judicial district shall require such motion to be made at some other term of the court.

If a notice of motion is served ten days before the return day thereof, it may, immediately after the prayer for relief and before the signature, contain the following statement: "Answering affidavits must be served five days before the return day," in which case answering affidavits, in order to be used upon the motion, must be so served. The moving party, upon receiving such answering affidavits, may serve affidavits in reply at least two days before the hearing. Such replying affidavits shall be limited strictly to matters in reply. Affidavits in answer and reply cannot be read upon the motion if not so served, unless the court in its discretion, for good cause shown, may otherwise order. (Last paragraph added April 1, 1910; in effect September 1, 1910.)

RULE XXXVIII.

Enumerated motions; non-enumerated motions, what are; contested motions, when not heard at trial term. — Enumerated motions are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, appeals from judgment or order granting or refusing a new trial in an inferior court, appeals by virtue of sections 1346 and 1349 of the Code, agreed cases submitted under section 1279 of the Code, and appeals from final orders and decrees of Surrogate's Courts, and matters provided for by sections 2085–2099 and 2138 of the Code.

Non-enumerated motions include all other questions submitted to the court, and shall be heard at Special Term except when otherwise directed by law.

Contested motions shall not be noticed or brought to a hearing at any Special Term held at the same time and place with a Trial Term, except in actions upon the calendar for trial at such term, and in which the hearing of the motion is necessary to the disposal of the cause, unless otherwise ordered by the justice holding

the court; and except, also, that in counties in which no Special Term distinct from a Trial Term is appointed to be held, motions in actions triable in any such county may be noticed and brought on at the time of holding the Trial and Special Term in the county in which such actions are triable.

RULE XXXIX.

Notes of issue, when to be filed; separate calendar for non-enumerated motions; preferred cases; cases not reserved; when passed, place on subsequent calendars. — At the first term of the Appellate Division of the Supreme Court in each department, and at such other times as the court shall from time to time direct, the clerk shall make up a calendar which shall consist of cases pending and undisposed of as follows:

Notes of issue for the Appellate Division shall be filed eight days before the commencement of the court at which the cause may be noticed. The clerk shall prepare a calendar for the Appellate Division, and, except in the first department, cause the same to be printed for each of the justices holding the court. Appeals shall be placed on the calendar, according to the date of the service of the notice of appeal; and all subsequent enumerated appeals in the same cause shall be put on the calendar as of the date of the first appeal; and other cases as of the time when the question to be reviewed arose. Appeals in non-enumerated motions shall also be placed upon a separate calendar. Cases entitled to preference shall be placed separately on the calendar.

The Appellate Division of each department shall adopt rules regulating the hearing of causes and of calendar practice in such department not inconsistent with the Code of Civil Procedure.

Judgment of reversal by default will not be allowed. Where the cause is called in its order on the calendar, if the appellant fails to appear and furnish the court with the papers required, and argue or submit his cause, judgment of affirmance by default will be ordered on motion of the respondent. If the appellant only appears, he may either argue or submit the case. If neither party appears, the case will be passed and placed at the foot of the calendar. When any cause shall be twice passed, the clerk shall enter an order of course dismissing the appeal or the proceedings, or denying the motion for a new trial, — but the court may, upon motion, vacate the order and restore the cause.

RULE XL.

Enumerated motions; what papers to be furnished, and by whom; points to contain a statement of facts. — The papers to be furnished on enumerated motions at Special Term shall be a copy of the pleadings, when the question arises on the pleadings, or any part thereof, a copy of the special verdict, return or other papers on which the question arises. The party whose duty it is to furnish the papers shall serve a copy on the opposite party, except upon the trial of issues of law, at least five days before the time for which the matter may be noticed for argument. If the party whose duty it is to furnish the papers shall neglect to do so, the opposite party shall be entitled to move, on affidavit and on four days' notice of motion, that the cause be struck from the calendar (whichever party may have noticed it for argument), and that judgment be rendered in his favor.

The papers shall be furnished by the plaintiff when the question arises on special verdict, and by the party demurring on the trial

of issues of law, and in all other cases by the party making the motion. Each party shall prefix to his points a concise statement of the facts of the case, with reference to the folios; and if such statement is not furnished, no discussion of the facts by the party omitting such statement will be permitted.

RULE XLI. See New Rule 23, 23L

Papers to be furnished, on appeal, by appellant; printed copies of case and points; appeals from non-enumerated motions; delegation of powers. — In all cases to be heard in the Appellate Division, except appeals from non-enumerated motions, the papers shall be furnished by the appellant or the moving party, and in cases agreed upon, under section 1279 of the Code, by the plaintiff. The party whose duty it is to furnish the papers shall cause a printed copy of the requisite papers to be filed in the office of the clerk of the Appellate Division within twenty days after an appeal has been taken, or the order made for the hearing of a cause therein, or the agreed case filed in the clerk's office pursuant to section 1279 of the Code of Civil Procedure; but if it shall be necessary to make a case or case and exceptions after the appeal has been taken or the order made for the hearing in the Appellate Division, the printed papers, including the case as settled and signed by the judge before whom the case was tried, shall be filed within twenty days after the settlement of the case; and the party whose duty it is to furnish the papers shall serve within said twenty days upon his adversary three printed copies of such papers.

Such papers shall consist of a notice of appeal, if an appeal has been taken; a copy of the judgment roll, or the decree in the court below, and the papers upon which it was entered; if no judgment was entered, the pleadings, minutes of trial, and the order sending the case to the Appellate Division or the order appealed from, or the papers required by section 1280 of the Code of Civil Procedure. To these papers shall be attached the case or case and exceptions if it is to be used in the Appellate Division. All the foregoing papers shall be certified by the proper clerk, or be stipulated by the parties to be true copies of the original. There shall be prefixed to these papers a statement showing the time of the beginning of the action or special proceeding, and of the service of the respective pleadings; the names of the original parties in full; and any change in the parties, if such has taken place. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured. The foregoing papers shall constitute the record in the Appellate Division. If the papers shall not be filed and served as herein provided by the party whose duty it is to do so, his opponent may move the court on three days' notice, on any motion day, for an order dismissing the appeal, or for a judgment in his favor, as the case may be.

The papers in all appeals from non-enumerated motions shall consist of printed copies of the papers which were used in the court below, and are specified in the order, certified by the proper clerk, or stipulated by the parties to be true copies of the original, and of the whole thereof. There shall be added to them the opinion of the court below, or an affidavit that no opinion was given, or, if given, that a copy could not be procured.

They shall be filed with the clerk within fifteen days after the appeal is taken and at the same time the appellant shall serve upon his adversary three printed copies thereof.

If the appellant fails to file and serve the papers as aforesaid, the respondent may move, on any motion day, upon three days' notice, to dismiss the appeal.

If the judge from whose order the appeal is taken orders that it shall not be necessary to insert in the printed papers upon which the appeal is to be taken such exhibits or other voluminous documents as are not necessary for a consideration of the questions raised by the appeal, the clerk shall then certify that the printed papers are true copies of the originals and of the whole thereof specified in the order except those omitted by order of the court. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XLII.

Briefs and points to be exchanged by the parties. — The Appellate Division in any department may make such rules in relation to the exchange of briefs and the delivery of papers and briefs to the justices thereof as they may deem expedient in all cases, whether enumerated or non-enumerated.

RULE XLIII.

Cases and points, to be printed and indexed;[1] number to be delivered to the court. — The cases and points, and all other papers furnished in the Appellate Division in calendar cases, shall be printed on white writing paper, with a margin on the outer edge of the leaf not less than one and a half inch wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and a half inches wide. The folio, numbering from the commencement to the end of the papers, shall be printed on the outer margin of the page.

The cases and points in each case shall be uniform in size and in the type of this rule.*

All cases cited on the briefs from the courts of this State shall be cited from the reports of the official reporters, if such cases shall have been reported in full in the official reports.

At the beginning of the argument of any appeal, the party whose duty it is to furnish the papers shall deliver to the clerk thirteen copies thereof, and each party shall deliver to the clerk thirteen copies of his briefs and points. The clerk shall deliver one copy of the papers and briefs to each Justice, two to the official reporter, and shall transmit one to the librarian of the State Law Library, one to the clerk of each of the other departments, and shall dispose of the remainder as directed by the court. The Appellate Division in any department may require further copies of the papers and briefs to be delivered in their discretion.

The printed papers on appeal shall contain an index in the front thereof. The index of the exhibits shall concisely indicate the contents or nature of each exhibit and the folio of the case at which it is admitted in evidence and at which it is printed in the record. Said index shall also contain a reference to the folios at which a motion for a dismissal of the complaint or the direction of a verdict is contained; and to the certificate that the case contains all the evidence. At the top of each page of the case or bill of exceptions must be printed the name of the witness

[1] As to the method of making up the papers on appeal in the First Department, see post, page 1484a.

* This means small pica type, in which editions of these rules are ordinarily printed.

then testifying and of the party calling him, and indicating whether the examination is direct, cross or redirect. Each affidavit or other paper printed upon an appeal from an order shall be preceded by a description thereof that must specify on whose behalf it was read; and the name of the affiant shall be printed at the top of each page containing an affidavit. On an appeal from an order granting or denying a motion to strike out parts of a pleading as irrelevant, redundant or scandalous, or to make a pleading more definite and certain, the portion of the pleading to which the motion relates must be printed in italics. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XLIV.

Non-enumerated motions, when heard; default, how taken. — Non-enumerated motions in the Appellate Division and appeals from orders will be heard upon such days as are designated by the special rule of the Appellate Division in each Department.

If a non-enumerated motion noticed to be heard at the Appellate Division shall not be made upon the day for which it is noticed, the party attending pursuant to notice to oppose the same, may, at the close of that order of business, unless the court shall otherwise order, take a rule against the party giving the notice, denying the motion, with costs. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XLV.

Additional allowance. — Applications for an additional allowance can only be made to the court before which the trial is had, or the judgment rendered, and shall in all cases be made before final costs are adjusted.

RULE XLVI.

Motion to amend justice's return on appeal, when to be noticed. — On appeal from a justice's judgment, where a County Court has not jurisdiction, by reason of relationship, etc., a notice of motion for an order to compel the justice to amend his return may be given in twenty days after the date of the certificate of the county judge, and not after that time.

RULE XLVII.

Counsel, time allowed. — At the hearing of causes in the Appellate Division or at Special Term, not more than one counsel shall be heard on each side, and then not more than one hour each, except when the court shall otherwise order.

On appeals from orders and on non-enumerated motions, but one counsel on each side shall be heard, and not more than thirty minutes each, unless the court shall otherwise order.

The Appellate Division in any department may make such further or different regulations upon these subjects as it may deem proper.

RULE XLVIII.

Stay of proceedings, for change of venue; affidavits, on motion to change venue. — No order to stay proceedings for the purpose of moving to change the place of trial shall be granted unless it shall appear from the papers that the defendant has used

due diligence in preparing the motion for the earliest practical day after issue joined. Such order shall not stay the plaintiff from taking any step, except subpœnaing witnesses for the trial, without a special clause to that effect.

On motions to change the place of trial, the moving party shall state the nature of the controversy and show how his witnesses are material, and the grounds of his belief that the testimony of such witnesses will be favorable to his contention, and shall also show where the cause of action arose, and such facts shall be taken into consideration by the court in fixing the place of trial. (As amended April 1, 1910; in effect September 1, 1910.)

RULE XLIX.

Guardians ad litem. — No person shall be appointed guardian ad litem, either on the application of the infant or otherwise, unless he be the general guardian of such infant, or is fully competent to understand and protect the rights of the infant, and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party. And no person shall be appointed such guardian who is not of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defense or prosecution of the suit, and such ability shall be shown by affidavit stating facts in respect thereto. And no person shall be appointed guardian ad litem who is nominated by the adverse party.

RULE L.

Guardian ad litem, duties, compensation; affidavit to entitle guardian to compensation. — It shall be the duty of every attorney or officer of the court to act as the guardian of any infant defendant, in any suit or proceeding against him, whenever appointed for that purpose by an order of this court. And it shall be the duty of such guardian to examine into the circumstances of the case, so far as to enable him to make the proper defense, when necessary for the protection of the rights of the infant; and he shall be entitled to such compensation for his services as the court may deem reasonable. But no order allowing compensation to guardians ad litem shall be made, except upon an affidavit to be made by such guardian, if an attorney of the court, or if the guardian be not an attorney, then an affidavit to be made by an attorney of the court who has acted in the matter in behalf of such guardian, showing that he has examined into the circumstances of the case, and has, to the best of his ability, made himself acquainted with the rights of his ward, and that such guardian has taken all the steps necessary for the protection of such rights, to the best of his knowledge, and as he believes, stating what has been done by him for the purpose of ascertaining the rights of the ward.

RULE LI.

Guardian, bond of, before receiving property. — No guardian ad litem for an infant party shall as such guardian receive any money or property belonging to such infant, or which may be awarded to him in the suit (except such costs and expenses as may be allowed by the court to the guardian), unless he has given an undertaking executed by a surety company authorized to do business in this State, in double the amount of such money or

property, or a bond secured by a mortgage on improved and unincumbered real property.

Neither shall the general guardian of an infant receive any part of the proceeds of a sale of real property belonging to an infant sold under a decree, judgment or order of the court until the guardian has given such further security for the faithful discharge of his trust as the court may direct. In case, however, such proceeds shall exceed the sum of five hundred dollars the court shall require the guardian to give a bond, in the penalty of double the amount to be paid to the guardian, such bond to be that of a surety company authorized to do business in this State or secured by a mortgage on improved and unincumbered real property worth the amount of the penalty of the bond. (As amended April 1, 1910; in effect September 1, 1910.)

RULE LII.

General guardian, appointment of. — Except in cases otherwise provided for by law, for the purpose of having a general guardian appointed, the infant, if of the age of fourteen years or upward, or some relative or friend, if the infant is under fourteen, may present a petition to the court, stating the age and residence of the infant, and the name and residence of the person proposed or nominated as guardian, and the relationship, if any, which said person bears to the infant, and the nature, situation and value of the infant's estate.

RULE LIII.

Age of infant and amount of property to be ascertained by court. — Upon presenting the petition, the court shall, by inspection or otherwise, ascertain the age of the infant, and if of the age of fourteen years or upward, shall examine him as to his voluntary nomination of a suitable and proper person as guardian; if under fourteen, shall ascertain who is entitled to the guardianship, and shall name a competent and proper person as guardian. The court shall also ascertain the amount of the personal property, and the gross amount of value of the rents and profits of the real estate of the infant during his minority, and shall also ascertain the sufficiency of the security offered by the guardian.

RULE LIV.

Bond of a general guardian. — The security to be given by the general guardian of an infant shall be a bond in the penalty of double the amount of the personal estate of his ward and of a gross amount or value of the rents or profits of the real estate during his minority. The bond shall be executed by the guardian, together with at least two sufficient sureties, each of whom shall be worth the amount specified in the penalty of the bond over and above all debts. If, however, the total amount of the personal estate of an infant and of the gross amount or value of the rents or profits of the real estate during his minority shall exceed twenty-five hundred dollars, then the bond must be the bond of a surety company authorized to do business in this State, or the general guardian may give a bond secured by a mortgage on improved and unincumbered real property of the value of the penalty of the bond.

The court in its discretion may vary the security where from special circumstances it may be found for the interest of the infant, and may direct the principal of the estate and any part

thereof to be invested in the stocks of the State of New York or of the United States, or deposited with any trust company which shall have been designated as a depository for such moneys, or invested in bond and mortgage on unincumbered and improved property of at least double the value of the amount invested, to be shown to the satisfaction of the court, for the benefit of the infants, and that the interest or income thereof only be received by the guardian. (As amended April 1, 1910; in effect September 1, 1910.)

RULE LV.

Sale of real estate of infants, lunatics, etc.; contents of petition. — The petition in proceedings to sell, mortgage or lease real estate belonging to an infant or lunatic, idiot or habitual drunkard, shall state, besides the particular grounds for a sale, mortgage or lease of the property, and the other matters required by the Code, the age and residence of the infant, lunatic, idiot or habitual drunkard, and the name and residence of the person proposed as a special guardian or committee, the relationship, if any, which he bears to the infant, lunatic, idiot or habitual drunkard, and the security proposed to be given; and also whether any previous application has been made, and, if so, the time thereof, and what disposition was made of the same.

RULE LVI.

Referee's report on petition to sell, etc. — The referee appointed on such petition must report as to whether a sale, mortgage or lease of the premises (or any and what portion thereof), would be beneficial to the infant, lunatic, idiot or habitual drunkard, and the particular reason therefor, and whether the infant, lunatic, idiot or habitual drunkard is in absolute need of having some and what portion of the proceeds of such sale, mortgage or lease, for a purpose provided in section 2348 of the Code, in addition to what he might earn by his own exertions; and such referee shall also ascertain and report the value of the property or interest to be disposed of, specifically, as to each separate lot or parcel, and whether there is any person entitled to dower or a life estate, or estate for years, in the premises, and the terms and conditions on which it should be sold.

And the referee's report shall give such further facts as are necessary or proper on the application.

The facts in relation to the value of the property or interest to be disposed of required to be ascertained and reported upon by the referee must be proved on such reference by evidence of at least two disinterested persons, in addition to that of the petitioner, and the report shall not refer to the petition or any other papers for a statement of fact.

RULE LVII. (under New Rule)

Bond of special guardian. — The security required on a sale of the real estate of an infant shall be a bond of the guardian, with two sufficient sureties, in the sum of double the value of the premises, including the interest on such value during the minority of the infant, each of which sureties shall be worth the penalty of the bond over and above all debts, which bond shall be duly acknowledged and accompanied with affidavits of justification made by the sureties. In case, however, the value of the premises including the interest on such value during the minority of the infant, shall

exceed the sum of five hundred dollars, the court must require the guardian to give a bond of a surety company authorized to do business in this State or a bond secured by a mortgage on improved and unencumbered real property of the value of the penalty of the bond. (As amended April 1, 1910; in effect September 1, 1910.)

RULE LVIII.

Proceeds of sale must be brought into court; costs. — If the proceeds of the sale exceed $500, and the guardian has not given security by mortgage upon real estate, he shall bring the proceeds into court, or invest the same under the direction of the court, for the use of the infant; and the guardian shall only be entitled to receive so much of the interest or income thereof, from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. If the infant's interest in the property does not exceed $1,000, the whole costs, including disbursements, shall not exceed twenty-five dollars, and referee's fees not exceeding ten dollars. Where several infants are interested in the same premises as tenants in common, the application in behalf of all shall be joined in the same petition, although they may have several general guardians; and there shall be but one reference to ascertain the propriety of a sale as to all, and but one bill of costs shall be allowed.

RULE LIX.

When proceeds to be paid to general guardian; petition therefor. — No money arising from the sale of the real estate of an infant shall be paid over to his general guardian, except so much thereof, or of the interest or income, from time to time, as may be necessary for his support or maintenance, unless such guardian shall give a bond in the penalty of double the amount to be paid to him with sufficient surety to be approved by the court. In case however such money shall exceed the sum of five hundred dollars the court must require the guardian to give a bond of a surety company authorized to do business in this State or a bond secured by a mortgage on improved and unencumbered real property of a value of the penalty of the bond.

No order shall be made for the payment of any such moneys to any person, except upon petition, accompanied by a certified copy of the order, in pursuance of which the money was brought into court, together with a statement of the county treasurer, city chamberlain, or other depository of the money, showing the present state and amount of the fund, separating the principal and interest, and showing the amount of each; and the court may take such proof of the truth of the matters stated in the petition as shall be deemed proper, or may refer the same to a suitable referee to take proof and report thereon. (As amended April 1, 1910; in effect September 1, 1910.)

RULE LX.

Reference on failure to answer on mortgage foreclosure; judgment. — If, in an action to foreclose a mortgage, the defendant fails to answer within the time allowed for that purpose, or the right of the plaintiff, as stated in the complaint, is admitted by the answer, the plaintiff may have an order referring it to some suitable person as referee, to compute the amount due to the plaintiff, and to such of the defendants as are prior incumbrancers

of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels, if the whole amount secured by the mortgage has not become due. If the defendant is an infant, and has put in a general answer by his guardian, or if any of the defendants are absentees, the order of reference shall also direct the person to whom it is referred to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent, on oath, as to any payments which have been made, and to compute the amount due on the mortgage, preparatory to the application for judgment of foreclosure and sale.

When no answer is put in by the defendant, within the time allowed for that purpose, or any answer denying any material facts of the complaint, the plaintiff, after the cause is in readiness for trial, as to all the defendants, may apply for judgment, at any Special Term, upon due notice to such of the defendants as have appeared in the action, and without putting the cause on the calendar.

The plaintiff, in such case, when he moves for judgment, must show, by affidavit or otherwise, whether any of the defendants who have not appeared are absentees; and, if so, he must produce the report as to the proof of the facts and circumstances stated in the complaint, and of the examination of the plaintiff or his agent, on oath, as to any payments which have been made. And in all foreclosure cases the plaintiff, when he moves for judgment, must show by affidavit, or by the certificate of the clerk of the county in which the mortgaged premises are situated, that a notice of the pendency of the action, containing the names of the parties thereto, the object of the action, and a description of the property in that county affected thereby, the date of the mortgage, and the parties thereto, and the time and place of recording the same, has been filed at least twenty days before such application for judgment, and at or after the time of filing of the complaint, as required by law.

RULE LXI.

Judgment for sale on foreclosure, what to contain; disposition of surplus money; referee. — In every judgment for the sale of mortgaged premises, the description and particular boundaries of the property to be sold, so far, at least, as the same can be ascertained from the mortgage, shall be inserted. And, unless otherwise specially ordered by the court, the judgment shall direct that the mortgaged premises, or so much thereof as may be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, as provided by sections 1626 and 1676 of the Code, and which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of the county, or a referee, and that the plaintiff, or any other party, may become a purchaser on such sale; that the sheriff or referee execute a deed to the purchaser; that out of the proceeds of the sale, unless otherwise directed, he pay the expenses of the sale, as provided in section 1676 aforesaid, and that he pay to the plaintiff, or his attorney, the amount of his debt, interest and costs, or so much as the purchase money will pay of the same and that he take the receipt of the plaintiff, or his attorney, for the amount so paid, and file the same with his report of sale, and that the purchaser at such sale be let into possession of the premises on production of the deed.

All surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale within five days after the same shall be received and be

ascertainable, in the city of New York to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court, and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of a sale shall be filed or confirmed, unless accompanied with a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of in pursuance of the judgment. The referee to be appointed in foreclosure cases, to compute the amount due, or to sell mortgaged premises, shall be selected by the court, and the court shall not appoint as such referee a person nominated by the party to the action or his counsel.

RULE LXII.

Sale of lands in New York and Kings counties and in Buffalo under judgment or order. — Where lands in the county of New York or the county of Kings are sold under a decree, order or judgment of any court, they shall be sold at public auction, between eleven o'clock in the forenoon and three o'clock in the afternoon, unless otherwise specifically directed.

Notice of such sale must be given, and the sale must be had, as prescribed in section 1678 of the Code.

Such sales in the county of New York, unless otherwise specifically directed, shall take place at the Exchange Sales Rooms, now located at No. 14–16 Vesey street in the city of New York.

The Appellate Division of the Supreme Court in the first department is authorized to change the place at which said sales shall be made, may make rules and regulations in relation thereto and may designate the auctioneers or persons who shall make the same.

Such sales in the city of Buffalo, shall, on and after May first, 1896, take place at the Real Estate Exchange Rooms, between the hours of nine and eleven in the forenoon, and two and three o'clock in the afternoon, unless the court ordering the sales shall otherwise direct. Such sales shall, however, be made subject to such regulations as the justices of the Supreme Court of the eighth district shall establish.

RULE LXIII.

Mortgage and assignments to be filed or recorded before conveyance. — Whenever a sheriff or referee sells mortgaged premises, under a decree or order, or judgment of the court, it shall be the duty of the plaintiff, before a deed is executed to the purchaser, to file such mortgage and any assignment thereof in the office of the clerk, unless such mortgage and assignments have been duly proved or acknowledged, so as to entitle the same to be recorded; in which case, if it has not been already done, it shall be the duty of the plaintiff to cause the same to be recorded, at full length, in the county or counties where the lands so sold are situated, before a deed is executed to the purchaser on the sale; the expense of which filing or recording, and the entry thereof, shall be allowed in the taxation of costs; and, if filed with the clerk, he shall enter in the minutes the filing of such mortgage and assignments, and the time of filing. But this rule shall not extend to any case where the mortgage or assignments appear, by the pleadings or proof in the suit commenced thereon, to have been lost or destroyed.

RULE LXIV.

Application for surplus moneys; reference; searches; unsatisfied liens. — On filing the report of the sale, any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. The referee shall, in all cases, be selected by the court. The owner of the equity of redemption, and every party who appeared in the cause, or who shall have filed a notice of claim with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus. But if such claimant or such owner has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post office, directed to the claimant at his place of residence, as stated in the notice of his claim, and upon the owner in such manner as the court may direct. All official searches for conveyances or incumbrances, made in the progress of the cause, shall be filed with the judgment-roll, and notice of the hearing shall be given to any person having or appearing to have an unsatisfied lien on the moneys in such manner as the court shall direct; and the party moving for the reference shall show, by affidavit, what unsatisfied liens appear by such official searches, and whether any, and what other unsatisfied liens are known to him to exist.

RULE LXV.

Partition to embrace all lands in common. — Where several tracts or parcels of land lying within this State are owned by the same persons in common, no separate action for the partition of a part thereof shall be maintained without the consent of all the parties interested therein; or without the special order of the court made on notice to all parties who have appeared in the action, to be obtained before application for the relief demanded in the complaint; and, if brought without such a consent or order, the share of the plaintiff may be charged with the whole cost of proceeding; and where infants are interested, the complaint shall state whether or not the parties owned any other lands in common. (As amended April 1, 1910; in effect September 1, 1910.)

RULE LXVI.

Reference as to title of premises. — Where the rights and interests of the several parties, as stated in the complaint, are not denied or controverted, if any of the defendants are infants or absentees, or unknown, the plaintiff, on an affidavit of the fact, and notice to such of the parties as have appeared, may apply at a Special Term for an order of reference, to take proof of the plaintiff's title and interest in the premises, and of the several matters set forth in the complaint; and to ascertain and report the rights and interests of the several parties in the premises, and an abstract of the conveyances under which the same are held. Such referee and the referee appointed to sell shall in all cases be selected by the court. (As amended October 24, 1905.)

RULE LXVII.

Notice of stay of sale in partition or foreclosure. — No order to stay a sale under judgment in partition or for the foreclosure of a mortgage shall be granted or made by a judge out of court, except upon a notice of at least two days to the plaintiff's attorney.

RULE LXVIII.

Moneys paid into court; report in regard thereto to be filed annually by county treasurers and by the chamberlain of N. Y. City. — On or before the first day of February in each year the county treasurer in each county and the chamberlain of the City of New York shall file a report, duly verified, with the Appellate Division of the Supreme Court of the department in which the county is embraced containing a statement of all moneys in his hands on the first day of January preceding that have been paid into court or received by him to the credit of any action or proceeding, specifically stating the securities in which the moneys so paid into court are invested or the depositories in which such moneys are deposited. In case such county treasurer or chamberlain refuses to comply with this rule the Appellate Division of the department shall issue an order requiring him to file such statement within the time specified therein, and obedience to such order may be enforced as for a contempt of court. (Added June 17, 1913; in effect November 1, 1913.)

RULE LXIX.

Order for payment out of court; accounts with trust companies; annual statement; draft to be countersigned by justice; what to be stated in draft. — All orders directing the payment of money out of court shall direct the payment to be made to the person entitled to receive the same, and all checks or drafts for the payment of money out of court shall be drawn payable to the order of the person entitled to the moneys; and shall specify in what particular suit or on what account the money is to be paid out, and the time when the order authorizing such payment was made. No order in any pending action, for the payment of money out of court, shall be made, except on regular notice or order to show cause, duly served on the attorneys of all the parties who have appeared therein, or filed notice of claim thereto. When moneys are deposited by the order of the court in any trust company, the entry of such deposit in the books of the company shall contain a short reference to the title of the cause or matter in which such deposit is directed to be made, and shall specify also the time from which the interest or accumulation on such deposit is to commence, where it does not commence from the date of such deposit. The secretary of the company shall, on or before the first day of February in each year transmit to the Appellate Division of the Supreme Court in the department in which the trust company is located a statement of the accounts in each department, showing the amount, on the last preceding first day of January, including the interest or accumulation on the sum deposited to the credit of each cause or matter.

In every draft upon the trust company by the county treasurer or chamberlain, for moneys deposited with the said company, or for the interest or accumulation on such moneys, the title of the cause

or matter on account of which the draft is made, and the date of the order authorizing such draft shall be stated, and the draft shall be made payable to the order of the person or persons entitled to the money. Any attorney or other person procuring an order for the payment of money out of court, shall obtain two certified copies of the order, both to be countersigned by the judge granting the same; one copy shall be filed with the county treasurer and the other shall accompany the draft drawn upon the depository and be filed with it, and the several banks and other depositories having trust funds of the court on deposit, are forbidden to pay out any of such funds without the production and filing of such certified and countersigned copy order. This provision is not intended to dispense with any of the requirements of this rule, as to the form of the draft, nor to apply to a case where periodical payments are directed to be made, as provided for by the last sentence of this rule, after the first payment from such fund shall have been made under an order of the court, in the manner herein specified. Where periodical payments are directed to be made out of a fund deposited with such company, the delivery to the secretary of the company of one copy of the order authorizing the several payments shall be sufficient to authorize the payment of subsequent drafts in pursuance of such order. (As amended April 1, 1910; in effect September 1, 1910.)

RULE LXX.

Gross sum in payment of life estate. — Whenever a party, as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing, and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of five per cent on the principal sum, during the probable life of such person, according to the Carlisle Table of Mortality. (As amended October 24, 1905.)

RULE LXXI.

Fees on inquisition of lunacy; special order of the court; when necessary for payment of costs. — On the execution of a commission of lunacy, etc., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to an allowance to be fixed by the court, not exceeding ten dollars for each day to each of such commissioners.

Where the costs and expenses exceed $250, besides witness fees and allowances to commissioners, the committee shall not be at liberty to pay the same out of the estate in his hands, without a special order of the court upon notice to all parties who have appeared in such proceedings, directing such payment.

RULE LXXII.

Divorce or separation, action for; reference on default; averments in complaint; plaintiff to be examined on oath. — When an action is brought to obtain a divorce or separation, or to declare a marriage contract void,

the court shall in no case order the reference to a referee nominated by either party nor to a referee agreed upon by the parties, nor without proof by affidavit conformable to the rules relating to the manner and proof of the service of the summons and complaint. Notice of appearance and retainer shall not be sufficient to excuse such proof.

When the action is for a divorce on the ground of adultery, unless it be averred in the complaint that the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; that five years have not elapsed since the discovery of the fact that such adultery had been committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and, also, where, at the time of the offense charged, the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed; that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff, and the complaint containing such averments be verified by the oath of the plaintiff in the manner prescribed by the Code, judgment shall not be rendered for the relief demanded until the plaintiff's affidavit be produced stating the above facts.

In an action for a divorce or for the annulment of a marriage, where the defendant fails to answer, no reference shall be granted to take proof of the facts stated in the complaint, but before a judgment shall be granted the proof of such facts must be made to the court in open court and a copy of the evidence taken before the court shall be written out and filed with the judgment-roll. The court, may, however, in case the evidence is such that the public interest requires that the examination of the witnesses should not be public, exclude all persons from the court room except the parties to the action and their counsel and the witnesses, and shall order such evidence, when filed with the clerk, sealed up and exhibited only to the parties to the action or some one specially interested upon order of the court.

RULE LXXIII.

Divorce, judgment by default, when granted. — Before judgment by default shall be granted in an action to annul a marriage on the ground that the party was under the age of legal consent, proof must be made showing that the parties thereto have not freely cohabited for any time as husband and wife, after the plaintiff had attained the age of consent. If the action is brought to annul the marriage, on the ground that the plaintiff's consent was obtained by force or fraud, the plaintiff must show that there has been no voluntary cohabitation between the parties as man and wife; and if it is brought to annul a marriage on the ground that the plaintiff was a lunatic, proof must be produced showing that the lunacy still continues; or that the parties have not cohabited as husband and wife after the plaintiff was restored to his reason.

RULE LXXIV.

Divorce, answer in action. — The defendant in the answer may set up the adultery of the plaintiff, or any other matter which would be a bar to a divorce, separation, or the annulling of a marriage contract;

and if an issue is taken thereon, it shall be tried at the same time and in the same manner as other issues of fact in the cause.

RULE LXXV.

Legitimacy of children on divorce. — On a complaint filed by a husband for a divorce, if he wishes to question the legitimacy of any of the children of his wife, the allegation that they are or that he believes them to be illegitimate, shall be distinctly made in the complaint. If, upon default, proofs shall be taken upon the question of legitimacy as well as upon the other matters stated in the complaint, and if the issue is tried by a jury, an issue on the question of legitimacy of the children shall be awarded and tried at the same time.

RULE LXXVI.

Judgment declaring marriage void, or granting a divorce, not to be by default; copy of pleading or testimony not to be furnished; judgment to be entered by court. — No judgment annulling a marriage contract or granting a divorce, or for a separation or limited divorce, shall be made of course by the default of the defendant; or in consequence of any neglect to appear at the hearing of the cause, or by consent. Every such case shall be heard after the trial of the issue, or upon the coming in of the proofs at a Special Term of the court; but where no person appears on the part of the defendant, the details of the evidence in adultery causes shall not be read in public, but shall be submitted in open court. No officer of any court, with whom the proceedings in an adultery cause are filed, or before whom the testimony is taken, nor any clerk of such officer, either before or after the termination of the suit, shall permit a copy of any of the pleadings or testimony, or of the substance of the details thereof, to be taken by any other person than a party or the attorney or counsel of a party, who has appeared in the cause, without a special order of the court.

No judgment in an action for a divorce shall be entered except upon the special direction of the court.

RULE LXXVII.

Receiver of debtor's estate; powers and duties; costs. — Every receiver of the property and effects of the debtor shall, unless restricted by the special order of the court, have general power and authority to sue for and collect all the debts, demands and rents belonging to such debtor, and to compromise and settle such as are unsafe and of a doubtful character. He may also sue in the name of a debtor, where it is necessary or proper for him to do so; and he may apply for and obtain an order of course that the tenants of any real estate belonging to the debtor, or of which he is entitled to the rents and profits, attorn to such receiver, and pay their rents to him. He shall also be permitted to make leases, from time to time, as may be necessary, for terms not exceeding one year. And it shall be his duty, without any unreasonable delay, to convert all the personal estate and effects into money; but he shall not sell any real estate of the debtor without the special order of the court, until after judgment in the cause. He is not to be allowed for the costs of any suit brought by him against an insolvent from whom he is unable to collect his costs,

unless such suit is brought by order of the court or by the consent of all persons interested in the funds in his hands. But he may, by leave of the court, sell such desperate debts, and all other doubtful claims to personal property, at public auction, giving at least ten days' public notice of the time and place of such sale.

RULE LXXVIII.

Suits by receiver; costs. — Whenever a receiver, appointed under proceedings supplementary to execution, shall apply for leave to bring an action, he shall present and file with his application the written request of the creditor in whose behalf he was appointed, that such action be brought; or else he shall give a bond with sufficient security and properly acknowledged and approved by the court, to the person against whom the action is to be brought, conditioned for the payment of any costs which may be recovered against such receiver. And leave to bring actions shall not be granted except on such written request or on the giving of such security.

In all other cases where a receiver applies to the court for leave to bring an action, he shall show in such application that he has sufficient property in his actual possession to secure the person against whom the action is to be brought for any costs which he may recover against such receiver; otherwise the court may require the receiver to give such bond conditioned for the payment of costs, and with such security as is above mentioned.

RULE LXXIX.

Who may be referee, and the duties of a referee. — Except in a case provided for by section 1011 of the Code of Civil Procedure, no person, unless he is an attorney of the court in good standing, shall be appointed sole referee for any purpose in any pending action or proceeding. Nor shall any person be appointed a referee who is the partner or clerk of the attorney, or counsel of the party in whose behalf such application for such appointment is made, or who is in any way connected in business with such attorney or counsel, or who occupies the same office with such attorney or counsel. All moneys received by a referee appointed to sell real property shall be forthwith deposited by the referee in his own name as referee in a bank or trust company authorized to receive on deposit court funds; and if there be no such depository in the city or town in which the referee resides, then he shall deposit such moneys forthwith in a depository located in an adjoining city or town, or with the county treasurer of the county in which the action or special proceeding is pending, and such moneys so deposited shall not be withdrawn except as directed by the judgment or order under which the deposit is made, or upon the order of the court. (As amended June 17, 1913; in effect November 1, 1913.)

RULE LXXX.

Sequestration of property of corporation; where motion for receiver may be made; removal of receiver. — All motions for the sequestration of the property of corporations, or for the appointment of receivers thereof, must be made in the judicial district in which the principal place of

business of said corporations, respectively, is situated, except that in actions brought by the Attorney-General in behalf of the people of this State, when it shall be made to appear that such sequestration is a necessary incident to the action, and that no receiver has already been appointed, a motion for the appointment of one may be made in any county within the judicial district in which such action is triable. No motion can be made, or other proceeding had for the removal of a receiver, elsewhere than in the judicial district in which the order for his appointment was made. And where a receiver has been appointed, his appointment shall be extended to any subsequent suit or proceeding relating to the same estate or property in which a receiver is necessary.

RULE LXXXI.

Power of receiver to employ counsel. — No receiver shall have power to employ more than one counsel, except under special circumstances and in particular cases requiring the employment of additional counsel, and in such cases only upon special application to the court, showing such circumstances by his petition or affidavit, and on notice to the party or person on whose behalf or application he was appointed. This rule shall apply to all receivers, present and future; and no allowance shall be made to any receiver for expenses paid, or made, or incurred in violation of this rule.

RULE LXXXII.

Examination of a party before trial. — When an examination is required under sections 870, 871, 872 of the Code of Civil Procedure, the affidavit shall specify the facts and circumstances which show, in conformity with subdivision 4 of section 872, that the examination of the person is material and necessary.

RULE LXXXIII.

Courts may make further rules. — The Appellate Division in each department, and the various courts of record, may make such further rules in regard to the transaction of business before them respectively, not inconsistent with the foregoing rules as they in their discretion may deem necessary.

RULE LXXXIV.

Practice in cases not covered by these rules. — In cases where no provision is made by statute or by these rules the proceedings shall be according to the customary practice as it formerly existed in the Court of Chancery or Supreme Court, in cases not provided for by statute or by the written rules of those courts.

RULE LXXXV.

Appellate division; announcement of decisions; delivery of copies of opinions; publication. — Before any decision of the Appellate Division of the Supreme Court in any department in which an opinion is written is announced there shall be furnished to the clerk of the court a copy of each opinion delivered by the court, and immediately after the

announcement of the decision and on the same day the clerk shall transmit such copy or copies so received by him, duly certified as required by section 92 of the Judiciary Law, and a list of all cases decided at the same time to the Supreme Court Reporter, and no decision on any appeal in which an opinion is written shall be announced until a copy of the opinion has been furnished to the clerk as aforesaid. No copy of any opinion in any case decided by the Appellate Division in any department shall be delivered to any person until after the decision is announced, and no copy of such opinion shall be delivered to any person except counsel in the case until after the list of decisions and certified copies of the opinions shall have been transmitted to the Supreme Court Reporter. The Supreme Court Reporter shall publish the opinions of the Appellate Divisions as soon as practicable without waiting to publish together all the opinions of a particular term or month. (Added June 17, 1913; in effect November 1, 1913.)

RULE LXXXVI.

Appellate division in first department to designate newspapers in which to publish legal notices, process, and other papers. — Whenever a notice, summons, citation, order or other paper shall be required by the Code of Civil Procedure or other provision of law, or by the order of any court or a judge thereof, or of a surrogate or of the clerk of a court or any other official or individual, to be published in a newspaper in the First Department, or public notice of any application to a court or judge or other officer shall be required to be given by publication thereof in a newspaper in the First Department, or where any court or a judge thereof or a surrogate or other judicial officer or public officer is authorized or required to designate a newspaper in the First Department for the publication of any such notice, summons, citation, order or other paper, the newspaper designated by any court or judge thereof, or surrogate or other judicial officer or public officer, shall be a newspaper designated by the Appellate Division of the Supreme Court in the First Department, as hereinafter provided, and no such publication shall be deemed to give the notice required to be given if the same is published in any newspaper in the First Department which has not been designated by an order of the Appellate Division of the Supreme Court in the First Department, and the publication of such notice, summons, citation, order or other paper in any undesignated newspaper in the First Department shall not be deemed a compliance with any provision of the Code of Civil Procedure or other provision of law or of the order of any court or judge.

The Appellate Division of the Supreme Court in the First Department shall from time to time designate such newspapers in such department as in its opinion have such a circulation as is calculated to give public notice of a legal publication, and from time to time revoke such designation. To entitle a newspaper to such a designation it must file with the clerk of the Appellate Division a statement, duly verified, showing approximately the amount of its circulation, the time and place of its regular publication, and a statement of its charges for legal publications. (Added June 17, 1913; in effect November 1, 1913.)

ANNUITY TABLE.

Table showing the value of an annuity of one dollar on a single life, according to the Carlisle table of mortality, at five per cent. interest, referred to in Rule LXX of the General Rules of Practice.

Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.	Age.	No. of years' purchase the annuity is worth.
1	13.995	33	14.287	65	7.765
2	14.983	34	14.260	66	7.503
3	15.824	35	14.127	67	7.227
4	16.271	36	13.987	68	6.941
5	16.590	37	13.848	69	6.643
6	16.735	38	13.694	70	6.336
7	16.790	39	13.541	71	6.015
8	16.786	40	13.389	72	5.711
9	16.742	41	13.244	73	5.434
10	16.669	42	13.101	74	5.190
11	16.561	43	12.956	75	4.969
12	16.495	44	12.805	76	4.792
13	16.406	45	12.648	77	4.609
14	16.316	46	12.480	78	4.422
15	16.227	47	12.301	79	4 210
16	16.145	48	12.107	80	4.014
17	16.067	49	11.892	81	3.799
18	15.988	50	11.660	82	3.606
19	15.905	51	11.409	83	3.406
20	15.818	52	11.154	84	3.211
21	15.727	53	10.892	85	3 009
22	15.629	54	10.624	86	2.830
23	15.526	55	10.347	87	2.695
24	15 417	56	10.063	88	2.597
25	15.304	57	9.771	89	2.495
26	15.198	58	9.478	90	2.389
27	15.065	59	9.199	91	2.281
28	14.942	60	8.940	92	2.412
29	14.827	61	8.712	93	2.517
30	14 723	62	8.497	94	2.509
31	14.617	63	8 258	95	2 598
32	14.506	64	8.016	96	2.565

RULE FOR ASCERTAINING THE VALUE OF A LIFE ESTATE OR ANNUITY.

Compute the interest at five per cent. for one year on the principal sum to the income of which the annuitant is entitled. Multiply the interest thus obtained by the number of years' purchase set opposite the age of the person on whose life the annuity depends, and the product will be the value of the life estate of such person.

Example.

Suppose a man, aged sixty, has a life estate in real property worth $3,000 Five per cent. interest on that amount for one year is $150. In the table we find the number of years' purchase of a man of sixty is 8.94, which, multiplied by $150, one year's interest, gives $1,341 as the value of his life estate.

Suppose a widow aged forty has a dower right of $2,000. Interest on this at five per cent. for one year is $100. The number of years' purchase, by the table, of a person of forty, is $13.389. Multiplying this by $100, the result is $1,338.90, which is therefore the value of her right of dower.

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RULES OF THE APPELLATE DIVISIONS OF THE SUPREME COURT OF NEW YORK.

Rules of Appellate Division, First Department.

(Amended to May, 1916.)

RULE I.

When court is open. — The court will open at two o'clock and continue until six o'clock in the afternoon unless sooner adjourned, except that on motion days the court will open at half-past ten o'clock in the forenoon. (As am'd December 17, 1909.)

RULE II.

Motion days; calendar; ex parte business. — The first and third Fridays succeeding the first and third Mondays of each month, or such other days as shall be designated for hearing appeals from orders by the Appellate Division, shall be motion days. The clerk will make up a calendar for each motion day of all motions noticed to be heard on that day. A note of issue stating the nature of the motion and the day for which it has been noticed must be filed with the clerk before 12 o'clock noon on the day preceding the day for which the motion is noticed. The Motion Calendar will be called by the clerk at 10 o'clock on each motion day, when all motions to be submitted without oral argument must be submitted. Where a motion is to be orally argued the same will be marked ready on the call by the clerk, and will be heard by the court at 10.30. (As am'd December 17, 1909.)

RULE III.

Appeals from orders; time allowed; submission. — Appeals from orders will be heard only upon motion days, the calendar of which will be taken up immediately after the disposition of the motion calendar. On the argument of such appeals not more than fifteen minutes will be allowed to each side, except when the court otherwise orders. Appeals from orders which have been placed upon the calendar may be submitted by the parties, with the approbation of the court, at any time during the term, upon delivering to and leaving with the clerk the requisite number of printed copies of the points.

RULE IV.

Appeals from orders; return; dismissal; postponement of argument of non-enumerated case by consent. — Appeals from orders may be noticed for argument on any motion day. The appellant or moving party must file with the clerk of the Appellate Division at least eight days before the day upon which such appeal shall have been noticed, a note of issue, which shall state the day upon which the notice of appeal shall have been served, and nineteen copies of the papers upon which the appeal is to be heard, printed as required by Rule XLI of the General Rules of Practice, with an affidavit showing the service of three printed copies thereof upon the attorney for the respondent, together with a notice of argument of the appeal with admission or proof of service, and the clerk shall thereupon place the appeal upon the calendar for the day upon which such appeal shall have been noticed. If an appeal shall have been noticed for argument by the respondent, and the appellant or other party whose duty it is to file nineteen copies of the papers upon which the appeal is to be heard, printed as required by the General Rules of Practice, shall fail to file the same at least eight days before the day for which such appeal is noticed, the opposite party may move upon affidavit and upon four days' notice of motion that the appeal be dismissed or that judgment be rendered in his favor.

At any time before three o'clock of the day preceding the day upon which a non-enumerated case shall have been noticed for argument, or to which the hearing thereof shall have been adjourned, the respective counsel may file a written consent with the clerk that the case may be set down for a subsequent motion day; and cases set down will be added to the calendar of that day at the foot of the cases remaining thereon undisposed of without further notice.

RULE V.

Calendar of enumerated cases; note of issue; return; dismissal; preferred causes. — The clerk will make up a calendar of enumerated causes for each term of the court, which shall consist of the enumerated causes upon the calendar of the preceding term undisposed of, to which shall be added new cases which shall have been noticed as hereinafter provided.

The appellant, the plaintiff in a controversy submitted to the court under section 1279 of the Code of Civil Procedure, the relator in a writ of certiorari, or the moving party in a case to be heard as an enumerated case, shall file with the clerk of the Appellate Division, within the time prescribed by Rule 41 of the General Rules of Practice, a printed copy of the papers upon which the appeal or case is to be heard, duly certified as required by the rule, and nineteen copies of the printed papers upon which the case is to be heard, printed as required by the General Rules of Practice, with an admission of service or an affidavit showing the service of three printed copies thereof upon the attorney for the respondent or opposing party. After the printed copies of the papers shall have been duly filed as hereinbefore required, and after the printed copies of the points shall have been filed by the appellant or moving party, as required by Rule VI, either party may notice the case for argument for any day in the term, and upon filing of such notice of argument, with admission or proof of service, with the clerk of the court, and a note of issue which shall state the day upon which the notice of appeal was served, the clerk shall, upon the day for which the same shall have been noticed, place the case upon the calendar at the foot thereof.

In case the party whose duty it is to file and serve the printed papers shall fail to file or serve the same as hereinbefore required, the opposing party may move upon four days' notice that the appeal be dismissed, or that judgment or order be rendered in his favor.

Either party to an appeal which by law is entitled to a preference may serve with the notice of argument a notice that application will be made on the next motion day for an order placing the cause upon the Day Calendar upon a day named in the notice of motion, and such application will be heard as a motion on the motion day for which the same is noticed. (As am'd March 23, 1911.)

RULE VI.

Day calendar; points. — Within twenty days after the papers upon which an appeal is to be heard shall have been filed with the clerk of the court as required by Rule 41 of the General Rules of Practice and by Rule V of these rules, except when the papers are filed in July, August or September, the appellant, plaintiff in a controversy submitted to the court under section 1279 of the Code of Civil Procedure, the relator in a writ of certiorari, or the moving party in a case to be heard as an enumerated case, shall file with the clerk eighteen printed copies and serve upon the attorney for his opponent three printed copies of the points to be relied upon by him, with a reference to the authorities to be cited. When the papers are filed in July, August or September, then the points

must be filed and served at least fifteen days before the first Tuesday of October. Within ten days after such service the respondent or defendant shall file with the clerk eighteen printed copies and serve on the attorney for the appellant or moving party three printed copies of the points to be relied upon by him, with a reference to the authorities to be cited. If the appellant or moving party desires to present points or authorities in reply he shall file with the clerk eighteen printed copies and serve three printed copies thereof on the attorney for his opponent within five days after the receipt of his opponent's points. No points shall be received by the court on the argument or submission of the appeal unless they shall have been filed and served as above provided. At 4 o'clock on each day the Clerk will make up a calendar of fifteen enumerated cases for the next day. A case on such Day Calendar will not be reserved or postponed except by order of the court upon special cause shown. At any time after the filing of a note of issue in an enumerated case, and before it shall have been placed on the Day Calendar, a written consent, signed by the attorneys or counsel who are to argue the case, that the appeal be set down for any future day of the term may be filed with the clerk, and such case shall be placed on the Day Calendar for such day at the end of the cases remaining thereon undisposed of in the order in which they have been set down, provided that no more than fifteen cases shall be placed on any Day Calendar, and provided that such case would have been reached on the General Calendar if not so set down.

If an appellant or moving party is in default in filing and serving the points hereinbefore required the opposing party may move upon four days' notice to dismiss the appeal or for final judgment or final order, as the case requires. If the respondent is in default in filing and serving the points hereinbefore required he will not be heard except by special leave of the court. (As am'd March 23, 1911.)

RULE VII.

Submission of appeal. — In any case in which the printed copies of the papers upon which an appeal is to be heard shall have been filed with the clerk of the Appellate Division as required by Rule 41 of the General Rules of Practice, and the printed copies of the points filed with the clerk as required by Rule 6 of the Rules of the Appellate Division for the First Department, either party may, by a written stipulation filed with the clerk, submit the appeal upon the printed papers and points filed as aforesaid.

RULE VIII.

Motions for reargument. — Motions for reargument must be noticed for the first, second or third motion days after the appeal has been decided. Such motions will only be heard on notice to the adverse party, stating briefly the grounds upon which a reargument is asked; and such motion must be submitted on printed briefs stating concisely the points supposed to have been overlooked or misapprehended by the court, and with proper reference to the particular portion of the case and the authorities relied upon, and a printed copy of the opinion, and counsel will not be heard orally. (As am'd December 17, 1909.)

RULE IX.

Submission of brief after argument; where counsel first to attend who has cases on calendars of First and Second Departments on the same day. — No brief or memorandum of authorities will be received by the court after the argument of a motion or an appeal, unless permission be given by the court for its submission after notice to opposing counsel of the application for such permission.

In the event of counsel having cases upon the day calendars of the Appellate Divisions of the First and Second Departments on the same day, such counsel shall attend the court in that department in which his case stands nearest the head of such day calendar; and his case upon the calendar of the other department will be held until the argument of the case is finished in the department in which he is first required to attend.

In the event of counsel having cases upon each of the day calendars of the said departments upon the same day, which stand equally distant from the heads of the respective day calendars, such counsel shall attend court in the First Department.

RULE X.

Applications to Appellate Division Justice to appeal from Appellate Term to Appellate Division. — Applications "to a justice of the Appellate Division of the First Judicial Department," under section 1344 of the Code of Civil Procedure, for the allowance of an appeal to be taken to such Appellate Division from the determination of the justices designated to hear appeals from the City Court of the City of New York and the Municipal Courts of the Boroughs of Manhattan and the Bronx, may be made upon any motion day within two months after such determination, unless the determination is made within two months of the last motion day prior to the first day of July, in which case they may be made on the first motion day in the October term; and must be upon notice of two days to the opposite party or parties, and a note of issue filed, and the same put upon the calendar of motions in the manner provided by Rule 2 of the Appellate Division Rules relating to the hearing of motions. The papers upon which such application is made must contain a copy of the opinion of the justices below, if any; a copy of the printed record in the court below, if any; a concise statement of the grounds of alleged error, and proof of due service of the papers upon which the application is founded. Upon the calling of the motion calendar such applications must be submitted without argument. Such applications will not be entertained unless an application for leave to appeal has first been made to the justices by whom such determination was made, in the manner provided by Rule VII for the regulation of the hearing of appeals from the City Court of the City of New York and the Municipal Courts of the Boroughs of Manhattan and the Bronx, and has been denied. (As am'd December 17, 1909.)

RULE XI.

Admission to the bar of attorneys from other States. — Every application for admission to practice as an attorney and counselor at law under Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counselors at law shall, in addition to the proof required by said rule and by Rule 1 of the General Rules of Practice, present to the court proof of the qualifications required for the admission of an attorney and counselor at law in the State in which he had been admitted and had practiced, and the nature of the examination required of an applicant for admission to practice as an attorney and counselor at law in such State.

Every application for admission to practice under Rule 2 of the Rules of the Court of Appeals for the admission of attorneys and counselors at law shall be referred to the Committee on Character, who shall report to the court upon the character of the applicant and his qualifications to be admitted to practice in the courts of this State, and no person will be admitted to practice on such an application until after the Committee on Character shall have made its report. (Added, July 13, 1909; am'd, Dec. 28, 1910.)

SPECIAL RULE FOR ELECTION CASES.

Rule 1.—All applications to the Supreme Court or a justice thereof to review the determination and acts of the election officers under § 56 of the Election Law (chapter 909 of the Laws of 1896, as amended); all applications for a writ of mandamus under § 114 of the said Election Law, and all other applications to the Supreme Court or a justice thereof under any of the other provisions of the said Election Law, shall be made to Special Term, Part I of the Supreme Court of the First Judicial District. The justice assigned to such term may hear and determine any such proceeding or may assign any such proceedings to the other parts of the Special Term for hearing and decision, and such application shall have precedence over all other business at any part of the Special Term. The final order determining such special proceeding should in each case state the facts found by the Special Term upon which the determination is made and the determination of the Court upon the facts thus stated.

Rule 2.—Appeal from any final order entered in a proceeding specified in Rule 1 shall be brought on for hearing at such time on such day as the Appellate Division shall designate by an order which will be granted on the application of any party to such a special proceeding.

NOTICE.

PAPERS ON APPEAL TO THE APPELLATE DIVISION ARE MADE UP AS FOLLOWS:

Index. EVERYTHING MUST BE INDEXED.

The index *must refer to each paper*, the *name of each witness* and *where the witness' testimony is to be found.*

All *exhibits* must show number or letter and where the exhibit was admitted in evidence and nature of exhibit (see Rule 43) and page of case where printed.

All amendments to proposed case should be inserted in proper place where allowed. Plaintiff's Exhibits should be first.

Statement under Rule 41. (Now new Rule 23 c/)

Notice of Appeal.

Pleadings and all papers filed with judgment roll, viz.:

Summons.
Complaint.
Answer.
Demurrer or
Reply.
Order Directing Exceptions to be heard.
Order setting aside Verdict or Granting New Trial.
Order of Reference.
Report of Referee.
Decision; Findings; Conclusions of Law.
Extract of Minutes in Jury Cases.
Judgment.
Exceptions.
Case.
Testimony.

Charge of the Judge, requests to charge, and exceptions.
Verdict.
Motion, if any.
Exhibits, if not in the Evidence.
"The foregoing case contains all the evidence and testimony offered and given upon the trial of this action," etc.
Stipulation Settling Case.
Order Settling Case (Rule 35 of Gen. Rules of Practice).
Stipulation Waiving Certification,
or
Certificate of Clerk of Court.
Opinion,—or Affidavit of No Opinion.
Order Filing Record in Appellate Division.
(Code Civil Procedure, section 1353.) Necessary only in appeals where there is a settled Case.
NOTE.—**Full titles and verification** MUST **be included.**

Stipulation Settling Case or Consent to Settlement.

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this action and that the same be settled and ordered to be filed and annexed to the judgment roll herein.

Dated New York,.....191 .

(Signed by the attorneys.)

Order Settling Case.

On the above stipulation the foregoing case on appeal containing all the evidence, is hereby settled and ordered on file.

Dated New York,....., 191 .

(Signed)

J. S. C.

Stipulation Waiving Certification or Waiver.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the Notice of Appeal, the judgment roll, and Case and exceptions as settled, and the whole thereof, now on file in the office of the clerk of the County of New York; and certification thereof by the Clerk of said County, pursuant to Section 1353, is hereby waived.

Dated New York,....., 191 .

(Signed by the attorneys.)

Order Filing Record in Appellate Division.

Pursuant to Section 1353 of the Code of Civil Procedure, it is Ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court in the First Judicial Department.

Dated New York,....., 191 .

(Signed)

J. S. C.

Each affidavit or other paper printed upon appeal from an order should be preceded by a **statement of what it is and on whose behalf it was read.** (Rule 43 of Gen. Rules of Practice.)

Rules of Appellate Division, Second Department.

(Amended to May, 1916.)

Enumerated Calendar.

Seventeen copies of the case must be delivered to the clerk before the commencement of the argument.

The appellant's brief and points in a cause which is on the printed calendar shall be filed with the clerk and shall be served on the attorney for the respondent at least five days before the first day of the term. The appellant shall file with the clerk seventeen printed copies and serve on the attorney for the respondent three printed copies of his said brief and points. Within five days after such service the respondent shall file with the clerk seventeen printed copies and serve on the attorney for the appellant three printed copies of his brief and points. If the appellant desires to present briefs or points in reply, he shall file with the clerk seventeen printed copies thereof and serve three printed copies thereof on the attorney for the respondent within three days after the receipt of the respondent's points.

When, according to this rule, an appellant is in default, the appeal may, without previous notice, be dismissed on motion when the cause is reached for argument; and when a respondent is in default he will not be heard except by leave of the court.

This rule shall not apply to appeals from orders.

Non-enumerated Calendar.

Seventeen copies of the appeal papers and points must be delivered to the clerk before the commencement of the argument.

Special Rule (for both the Enumerated and the Non-enumerated Calendar).

When a motion is made to dismiss an appeal for want of prosecution or other neglect, the party desiring to oppose such a motion, in addition to affidavits stating facts excusing the delay, must also submit affidavits stating concisely the facts out of which the controversy arose and the questions of law and fact involved in the said appeal, and showing that the appeal is a meritorious one. (Added, Oct. 4, 1910.)

Attention is called to General Rule XLI, as printed in this calendar. If this rule is not strictly complied with, such causes as are therein referred to cannot be placed upon the calendar.

(N. B. Rule XLI of the General Rules of Practice is usually printed at this point in the Rules of the Second Department. It will be found *ante*, on page 1455 and therefore is omitted here.)

Attention is called to section 1353, *Code of Civil Procedure.*

(N. B. Section 1353 of the Code is usually printed at this point in the Rules of the Second Department. It will be found *ante*, on page 368, and therefore is omitted here.)

CALENDAR PRACTICE.

RULE I.

Appeals from orders. — Appeals from orders, heard as non-enumerated motions, will be placed upon a separate calendar and called upon the first day of the term.

RULE II.

Calendars.—A new calendar will be made up for the January term. Calendars for subsequent terms during the year will be made up by adding to the calendar of the previous term all new appeals to be placed in regular order, according to the date of appeal, on compliance with the requirements hereinbefore prescribed. An appeal passed during any term may be brought on for argument on any day during the first week of a subsequent term upon stipulation, or upon four days' notice to the opposing party and on filing with the clerk such stipulation or proof of service of such notice, the clerk will cause the appeal to be placed on the day calendar of the day named in such notice or stipulation. (As am'd Nov. 29, 1912.)

RULE III.

Appeals from orders; when heard. — Appeals from orders will also be heard on the second Friday of each term, and notices of argument may be given for such day, and the calendar for such day will consist of causes not called on the first Monday, and other causes in which the appeal papers and affidavit of service thereof have been filed with the clerk, as required by section 1353 of the Code of Civil Procedure and the General Rules of Practice. (As am'd March 12, 1915.)

RULE IV.

Day calendar of non-enumerated causes. — Non-enumerated causes will be placed upon the day calendar for the first Monday and second Friday of the term, and the hearing of such causes will continue from day to day until completed. The calendar for other days will consist of as many causes as shall be placed thereon from the general calendar in their numerical order. (As am'd October 22, 1908 and March 12, 1915.)

RULE V.

Reservation by consent of causes on day calendar. — Causes can be reserved by consent for a day subsequent to the time when they would be reached in their order, but not, however, later than the first week of the term. A stipulation for reservation must be filed with the clerk before the day calendar is made up (1 o'clock P. M.). (As am'd Nov. 29, 1912.)

RULE VI.

Motions, other than appeals from orders, when heard. — Motions, other than appeals from orders, will be heard on the first Monday

and second Friday of the term, and notes of issue therefor must be filed with the clerk at least two days before the day for which they are noticed. (As amended March 12, 1915.)

RULE VII.

Non-enumerated calendar of appeals from orders; notes of issue. — No appeal from an order will be heard unless it is placed on the non-enumerated calendar. The attorney or party intending to move such an appeal for argument shall, at least eight days before the time of the making up of the calendar, file with the clerk a note of issue, specifying the date of the service of the notice of appeal and stating that the cause is to be put on the non-enumerated calendar. No cause shall be put on the enumerated or non-enumerated calendar until the papers required by General Rule XLI shall have been filed with the clerk.

RULE VIII.

Notes of issue in preferred causes. — A party who desires to have a cause heard as a preferred cause, must, in his note of issue, state his claim for preference, as provided in section 793 of the Code; or if an order giving the cause a preference has been made under that section, the note of issue must be accompanied with a copy of such order. The clerk, in making up the calendar, shall place such preferred causes at the head of the general calendar, indicating that they are preferred, and that class to which they belong.

RULE IX.

Criminal causes may be put upon the calendar at any time. — Appeals in criminal causes, brought after making up the calendar, or too late to be placed upon the calendar, may be put upon the calendar at any time, and brought on for hearing as preferred causes, upon a notice of ten days to the adverse party, as provided in section 535 of the Criminal Code. A note of issue must be filed with the clerk at least five days before the day on which the cause is to be heard, and he shall put the same upon the calendar for the day on which it shall be noticed, or upon which it shall be ordered by the court, or stipulated by the parties to be heard.

RULE X.

Endorsement on brief. — In order to facilitate the work of the reporter the counsel who argues the cause orally shall endorse his name on upper right-hand corner of first page of brief.

RULE XI.

Motions for re-argument. — Motions for re-argument will be heard only on notice to the adverse party, stating briefly the ground upon which a re-argument is asked, and such motions must be submitted upon printed briefs, stating concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the case and

the authorities relied on; and a copy of the opinion delivered by the court in deciding the cause; and counsel will not be heard orally.

RULE XII.

Citation of statutes in briefs. — When a statute is cited, so much thereof as may be deemed necessary to the decision of the case should be printed at length on the brief.

RULE XIII.

The general rule will prevail of imposing costs on the decision of motions.

Attention is called to section 1355, *Code of Civil Procedure.*

(N. B. Section 1355 of the Code is usually printed at this point in the Rules of the Second Department. It will be found *ante*, on pages 368, 369, and therefore is omitted here.)

Remittitur. — The remittitur to be transmitted pursuant to section 1355 of the Code shall contain a copy of the judgment order of this court, and the record which has been filed with the clerk, and shall be sealed with the seal and signed by the clerk of this court.

Rules Relating to the Admission of Attorneys in the Second Department.

Notice of the time of application for admission as attorneys by those who have passed the examination prescribed by the rules of the Court of Appeals, will be published in the "Law Journal," at which time applicants must file with the clerk the papers enumerated in Rule I of the General Rules of Practice, and appear personally before the Committee on Character to furnish such information as the committee may desire from them.

Rule Regulating the Procedure upon Applications for Naturalization in the Supreme Court in the Second Department.

All applications of aliens to become citizens of the United States must be heard at the various Special Terms as directed and indicated in the assignment of Justices for holding such terms.

If the applicant fail to appear at the time and place specified in such application, the application will be dismissed without prejudice to a fresh application.

If he appear and for any reason the hearing is not completed upon the stated day aforesaid, the Court may complete such hearing and take final action upon any subsequent day to which the matter shall be publicly adjourned by the direction of the Justice presiding. (As am'd December 10, 1909.)

Where counsel first to attend who has cases on calendars of First and Second Departments on the same day. — In the event of counsel having cases upon the day calendars of the Appellate Divisions of

the First and Second Departments on the same day, such counsel shall attend the court in that department in which his case stands nearest the head of such day calendar; and his case upon the calendar of the other department will be held until the argument of the case is finished in the department in which he is first required to attend.

In the event of counsel having cases upon each of the day calendars of the said departments upon the same day, which stand equally distant from the heads of the respective day calendars, such counsel shall attend court in the First Department.

Bonds of applicants for license to practice as official examiners of title. — All bonds executed by individual sureties in accordance with the provisions of section 9 of chapter 444 of the Laws of 1908, and the Rules of the Court of Appeals adopted pursuant thereto, must contain a statement of the place of residence of each surety, giving the street and the number thereof, if such residence is so known and designated, and in addition to the facts required by the Rules of the Court of Appeals to be stated in the affidavit of justification, each surety must specifically state what property is owned by him, giving a brief description thereof, and also state the value of the same and what, if any, liens or incumbrances there are on such property, with a brief description of the nature and amount of such lien. (Added, March 4, 1909.)

RULES OF THE APPELLATE TERM OF THE SUPREME COURT IN THE SECOND JUDICIAL DEPARTMENT.

Relating to the Hearing of Appeals from the Municipal Court and the Making and Hearing of Motions in said Appellate Term.

(As amended February 2, 1916.)

RULE I.

Calendar of appeals. — The clerk of said Appellate Term shall, at least eight days before the first day of an appointed term thereof, prepare a calendar of all the appeals to that court in which the returns, conformable in all respects with § 161 of the New York City Municipal Court Code and with Rule III, have been filed ten days prior to the commencement of such term. Such appeals shall be placed upon said calendar according to the date of the filing of the returns respectively, shall be brought on for hearing in the manner provided in Rule IV, and shall be continued on said calendar until disposed of.

RULE II.

Motion to dismiss for want of return. — If the appellant fails to procure the return on appeal to be made and filed as prescribed in § 161 of said Municipal Court Code, the respondent may move to dismiss the appeal, and such appeal shall be dismissed unless the justices assigned to hear the same shall, for good reason shown, extend the time. (As am'd Feb. 2, 1916.)

RULE III.

Returns, points, etc. — The stenographer's minutes, attached to the return, and the points on appeal, shall be printed or typewritten upon white paper of the quality and weight prescribed in § 796 of the Code of Civil Procedure, shall be of uniform size, namely, ten and one-half inches in length and eight inches in width; the stenographer's minutes shall be numbered at the bottom of the page, fastened at the left hand edge, bound with suitable cover, and appropriately indexed. Such points shall be fastened on the left hand edge thereof and the number of the appeal shall be indicated thereon, and on the upper right hand corner of the points submitted to the court shall appear the name of the counsel arguing or submitting the same.

All returns on appeal, including the evidence, the exhibits and all papers relating thereto, all points, briefs and all motion papers for submission to the court must be flat and so delivered to the clerk of the Appellate Term; all motion papers for submission to the Appellate Term, or to a justice thereof, must comply with the foregoing conditions as to quality and weight. The exhibits offered by each party shall be copied in typewriting and annexed to the return in the order of their admission in evidence, and the originals thereof shall also be returned separate, attached in the order in which they are numbered or lettered and placed flat in an appropriate envelope, plainly marked, and enclosed in the return envelope. The opinion of the Municipal Court justice, if any, must be included in the return.

Returns on appeal from orders must be accompanied by a certificate from the clerk of the Municipal Court that the return contains the pleadings, if any, all affidavits and other papers recited in the order appealed from. (As am'd Feb. 2, 1916.)

RULE IV.

Noticing appeals for hearing. — After the filing of the return therein an appeal may be brought to a hearing upon notice of either party of not less than eight days, which notice, with proof of service thereof, must be filed with the clerk of the Appellate Term on or before the Monday preceding the first day of the term. If the parties to an appeal shall fail to bring the same to a hearing for at least two terms after the same had been regularly placed on the calendar, the court must dismiss such appeal unless it directs its continuance for good cause shown.

If the appellant does not appear upon the call of the calendar the judgment or order appealed from shall be affirmed. If the appellant appears and the respondent fails to appear, the appellant may either argue or submit his case, but judgment of reversal by default will not be allowed.

RULE V.

Hearing of appeals; points and filing same. — The appellant shall, on or before the Monday preceding the first day of the term at which the appeal is noticed for argument, file with the clerk of the Appellate Term three original copies of his points to be used on the hearing and shall also, on or before the same day, serve a copy of said points on the respondent or his attorney. Upon failure to file and serve said points the appeal may, when called in its regular order on the calendar for argument, be dismissed, or the hearing thereof adjourned to the next term, as the court may determine. Not later than twelve o'clock noon on the Friday preceding the first day of the term, the respondent must serve a copy of his points upon the appellant or his attorney and file with the clerk three original copies thereof, to be used upon such argument and hearing. No further time for filing points will be granted and no other points will be received unless the court shall, by its own motion, direct further points to be submitted.

No appeal will be heard or received on submission unless it has been noticed for argument and proof of service thereof has been filed as provided in Rule IV, and all appeals must be heard or submitted when regularly called for argument, unless the court, for cause shown, shall adjourn the hearing until a subsequent day. No appeal shall be submitted without argument unless the points have been filed and served as hereinbefore provided, and in the argument of an appeal not more than fifteen minutes shall be occupied by counsel on either side except by permission of the court. (As am'd Feb. 2, 1916.)

RULE VI.

Judgments, orders and resettlements. — The judgment or order of the Appellate Term shall be entered in the office of the clerk of the county embracing the district of the Municipal Court whence

the appeal comes, and the return, with a certified copy of the judgment or order attached thereto, and all papers on which the appeal was heard, shall be remitted to the Municipal Court in the district from which the appeal was taken, as provided in § 163 of the Municipal Court Code. If, however, a motion for reargument or an application for leave to appeal to the Appellate Division is made, the return on such appeal shall be retained by the clerk of the Appellate Term until the motion is decided, and if a new trial has been ordered and the day fixed for such new trial shall intervene the submission and decision of such motion, then the day fixed for such new trial shall be adjourned for three weeks from that day.

Except when the Appellate Term shall otherwise direct, all decisions, either in cases upon appeal or on motion, will, when announced, be accompanied by an order duly signed.

A motion for resettlement of an order must be made within ten days after its entry and upon two days' notice to the adverse party or his attorney.

RULE VII.

Motions generally. — Five days' notice of motion shall be given of all motions made in the Appellate Term, and all motions noticed for the first day of the term, whether upon an order to show cause or on regular notice of motion, with proof of service thereof, and a note of issue, must be filed with the clerk of the Appellate Term on the Thursday preceding the commencement of the term. The motion calendar will be published on the Saturday preceding the commencement of the term, but no motion will be placed thereon except upon compliance with this rule and Rule III so far as applicable. Briefs of counsel and the answering affidavits, if any, must be filed with the clerk on or before twelve o'clock noon on the Saturday preceding the first day of the term. All motions, including those made under Rule II may be made returnable any day of the term, must be submitted without argument, and when relating to a pending appeal the calendar number of such appeal shall be indicated on the first page thereof, to the right of the title of the action. (As am'd Feb. 2, 1916.)

RULE VIII.

Motion for reargruments and applications for leave to appeal. — Motions for reargument and applications for leave to appeal to the Appellate Division in the Second Judicial Department from a judgment or an order of the Appellate Term, based upon affidavits setting forth concisely the matters claimed to have been overlooked or misapprehended by the court, a concise statement of the grounds of alleged error, and the reasons why said motion should be granted or such application be allowed, with appropriate reference to the authorities relied upon, may be made and submitted to the justices who heard such appeal, after five days' notice thereof to the adverse party, provided the motion papers be served within ten days after the entry of the order determining said appeal; all papers to be used on such motion, together with a copy of the opinion, if any, and briefs of counsel, shall be delivered to the clerk of the court

within fifteen days after such determination and thereupon deemed submitted, without argument.

An appeal to the Appellate Division from an order granting a new trial will not be allowed unless the party so applying files with his notice of application for such leave to appeal a stipulation that if the order appealed from be affirmed or the appeal therefrom be dismissed, judgment absolute may be rendered against him.

Motions for leave to appeal to the Appellate Term from an order of the Municipal Court pursuant to the provisions of paragraph VII of § 154 of the Municipal Court Code, may be made to the justices of the Appellate Term or one of them, provided such application has first been made to and denied by the justice of the Municipal Court making the order sought to be reviewed. The motion must be made upon the record in the court below, a copy of the opinion, if any, of the justice making the order, and a concise statement of the ground of the alleged error. The motion may be made after five days' notice thereof to the adverse party, provided the motion papers be served within ten days after the order of the justice of the Municipal Court denying leave to appeal was made. The motion papers shall be delivered to the clerk of the Appellate Term within fifteen days after the making of the order by the justice of the Municipal Court denying leave to appeal, except that after the last Monday of June the same may be delivered to the clerk of the Appellate Term at any time prior to the Monday preceding the beginning of the next succeeding Appellate Term.

A party seeking a stay pending a motion for reargument, or asking leave to appeal to the Appellate Term, or applying for allowance of an appeal to the Appellate Division as hereinbefore provided, must give to the adverse party five days' notice of such application, and the motion papers shall show proof of such service.

All papers in motions provided for by this rule shall be delivered to the clerk of the Appellate Term and thereupon be deemed submitted, without argument, and the clerk shall bring the same to the attention of the court, or one of the justices thereof, as the provision for such motion may require.

In motions for reargument or for leave to appeal to the Appellate Division an endorsement must be made upon the motion papers, stating the term of the court at which the case was argued or submitted.

Calendar Rules Adopted by the Appellate Term

RULE I.—The regular day calendar of appeals from orders and judgments will be called on the first and succeeding days of each term at one o'clock, P. M. (As am'd Feb. 2, 1916.)

RULE II.—If an appeal upon the calendar is affected by a motion, the motion papers and the note of issue must be endorsed with the calendar number of such appeal.

RULE III.—Briefs of counsel, when reference therein is made to the testimony given upon the trial, must give the number of the folio or the page in the record. If the appellant's brief fails to comply with this rule, the appeal may be dismissed. If the respondent's brief is deficient in this respect, the appeal may be considered on the appellant's brief alone.

Adopted February 2, 1916.

Rules of Appellate Division, Third Department.

(Amended to May, 1916.)

RULE I.

Appeals from orders; appeals in compensation cases; placed on non-enumerated calendar; argument thereof. — Appeals from orders shall be put upon the non-enumerated calendar. Appeals in compensation cases shall be put upon the compensation appeals calendar immediately following the non-enumerated calendar. The argument of both such classes of cases will be heard only upon the first day of a term and the days immediately following, until they shall all be disposed of, before the general calendar shall be taken up. But submission of such appeals will be received on any day during the term.

Appeals from orders and compensation appeals which are not upon the calendar when printed, may, after papers have been filed and served in compliance with General Rule No. 41, be added thereto upon filing a note of issue with the clerk five days before argument, and be noticed for argument for any Tuesday of the term upon the usual notice of eight days.

The argument of a case on the general calendar will not be required in any case before Wednesday of the first week. (As am'd December, 1915).

RULE II.

Original motions; for what day noticed. — Original motions in this court may be noticed for the first day of a term, or for the Tuesday of any subsequent week of the term. (As am'd December, 1915).

RULE III.

Preferred causes. — A party who desires to have a cause heard as a preferred cause must in his note of issue state his claim for preference as provided in section 793 of the Code, or if an order giving the cause a preference has been made under that section, the note of issue must be accompanied with a copy of such order. The clerk, in making up the calendar, shall place such preferred causes at the head of the general calendar, indicating that they are preferred, and the class to which they belong.

RULE IV.

Appeals in criminal cases. — Appeals in criminal cases, brought after making up the calendar, or too late to be placed thereon, may be put upon the calendar at any time and brought to a hearing as preferred cases upon a notice of ten days to the adverse party, as provided by section 535 of the Criminal Code. A note of issue, with a statement of the day on which the cause is noticed to be heard, must be filed with the clerk at least five days before such date. The clerk shall place such causes on the calendar for the day for which they are so noticed, or upon which the cause shall be ordered by the court, or stipulated by the parties to be heard.

RULE V.

Day calendar, when prepared. — The clerk shall prepare at one o'clock P. M. of each day for the next day a calendar of such number of causes as the court shall direct, including those undisposed of on the then day calendar, taken from the general calendar in their order thereon, subject to the provisions of Rule VI. Causes not disposed of on any day shall be placed at the head of the calendar for the next day until disposed of.

RULE VI.

What causes placed on day calendar; reservation of causes; when causes passed. — Excepting the first twenty causes on the general calendar, no cause shall be placed upon the day calendar unless written notice is served on the clerk, by the attorney on one side or the other, that such cause is intended to be moved when called in its regular order; or unless it has been reserved for that day, by stipulation filed with the clerk. None of the first twenty causes on the general calendar shall be reserved by stipulation without consent of the court, upon application made on the first day of the term, and any cause not placed on the day calendar in its order on the general calendar, will be regarded as passed for the term, unless put over or reserved as above provided.

RULE VII.

Exchange of cases. — Causes must be argued when reached on the calendar. No exchange of cases will be allowed, unless both cases are ready for argument, and counsel intend to argue them at the same term at which the exchange be made, and when causes are exchanged each shall occupy the proper position of the other in date, on the same and every other subsequent calendar, until heard. A preferred cause exchanged for one not preferred, or set down for a particular day, shall lose its preference; and no case will be called more than once during the same term, unless it shall have been reserved or postponed with the consent of the court.

RULE VIII.

Submission of cases. — If both parties desire to submit, they may do so at any time during the term by delivering to the clerk the cases and points required by General Rule 43, and either party may submit his points when the case is called, if the other party desires to argue orally on his part.

RULE IX.

Statement to be prefixed to points. — The appellant, in addition to the statement required by Rule 41, shall prefix to his points a brief statement, showing in what court or before what officer or tribunal the action or proceeding was instituted, the relief sought, the defense or ground of opposition thereto, the result in the court or before the officer or tribunal in which the action or proceeding was commenced, and how the cause was brought into this court. If any opinion written in the case has been previously reported, he shall also state where it was so reported. If any opinion has been written which has not been reported, the party whose duty it is to furnish the papers shall submit a printed copy of such opinion to the court either in the record or with his brief.

RULE X.

Indorsement of papers. — The counsel who argue a case shall indorse on the papers delivered to the justices their names and places of residence.

Every cause shall be deemed to be submitted to any justice, qualified to sit therein, who may be absent at the time of the argument, unless objection to such submission by counsel arguing such cause be then made.

RULE XI.

Motions for reargument. — Motions for reargument will only be heard on notice to the adverse party, stating briefly the ground upon which a reargument is asked, and such motion must be submitted on printed briefs stating concisely the points supposed to have been overlooked or misapprehended by the court with proper reference to the particular portion of the case, and the authorities relied upon.

RULE XII.

Cause passed; how entered on subsequent calendars. — If a cause is passed without being reserved, or put over by consent of the court, it shall be entered on all subsequent calendars as of the date when passed, and the party placing it on the calendar for a subsequent term, must state in his note of issue the date when it was passed. If he omits to do so, whereby the cause retains its priority on the calendar, the court, on the application of the adverse party, or on its own motion, may strike the cause from the calendar.

RULE XIII.

Term designated for legal holiday, when held. — Whenever a Trial Term or Special Term of the Supreme Court, in this department, shall be designated to be held or opened on a day which is provided by law to be observed as a legal holiday, such court shall be opened and held on the next succeeding secular day.

RULE XIV.

Exchange of briefs by counsel. — At least twenty days before a term of the Appellate Division at which a cause may be noticed for argument the appellant, or relator, shall serve upon the attorney for the respondent three printed copies of his brief upon which he intends to rely upon the argument, with a reference to all the authorities which he intends to cite to the court. At least eight days before said term the respondent shall serve upon the attorney for the appellant, or relator, three printed copies of his brief, with a reference to all the authorities which he intends to cite to the court. If the appellant, or relator, desires to present a brief in reply, he may serve the same upon the attorney for the respondent at least three days before said term. Service under this rule may be made either personally or by mail, but service by mail shall not extend the time within which the answering brief may be served. This rule shall not apply to appeals from orders upon non-enumerated motions, nor to causes in which the time to file papers on appeal shall, under General Rule 41, expire within twenty days of the commencement of a term.

RULE XV.

Admission to the Bar. — Candidates for admission to the bar may be sworn in at the opening of the court on any Thursday of the term, provided the necessary papers therefor shall have been filed with the clerk of the court on or before the Tuesday preceding.

An applicant for admission must present a certificate to this court signed by two members of the committee on character and fitness before one of whom he must appear personally. At the time of such appearance he must present to such member of the committee his certificate of the State Board of Law Examiners, and the affi-

davits of two practicing attorneys residing in the same Judicial District, as provided by Rule 1 of the General Rules of Practice. Such certificate of the committee on character and fitness, together with the certificate of the State Board of Law Examiners, and the affidavits as to character and fitness, shall be filed with the clerk of this court.

NOTE.—The Trial Justices of this department constitute the committee on character and fitness for their respective Judicial Districts.

RULE XVI.

Appeal; case; resettlement; omission of evidence. — By General Rule 34, as amended, said amendment taking effect November 1, 1913, it is provided that "if a case or bill of exceptions does not conform to this rule, the court before which the same shall be brought for review may order the same back for resettlement." In accordance with the discretionary power thereby vested in the different Departments the Appellate Division of the Third Department announces that a case brought before said Appellate Division on appeal, will not be ordered back for resettlement where, upon the approval of the trial Judge or Referee, evidence is omitted bearing upon any issue of fact the determination of which issue of fact the appellant stipulates, upon serving a proposed case, he will not seek to reveiw upon the appeal. (Added, 1913.)

Notice to Attorneys.

A printed copy of the appeal papers shall be filed in the office of the clerk of the Appellate Division within 20 days after an appeal has been taken, etc. The copy so filed shall be certified by the proper clerk, or be stipulated by the parties to be true copies of the original. (Rule 41, General Rules of Practice.) This shall be done before an appeal shall be placed upon the calendar. (Section 1353, Code Civ. Proc.)

Attorneys should also notice that Rule 41 requires three copies of the appeal papers to be served within the same time upon the opposite party.

Notes of issue shall be filed in the clerk's office eight days before the commencement of the court at which the cause may be noticed. (Rule 39, Gen. Rules of Prac.).

Notes of issue shall specify whether the appeal is to be placed upon the non-enumerated or general calendar, and where a preference is desired, the note of issue must state the claim for preference as provided in § 793 of the Code, and indicate the class to which it belongs. (Rules 1 and 3, Third Dept.)

Attention is also called to Special Rule 6 of this department, requiring notice to the clerk, if a party desires the case put upon the day calendar when reached in its order upon the general calendar.

Thirteen copies of the appeal papers and points must be delivered to the clerk before the commencement of the argument.

Rules of Appellate Division, Fourth Department.

(Amended to May, 1916.)

RULE I.

Notes of issue in appeals from orders. — No appeal from an order will be heard unless it is placed on the non-enumerated calendar. The attorney or party intending to move such an appeal for argument shall, at least eight days before the time of the making up of the calendar, file with the clerk a note of issue, specifying the date of the service of the notice of appeal, and stating that the case is to be put on the non-enumerated calendar. No case shall be put upon the enumerated or non-enumerated calendar until the papers required by General Rule XLI shall have been filed with the clerk.

RULE II.

Notes of issue in preferred cases. — A party who desires to have a case heard as a preferred case must, in his note of issue, state his claim for preference, as provided in section 793 of the Code; or if an order giving the case a preference has been made under that section, the note of issue must be accompanied with a copy of such order. The clerk in making up the calendar shall place such preferred cases at the head of the general calendar, indicating that they are preferred, and the class to which they belong.

RULE III.

New calendar, when to be made; passed cases. — When a new calendar is ordered by the court, the clerk shall place thereon all cases which remain undisposed of on the former calendar, and all other cases in which notes of issue have been filed in his office. If a case shall have been passed, it shall go upon the calendar as of the time when it was passed, and the fact that it was passed shall be stated upon the calendar.

RULE IV.

Criminal cases may be put upon the calendar at any time. — Appeals in criminal cases, brought after making up the calendar, or too late to be placed upon the calendar, may be put upon the calendar at any time, and brought on for hearing as preferred cases, upon a notice of ten days to the adverse party, as provided in section 535 of the Criminal Code. A note of issue must be filed with the clerk at least five days before the day on which the case is to be heard, and he shall put the same on the calendar for the day on which it shall be noticed, or upon which it shall be ordered by the court or stipulated by the parties to be heard.

RULE V.

Day calendar to be made by clerk. — The clerk shall prepare at three o'clock P. M. of each day, a day calendar for the next day, to consist of ten cases, or such other number as the court shall direct, including those undisposed of on the then day calendar. They shall be taken from the general calendar in their order thereon, subject to the provisions of Rule VI. Cases not disposed of on any day shall be placed at the head of the calendar for the next day until disposed of.

RULE VI.

Notice to clerk no longer necessary, etc. — It shall not be necessary to notice cases for the day calendar. Any case on the general calendar may, by stipulation of the parties, filed with the clerk at any time before the case is placed upon the day calendar, be reserved for a day certain, except that no stipulation shall be made or filed reserving any of the first fifty cases on the general calendar beyond the first week. Cases so reserved for a day certain shall not be placed upon the day calendar for any day prior to that to which they have been so reserved. No case shall be put upon the day calendar unless the papers and points have been delivered to and filed with the clerk. Cases which cannot be placed upon the day calendar in their regular order or at the time to which they have been reserved by reason of the non-filing of the papers and points, will be regarded as passed for the term.

RULE VII.

Clerk to telegraph day calendar. — The clerk shall, on each day during the term, immediately on making up the day calendar, telegraph the numbers of the cases upon it to the county clerks at Buffalo, Syracuse, Utica, Oswego, Lockport, Auburn and Watertown, and the county clerks receiving said telegrams are directed to post or bulletin the same in such manner as shall be most convenient for attorneys and others desiring to see the same, and also to procure the publication of such telegrams in the newspapers of their respective cities.

RULE VIII.

Reservations and submissions. — Cases will not be received upon submission until reached in the regular call of the calendar. No reservation will be made of any of the first eight cases upon the general calendar, unless on account of sickness, or an engagement of counsel elsewhere in the actual trial or argument of another case in a court of record, commenced before the term of this court, or other inevitable necessity to be shown by affidavit. Other cases may be reserved upon reasonable cause shown, or by stipulation of parties, filed with the clerk, but no case shall be so reserved by stipulation after the same has been placed upon the day calendar. Cases reserved for a day certain by stipulation, when in order to be called, have priority among each other according to their number on the calendar, and shall follow next in order the undisposed of cases of the calendar for the day previous. Default may be taken in them, and they will, if passed, be put upon future calendars as if passed in the regular call.

Every cause shall be deemed to be submitted to such justices as may be absent from the court at the time of the argument, unless objection to such submission by counsel arguing the cause be then made.

RULE IX.

Papers to be filed with the clerk; exchange of briefs. — Within fifteen days after the service of the printed papers required to be served by General Rule 41 in enumerated motions, the party whose duty it is to furnish those papers, shall file with the clerk sixteen printed copies of the papers, and sixteen printed copies of his brief and the points upon which he intends to rely upon the argument, with a reference to all the authorities, which

he intends to cite to the court; and shall, at the same time, serve on the attorney or counsel for the other party three copies thereof. Within seven days thereafter the other party shall file with the clerk sixteen printed copies of his brief and points, with a reference to all his authorities, and serve on the attorney or counsel for the moving party three printed copies thereof. If either party shall fail to serve and file his brief and points, as herein required, he shall not be heard upon the argument, and judgment may be entered against him as upon default, on application to the court on any motion day upon three days' notice.

If the moving party desires to serve an answering brief he shall file with the clerk sixteen printed copies thereof, and serve upon his opponent three printed copies, within five days after the receipt of his opponent's brief. He shall not include, in his answering brief, any matter which is not in the nature of an answer to the brief to which it purports to reply. No supplemental briefs will be allowed unless requested by the court. This rule shall not apply to appeals from non-enumerated motions. It shall apply to all cases which shall be put upon the day calendar upon and after the first day of March, 1896. Upon the argument of all cases before that time, the moving party shall furnish to the clerk sixteen copies of the case and each party shall furnish to the clerk sixteen copies of his brief. The clerk shall distribute the cases and briefs as prescribed in General Rule 43, and he shall, in addition, deliver one copy of each to the librarian of the law library in Buffalo, Rochester and Syracuse, to be bound and indexed for reference.

RULE X.

Statement to be prefixed to brief. — The moving party, in addition to the statement required in General Rule 41, shall prefix to his points a brief statement, showing when and in what court or before what officer or tribunal the action or proceeding was instituted, the relief sought, the defense or grounds of opposition thereto, the result in the court or before the officer or tribunal in which the action or proceeding was commenced, the proceedings subsequent to the first decision, and how the case was brought into this court. If any opinion written in the case has been previously reported, he shall also state where it was so reported. If any opinion has been written which has not been reported, the party whose duty it is to furnish the papers shall submit a printed copy of such opinion to the court, in the record.

RULE XI.

Indorsement on brief. — The counsel who argues the case shall indorse on his brief delivered to the judges, his name and place of residence.

RULE XII.

Exchange of cases. — No exchange of cases will be allowed unless both cases are ready for argument, and counsel intend to argue them at the same term at which the exchange is made; and when cases are exchanged, each shall occupy the proper position of the other in date, on the same and every subsequent calendar until heard. A preferred case, exchanged for one not preferred, or set down for a particular day, shall lose its preference, and no case will be called more than once during the same term, unless it shall have been reserved or postponed with the consent of the court.

RULE XIII.

Non-enumerated calendar to be disposed of at opening of term. — Argument of appeals on the non-enumerated calendar will be heard only upon the first day of a term, and the hearing of such appeals will be continued from day to day until they shall all be disposed of before the general calendar shall be taken up, but submission of appeals from the non-enumerated calendar will be received on any day during the term. Original motions in this court may be noticed for the first day of a term, or for the Friday of any subsequent week of the term. (As am'd May 29, 1912.)

RULE XIV.

Motions for re-argument and leave to appeal. — Motions for re-argument or for leave to appeal to the Court of Appeals will be heard only on notice to the adverse party, stating briefly the ground upon which a re-argument is asked, or upon which leave to appeal is desired, and such motions may be submitted upon five copies of printed or typewritten papers and briefs, stating concisely the points supposed to have been overlooked or misapprehended by the court, or the questions of law sought to be reviewed upon appeal to the Court of Appeals, with proper reference to the particular portion of the case and the authorities relied upon, with a copy of the opinion, if any, delivered by the court in deciding the case. Oral argument on such motions will not be heard, and it is unnecessary for counsel to appear on such motions. They may be submitted by mailing papers to the clerk. (As am'd Oct. 16, 1912.)

RULE XV.

Remittitur. — The remittitur to be transmitted pursuant to section 1355 of the Code shall contain a copy of the judgment or order of this court, and the record which has been filed with the clerk, and shall be sealed with the seal and signed by the clerk of this court.

RULE XVI.

Official examiners of title. — An official examiner of title, before he is licensed and admitted to practice as such, must file the bond required by Rule 3 of the Rules of the Court of Appeals relating to applications to practice as official examiners of title, approved by the presiding justice of the Appellate Division of the Supreme Court in this department. In case of the death or insolvency of either of the sureties, the official examiner of title must forthwith file a new bond with new sureties fully complying with said rule. Each applicant for a license as an official examiner of title must also produce such evidence of character and as to his standing in regard to financial transactions as the Appellate Division of this department may require.

SPECIAL RULES

(In effect January 1, 1916.)

RULE I.

New calendar for January term; day calendar. — A new calendar will be made up for the January Term. Cases not upon the printed calendar

may thereafter be noticed for argument for any day of the term, and may be added to the calendar, after the printed records have been filed, upon filing with the clerk a note of issue and proof of service of notice of argument; and will be placed upon the day calendar when reached in their regular order; but no case will be placed upon the day calendar until the briefs have been filed, without special order of the court.

RULE II.

Effect of failure to make or serve case, or serve and file points, etc. — After an appeal has been taken to this court the appeal may be dismissed on motion upon notice of three days for failure by appellant to make, or serve, his proposed case, or to procure the settlement thereof, or to print, serve and file the record, or to serve and file his points, or for any other unreasonable delay upon his part in prosecuting the appeal. If the respondent fails to serve or file his points within the time allowed therefor, the appellant may serve upon respondent a written demand that the respondent file and serve his points, and upon filing proof of service of such demand and showing that three days have elapsed since such service, and that the respondent has not served and filed his brief, the case may be placed upon the day calendar when reached in its regular order, and the respondent shall not be heard upon the argument of the appeal except by leave of the court.

Notice.

Index all records on appeal in front part of case.

The daily sessions of the court are held from 2 o'clock P. M. to 6 o'clock P. M., except Fridays only, when court sits from 10 A. M. to 1 P. M. No court on Saturdays.

The session appointed for July is for one day only, and court meets at 2 P. M., on that day, for handing down decisions, admission of attorneys, and the hearing of original motions in this court. No argument of an appeal will be heard on that day.

Counsel will be heard orally on motions to dismiss appeals, amend decisions, etc.

All stipulations, notes of issue and motion papers must be properly endorsed on the back for filing.

No stipulation reserving any of the first fifty cases on the general calendar beyond the first Friday will be honored except by order of the court. After the day calendar is made up — at 3 o'clock P. M. — stipulations in any case are too late. The clerk has then no power to leave a number off.

No case will be given a place on the calendar until the original record, settled by the trial court, has been filed with the clerk.

The full number of cases and points (16) are required, without which appeals may not be heard.

The sixteen printed copies of the case required by Rule 41 to be filed with the Clerk, must be bound in light-colored (not dark) paper.

The County Clerk's certificate, or waiver thereof under § 3301 of the Code of Civil Procedure, is a necessary part of the printed case on appeal.

Counsel whose names appear in the calendar will be notified by

telegram collect, when case is on day calendar, unless otherwise desired.

Every exhibit presented to the Court must be plainly marked with the address of counsel presenting the same, as well as the title of the cause, in order to ensure its return.

Decisions of the Court are handed on Wednesdays at 2 P. M. when the Court is in session, and on the Tuesday appointed in July.

Attorneys desiring to be notified by telegram collect, of any decision should so request the clerk.

Remittiturs are sent on the day the decision is made, or the day following, to the county clerk of the county in which the appeal arises, except in appeals from Surrogate's Court, when they are sent to the clerk of the Surrogate's Court.

Request for copies of opinions should be addressed to the clerk of the Justice writing the opinion.

Supreme Court — Special Rules of First Department.

(Amended to May, 1916.)

RULES FOR THE REGULATION OF THE TRIAL TERMS OF THE SUPREME COURT IN THE FIRST JUDICIAL DISTRICT AND TO REGULATE THE CALENDAR PRACTICE THEREIN.

RULE I.

General Calendars.—The calendar of issues of fact to be tried by jury in New York County shall consist of two separate calendars, known respectively as General Calendar No. 1 and General Calendar No. 2, which shall be made up from time to time as ordered by the Appellate Division of the Supreme Court in the First Department, and these calendars shall remain for the successive Trial Terms of the court until new calendars are prepared. There shall be placed upon Calendar No. 1, all tort actions, except actions in ejectment and replevin and to recover damages for the conversion of personal property, and upon Calendar No. 2 all actions not on Calendar No. 1. A note of issue must specify, in addition to the particulars required by section 977 of the Code of Civil Procedure, the number of the calendar on which the cause is to be placed as above provided, and the clerk shall not receive a note of issue unless it complies with this provision. New causes that have been regularly noticed for trial and a note of issue duly filed after the making up of the general calendars shall be put at the foot of the proper calendar according to date of issue. A cause on either of said general calendars may be reserved generally and so marked by the clerk at any time if the parties file a consent to that effect. All motions or applications in regard to the calendars, except as provided by Rules 3, 5, 6 and 7, must be heard by or made to the justice holding Part III in regard to the Calendar No. 1, and the justice holding Part XIV in regard to Calendar No. 2.

At least ten days before the first Monday of a Trial Term the calendar clerk of the Trial Terms shall prepare a Trial Calendar No. 1, containing so many of the pending causes on General Calendar No. 1 not reserved generally as the justice holding Part III shall direct, and a Trial Calendar No. 2 containing so many of the pending causes on General Calendar No. 2 not reserved generally as the

justice holding Part XIV shall direct. Such Trial Calendars shall be posted in said clerk's office and published in the New York Law Journal on Saturday, Monday and Tuesday. Any party to a cause appearing on such Trial Calendars may serve notice on the calendar clerk and on the attorneys for the other parties to the cause before four o'clock Tuesday afternoon to the effect that the cause is to be marked ready for trial, and, if no motion for postponement is made as hereinafter provided, the cause shall be marked ready by the clerk; but if no party shall serve such notice the cause shall be marked reserved generally and restored to the general calendar. If, however, a party desires to apply to the court for a postponement, or to have the cause marked reserved generally, he shall serve upon the attorneys for the other parties not later than twelve o'clock on Wednesday noon written notice specifying the grounds of the application for postponement and also copies of any affidavits and exhibits upon which the motion will be made, which notice, affidavits and exhibits, with proof of service, must be filed with the calendar clerk before four o'clock Wednesday afternoon. A party intending to oppose such motion must serve any affidavits and exhibits in opposition and file the same with proof of service not later than four o'clock Thursday afternoon. The justices holding Parts III and XIV, respectively, shall hear and determine all motions for postponement of causes on their several calendars, and, provided the papers are indorsed "for argument," counsel may briefly argue such motions, which shall be heard and disposed of on Friday so far as practicable. The calendar clerk shall thereupon post in his office and publish on Saturday and Monday in the Law Journal the list of causes marked ready for trial, or such part thereof as the said justices may respectively direct.

RULE II.

Reserved causes; motions in respect to calendar.—Causes marked reserved generally, if younger issues have been reached in regular order, and causes in which new trials have been ordered, may be placed on the appropriate Trial Calendar on filing a consent with the calendar clerk; or a party may apply to the justice holding either Part III or XIV of the Trial Terms, as the case may require upon two days' notice for an order placing such a cause upon the Trial Calendar or upon a Day Calendar as the court may direct.

Annually, during the month of June, or at such other time or times as the Appellate Division in the First Department may direct, a call shall be made of all causes on each of the General Calendars marked "reserved generally." The Part in which such call shall

be made and the justice to make the same shall be designated by the Appellate Division, and said justice shall have power to adjourn the call from day to day until it is completed. A list of the causes to be so called shall be published in the Law Journal at least eight days before the call.

If, upon such call, it shall appear that the plaintiff has unreasonably neglected to proceed in the action or that younger issues have been tried in their regular order, the defendant or one or more defendants in the action may move to dismiss the complaint as provided for in Rule 36 of the General Rules of Practice, provided notice of motion to that effect and any affidavits or exhibits be served upon the plaintiff five days before such call. Upon such motion, the court may make an order dismissing the complaint, or if it is made to appear that failure of the plaintiff to bring the action to trial has not been unreasonable, the court may place the cause at the foot of the appropriate Trial Calendar, or otherwise dispose of it as justice may require and on such terms as may be just. If upon such call any party to a cause in which no such motion is made shall answer ready, or shall have theretofore filed with the calendar clerk a notice so stating, the cause shall thereupon be marked ready for trial and placed at the foot of the appropriate Trial Calendar unless otherwise directed by the court. If, however, upon such call none of the parties to the cause appear or answer ready or file notice as aforesaid, then the same shall be stricken from the General Calendar and subsequently restored only upon service of a new notice of trial and filing of a new note of issue, whereupon it shall be placed upon the appropriate General Calendar as of the date when restored and not as of the date of original issue.

RULE III.

Preferred causes.—A party claiming to be entitled to a preference under section 791 of the Code of Civil Procedure may apply therefor to the court at Trial Term, Part II, in the manner prescribed by section 793. If the application for a preference be granted, the court shall direct the cause to be placed upon an appropriate Day Calendar for a day certain for trial, and called after the causes then upon such Day Calendar marked ready. If the party who has moved for the preference shall not be ready to proceed with the trial when the cause is called for trial, the court, in its discretion, may allow an adjournment, or send the cause to the foot of the Trial Calendar, or direct a dismissal or inquest, or otherwise dispose of the cause as justice may require.

The justices holding Parts III and XIV in charge of Calendars Nos. 1 and 2, respectively, may, on application of any party to a cause brought by or against a receiver of a corporation and on five days' notice to the other party, direct that such cause be granted a preference over older issues and placed on the Trial Calendar or on a Day Calendar for trial as it may direct, although no notice of application for a preference may have been served with the notice of trial as provided in section 793 of the Code of Civil Procedure.

RULE IV.

Trial Terms; number of; time of holding; time of opening; what causes tried at, respectively. — There shall be twenty Trial Terms of the Supreme Court in New York County, to be known respectively as Trial Terms Parts I to XX, inclusive. Each of said terms shall commence on the first Monday of January, February, March, April, May, June, October, November and December in each year, and shall continue to and until the Friday preceding the first Monday of the succeeding month, or until the term shall be adjourned without day.

The Trial Terms shall open at 10.30 A. M. on each trial day during the term, except on Mondays, when they shall open at 10.15 A. M., and shall continue in session until 5 P. M. Part I shall be the Criminal Term of the Supreme Court, and shall be held in the Criminal Court Building or in the County Court House in the County of New York. Part II shall be the Trial Term for the disposition of the Special Calendar under Rule 5. In Parts III to XIII, inclusive, shall be tried causes from General Calendar No. 1. In Parts XIV to XVIII, inclusive, shall be tried causes from General Calendar No. 2. In Parts XIX and XX shall be tried such causes from Calendars Nos. 1 and 2 as shall from time to time be ordered by the Appellate Division, or as may be sent from other Parts. Whenever there shall not be sufficient causes on any Day Calendar to occupy the time of the court, causes shall be sent to such Part or Parts for trial from the other Day Calendars by the justices thereof or by the justices holding Parts III and XIV. (As am'd November 11, 1914.)

RULE V.*

Special calendar; short cause calendar. — *Subd. 1.* — There shall be a Special Calendar, on which shall be placed for trial all ques-

* The following rule was adopted by the Justices of the Appellate Division of the First Department on March 2, 1916:

All causes in the Supreme Court in Bronx County that come within the purview of Rule V of the Special Rules of the Trial Term of the Supreme Court, First Judicial District, may be moved for preference at Trial Term, Part II, of said Supreme Court in Bronx County, on two days' notice. The papers upon which such application is made and the answering affidavits, if any, must be filed with the calendar clerk before 12 noon of the day for which the application is noticed. No oral argument will be heard upon such application unless ordered by the justice holding Part II.

The disposition of such applications will be published in the Law Journal. Causes advanced to the Special Calendar will be heard on the Fridays during the term at Trial Term, Part II.

tions of fact ordered or directed to be tried by a jury, all issues and questions of fact in special proceedings, and all issues and questions of fact which have been stated for trial in pursuance of §§ 970 and 971 of the Code of Civil Procedure, and all controverted questions of fact of which any party has a constitutional right of trial by jury, and in any proceedings for the probate of a will in which any controverted questions of fact arise which a Surrogate of the County of New York shall direct to be tried at a Trial Term of the Supreme Court to be held within the County of New York under § 2538 of the Code of Civil Procedure. Such calendar shall be called and the causes thereon tried and disposed of at Part II.

Subd. 2. In an action wherein the plaintiff seeks to recover a debt or liquidated demand upon a bond or other obligation for the payment of a specific sum of money, or upon a bond or undertaking on appeal, or upon a negotiable instrument, either party may, after the cause has been placed upon the General Calendar, upon two days' notice to the opposing party, apply to the justice holding Part II for an order placing said cause upon the Special Calendar for trial, and the cause shall thereupon be tried and disposed of at Part II.

Subd. 3. In an action wherein the plaintiff seeks to recover upon an account stated, or for wages, salary or compensation for services, or upon a policy of insurance, or for rent or hire of real or personal property, or for money had and received, or for money loaned, or for goods sold and delivered, or on a statute where the sum sought to be recovered is a sum of money other than a penalty, or on a guaranty, the plaintiff may, at the first term at which the cause shall have been placed upon the General Calendar, upon five days' notice to the defendant, and upon competent proof by affidavit of the facts upon which the cause of action is based, apply to the justice holding Part II for an order placing said cause upon the Special Calendar for trial. Copies of the affidavits and exhibits, if any, upon which the application is based, must be served with the notice of the application. If upon the affidavits so submitted and the affidavits of the opposing party the court shall be satisfied that there is no substantial defence to the action, or that the action was not interposed in good faith, or was interposed for the purpose of delay, the court may place the cause upon the Special Calendar in Part II. The court may, in its discretion, grant or deny the application, with or without costs, or upon terms, such as admitting facts not actually controverted, consenting to the examination before trial of a party or witnesses, producing books, papers or documents or giving security to secure the plaintiff in the event of final judgment being in his favor. The papers upon which such application shall be made and the answering affidavits, if any, must be filed with the calendar clerk before 12 o'clock noon of the day for which the application is noticed, and no oral argument will be heard upon such application unless ordered by the justice holding Part II.

Subd. 4. In an action on contract, express or implied, other than a contract to marry, either party may apply in Part II on two days' notice to the adverse party for an order placing the cause upon the Special Calendar. Upon such application, if it appears by affidavit and the pleadings to the satisfaction of the justice holding Part II

that the trial of the action will not occupy more than two hours, and that no good reason exists why the action should not be promptly tried, he may direct the cause to be placed upon the Special Calendar in Part II, and the cause shall thereupon be disposed of in its regular order on such calendar. The papers upon which the application is made and the answering affidavits, if any, must be filed with the calendar clerk before 12 o'clock upon the day for which the application is noticed, and no oral argument will be heard upon such application unless ordered by the justice holding Part II.

Sub. 5. All causes and all questions and issues of fact ordered on the Special Calendar shall be placed thereon in the order of filing with the calendar clerk of the order directing the cause to be so placed, or of the order or direction for the trial by jury, or, of the order stating the issues or questions of fact to be tried by jury, and shall be called and tried in that order, unless postponed for good cause shown by affidavit to the satisfaction of the justice holding Part II. If the trial of any cause which is placed upon the Special Calendar upon the ground that it will not occupy more than two hours shall nevertheless actually occupy more than that time, the court may, in its discretion, stop the trial and send the cause to the foot of the appropriate General Calendar. If at any time there shall be more causes upon the Special Calendar than can be promptly tried and disposed of in Part II the justice holding said Part may send said causes, or any of them, to Part XIV, where they shall be placed upon the Day Calendar and tried and disposed of in like manner as the other causes on the Day Calendar in that part. (As am'd January 18, 1915.)

RULE VI.

Day calendars.—From the causes marked ready, the calendar clerk shall, on the Friday next preceding the opening of each Trial Term, prepare and post in his office as many Day Calendars, each consisting of at least twenty ready causes, as the justices holding Parts III and XIV may direct as to their respective calendars, and shall cause the same to be published in the Law Journal on Saturday and Monday. On the three following Fridays said calendar clerk shall likewise prepare as many similar day calendars as the justices holding Parts III and XIV, respectively, may direct, and cause the same to be posted in his office and published in the Law Journal on Saturday and Monday. In preparing such day calendars, said clerk shall retain on each Day Calendar the causes thereon not yet disposed of, and shall add thereto a sufficient number of causes to make the number twenty ready

causes. On the following Monday at 10:15 A. M. each justice holding Trial Term shall call the Day Calendar.

Counsel having more than one cause on a Trial Calendar marked ready may file a notice with said calendar clerk requesting that all his causes be placed in one Part, and the justice holding Part III or XIV may, in his discretion, grant such request. The name of the counsel who is to try said causes shall be specified in the request.

No causes on any Day Calendar shall be adjourned unless for good cause shown and arising after the making up of such Day Calendar. Parties may, however, consent that any cause on the Day Calendar be marked reserved generally, or be restored to the Trial Calendar, or, if the justice in such Part shall so direct, adjourned to a day certain in the same term. The causes on each of the Day Calendars shall remain thereon from day to day until tried or otherwise disposed of, and shall be tried in the order in which they appear on the Day Calendars unless the justice holding such Part shall otherwise direct. The justice holding Part III or XIV shall have power to transfer causes from one Trial Part to another Trial Part appertaining to the calendar in his charge for any reason satisfactory to him. At the end of each Trial Term all causes remaining on the Day Calendars shall be placed at the head of the Trial Calendar, and thereupon reassigned to the new Day Calendars.

Whenever a jury has disagreed, or for any other reason there has been a mistrial, the cause may be restored to the Trial Calendar, or to the Day Calendar in the same Part, or otherwise, as the justice holding such Part or holding Part III or XIV may direct.

If it shall appear by affidavit to the satisfaction of the court that counsel who is to try any cause upon a Day Calendar expects to argue a cause upon a Day Calendar of the Supreme Court of the United States, or the Court of Appeals of the State of New York, or the United States Circuit Court of Appeals, or any Appellate Division of the Supreme Court, or is actually engaged in the trial of a cause in a Federal or State court of record, except the Municipal Court, sitting in the County of New York, Bronx, Kings, Queens, Nassau or Richmond, the cause shall be adjourned until such argument or trial is concluded, unless the trial in which the counsel is engaged is likely to be protracted. But a cause on the Day Calendar shall not be adjourned on account of the engagement of counsel for more than three days except by the court or upon the consent of all the parties to the cause. Not more than two causes shall be held ready on one Trial Calendar for one counsel in addition to the cause in which he is engaged unless otherwise ordered by the court. In any such case the counsel who is to try the causes must be designated

on the call of the Day Calendar on Monday morning. (As am'd May 2, 1916.)

RULE VII.

Fines imposed on delinquent jurors. — An order directing a delinquent juror to show cause why the payment of a fine should not be enforced must be granted by and made returnable before the justice by whom said fine is imposed and made returnable at the Trial Term to which said justice is assigned upon such day and at such time as he shall designate.

Where a justice by whom a fine was imposed has ceased to be a member of the court, or has been designated as a member of the Appellate Division or the Appellate Term, or has been assigned to hold Special Term, or is absent or unable for any reason to hear or determine the matter, the order directing the delinquent juror to show cause in such case must be granted by and made returnable before and heard and determined by the justice assigned to hold Trial Term Part III upon such day of the term and at such time as he shall designate.

These rules to take effect May 1st, 1912.

Dated New York, April 10th, 1912.

RULES FOR THE REGULATION OF THE SPECIAL TERMS OF THE SUPREME COURT IN THE FIRST JUDICIAL DISTRICT, AND ESTABLISHING THE CALENDAR PRACTICE THEREIN.

RULE I.

Special Term for litigated motions; when held. — There shall be a Special Term of the Supreme Court for the hearing of litigated motions to commence on the first Monday of each month and to continue until the Friday preceding the first Monday of the succeeding month, which term shall be held every day, except Saturdays, Sundays and legal holidays. The court shall open at 10.30 o'clock in the morning, and shall continue until all business before the court has been disposed of. This Special Term shall be known as Special Term, Part I.

RULE II.

Calendar of motions; notes of issue therefor; time allowed for argument; what litigated motions heard at Special Term, Part I, and when. — Motions may be noticed for any day during the term. The clerk of Special Term, Part I, shall make up a calendar for each day. The order to show cause or notice of motion, with proof of service thereof, must be filed with the clerk before the date on which the motion is noticed to be heard, except where an order to show cause is granted returnable in less than two days, when the clerk at any time before the day for hearing may place the motion on the calendar, or the justice assigned to said part of the court may place the motion on the calendar on the day upon which the order to show cause is returnable. This calendar will be called at the opening of the court and no motion will be heard that is not upon the calendar. On the hearing of a motion upon such calendar but one counsel on each side will be heard, and not more than fifteen minutes will be allowed to each counsel unless the court shall otherwise order. Application for final judgment where an interlocutory judgment has been entered and an account has been taken, or other proceeding had before a referee, or for a final judgment in an action for divorce under section 1774 of the Code of Civil Procedure, motions for a new trial on the ground of surprise or newly discovered evidence, motions to confirm a referee's report and for final judgment in an action or proceeding in which an issue of fact has been tried by a jury or by a referee, where application to the court for final judgment or final order is necessary, applications for

the appointment of commissioners or for a final order or judgment in a proceeding to condemn real estate for public use, motions for judgment upon the pleadings under section 547 of the Code of Civil Procedure, trial of an issue of law, brought on and tried by the court as a contested motion under section 976 of the Code of Civil Procedure, may be noticed for and made at Part I of the Special Term for the hearing of litigated motions upon any day of the July, August and September terms, or at any other time when Part III of the Special Term is not in session. The justice assigned to Part I of the Special Term, if he does not deem it important that such application should be heard during the time when Part III is not in session, may adjourn the same to the next term of Special Term, Part III. (As am'd February 1, 1914.)

RULE III.

Notice to creditors in proceedings to settle the accounts of assignees for benefit of creditors or of receivers of corporations. — In all actions or proceedings in which the accounts of an assignee for the benefit of creditors, or of a receiver appointed in an action or in a proceeding for the dissolution of a corporation, are presented for settlement or to be passed upon by the court, a notice, or a copy of an advertisement, requiring the creditors to present their claims to a referee, must be mailed to each creditor whose name appears on the books of the assignor or corporation, with the postage thereon prepaid, at least twenty days before the day specified in such notice or advertisement. Proofs of such mailing shall be required on the application for a final decree passing the accounts of the assignee or receiver, unless proof is furnished that personal service of such notice or copy of advertisement has been made upon the creditor.

RULE IV.

Special term for ex parte business; time of sessions. — There shall be a Special Term of the Supreme Court for the transaction of ex parte business, to be held on the first Monday of each month, and to continue to and including the Saturday prior to the first Monday of the following month. The court shall open at 10.30 o'clock in the morning, and shall continue in session until four o'clock in the afternoon, except Saturdays, upon which day the court may be adjourned at twelve o'clock noon, and shall be open every day in the year except Sundays and legal holidays. This Special Term shall be known as Special Term, Part II. The justice assigned to Part II shall also attend to the drawing of jurors for the Trial Terms of the Supreme Court.

RULE V.

What kinds of motions or proceedings determined at the Special Term for ex parte business. — Application for all court orders, ex parte or by consent, or where notice is not required or has been waived, must be made to Special Term, Part II. Any ex parte court order granted by any justice of the court other than the one assigned to hold Part II of the Special Term, shall not be entered by the clerk. All applications for judgment in actions where the defendant has failed to appear, or has waived notice of motion for judgment or has consented thereto, except in actions for divorce, all proceedings under the Domestic Relations Law for the adoption of children, and all proceedings under the Insanity Law for the commitment of a person alleged to be insane, shall be made to said Special Term, Part II, and shall not be made to any other court or justice. All orders for the examination of parties or witnesses in supplementary proceedings or to perpetuate testimony or for the examination of parties before trial or for the examination of witnesses under letters

rogatory or foreign commissions or in aid of an attachment, or for any other purpose, or in any proceeding (except an order to show cause or a warrant issued under section 2269 of the Code of Civil Procedure, which must be made returnable before Part I of the Special Term), shall be made returnable before the justice assigned to hold said Special Term, Part II, unless made returnable before a referee or commissioner under express statutory authority; and all writs of habeas corpus or other writs that are required by law to be returnable at a Special Term of the Supreme Court, or before a justice thereof, must be made returnable at the said Special Term, Part II, or before the justice assigned to hold the same. Any writ or order before mentioned returnable elsewhere shall, upon its return, be transferred to said Special Term, Part II, for hearing and decision. If not so transferred the writ or order shall be disregarded. In actions for absolute divorce or to annul a marriage, where no answer is interposed, a reference to take proof will not be granted. In such cases the application for judgment must be made at the Special Term, Part III, and the case placed upon the preferred calendar as hereinafter provided. Whenever the justice assigned to either Part I, Part II, or Part III of the Special Term is disqualified from hearing any application or motion that shall be brought on before him, he may send such application to such other part of the Special Term as he shall select, to be there heard and disposed of.

Proceedings under section 511 of the Consolidation Act, and all other proceedings authorized by title 5 of said act to be had before a justice holding the chambers of the court, must be heard in the said Special Term, Part II.

If a jury is demanded, the justice holding such term may continue such proceedings before the justice holding one of the Trial Terms, where a jury shall be forthwith impaneled and the question determined and the proceeding finally disposed of as required by said act. In case neither of the Trial Terms is in session, the justice assigned to the said Special Term, Part II, may impanel a jury and dispose of the proceeding as required by the said act. In case of an appeal from an order of commitment under section 63 of the Insanity Law, the justice assigned to Part II of the Special Term may send the question of the insanity of such alleged lunatic to either part of the Trial Term for trial before a jury, as required by said section. The justice trying such proceeding before a jury shall certify the verdict to the justice assigned to Part II of the Special Term, who shall make the order as required by such section.

In an application for a commitment under section 60 of the Insanity Law (chapter 545 of the Laws of 1896) it must be shown by the petition or by an accompanying affidavit whether or not the person alleged to be insane is confined on a criminal charge or on bail pending the determination of a criminal charge, or in official custody for the purpose of ascertaining his condition after a criminal charge has been made against him. If a criminal charge is pending against the person thus alleged to be insane, two days' notice of the time and place of presenting the application to the court or a justice thereof must be given to the district attorney.

All applications to the court in the summary proceedings authorized by sections 57 and 74 of the Public Service Commissions Law (chap. 429 of the Laws of 1907) shall be made at Part II of the Special Term, which court shall grant the necessary final order or judgment if the corporation proceeded against fails to answer within the time allowed by the court. If an answer is interposed, the justice holding Part II of the Special Term shall forthwith transfer the action or proceeding to Special Term, Part VI, which court shall immediately inquire into the facts and circumstances and grant the proper judgment or order. (As am'd December 17, 1907.)

RULE VI.

Regulations applicable to insolvent assignments. — The following regulations will apply to all the insolvent assignments for the benefit of creditors and applications to the court thereunder:

Subd. 1. Duties of the clerk. — The clerk, in addition to the books now kept by him, shall provide a register and docket.

In the register shall be entered in full every decree and final order made in the proceedings according to date, and the docket shall contain a brief memorandum of each day's proceedings according to their respective titles.

The register and docket shall be, at all times during court hours, open for public inspection.

Subd. 2. Each petition or order or decree filed shall be indorsed with the day and date of such filing, and the papers in each case shall be kept in a file by themselves.

Subd. 3. No paper shall be permitted to be taken off the files of the court for any purpose, except on an order of the court.

Subd. 4. Every paper filed shall have a brief memorandum indorsed on the outside cover, showing the nature thereof.

Subd. 5. Copies of any and all papers in these proceedings shall be furnished to any person applying for same upon the payment of the legal fees.

Subd. 6. Process. — All process, citations, summons and subpœnas shall issue out of the court under the seal thereof and be tested by the clerk.

Subd. 7. Appearances. — Any party may appear in these proceedings, either in person or by attorney. If by attorney the name of such attorney, with his place of business and residence, shall be indorsed on each and every paper filed by him, and his name shall be entered in the docket.

Subd. 8. Schedules. — The schedule of liabilities and assets required to be filed by the assignor or assignee shall fully and fairly state the nominal and actual value of the assets, and the cause for the difference, and a separate affidavit will be required which shall fully explain the cause of such difference. If required the affidavits of disinterested experts as to such value must be furnished.

Subd. 9. Signing of. — Where there may be more than one sheet of paper necessary to contain the schedules, each page shall be signed by the person or persons verifying the same. The sheets of paper on which the schedules are written shall be securely fastened before the filing thereof, and shall be indorsed with the full name of the assignor and assignee, and when filed by an attorney, shall also be indorsed with his name and business address.

Subd. 10. Filing by assignee. — Should the schedules be filed by the assignee there must be a full affidavit made by such assignee and some disinterested expert, showing the nature and value of the property assigned.

Subd. 11. Name and residence. — The name, residence, occupation and place of business of the assignor, and name and place of business of the assignee, may be incorporated in the affidavit or annexed to the schedules.

Subd. 12. Recapitulation. — There shall be a recapitulation at the end of the schedules as follows:

Debts and liabilities amount to $——: assets nominally worth $——: assets actually worth $——.

Subd. 13. Contingent. — Contingent liabilities shall appear on a separate sheet of paper.

Subd. 14. Amendments of. — Application to amend the schedules shall be made by verified petition, in which the amendment

sought to be made shall appear in full, and such amendment shall be verified in the same manner as the original schedules were verified.

Subd. 15. Bond of assignee. — The bond shall be joint and several in form, and must be accompanied by the affidavit prescribed by section 812 of the Code of Civil Procedure, and also by the affidavit of each surety, setting forth his business and where it is carried on, the amount of his debts and liabilities, and the description and value of property, real or personal, owned by him, so that it may appear that he is worth the amount in which he is required to justify over and above his debts and liabilities.

Subd. 16. Justification of sureties. — The court may in its discretion require any surety to appear and justify.

Subd. 17. At least one of such sureties shall be a freeholder. If the penalty of the bond be twenty thousand dollars or over, it may be executed by two sureties justifying each in that sum, or by more than two sureties, the amount of whose justification united is double the penalty of the bond.

Subd. 18. Provisional. — The affidavit upon which application is made for leave to file a provisional bond, must show fully and fairly the nature and extent of the property assigned, and good and sufficient reasons must be shown why the schedules cannot be filed, and it must appear satisfactory to the court that a necessity exists for the filing of such provisional bond, and for the purposes of this act the affidavits so filed shall be deemed a schedule of the assigned property until such time as the regular schedules shall be filed.

Upon the filing of the schedules the amount of the bond will be determined finally, and should the provisional bond already filed be deemed sufficient, an order will be granted making such bond as approved the final bond.

Subd. 19. Assignee. — Every assignee shall keep full, exact and regular books of account of all receipts, payments and expenditures of moneys by him, which said books shall always, during business hours, be open to the inspection of any person interested in the trust estate.

Subd. 20. — In making sales at auction of personal property the assignee shall give at least ten days' notice of the time and place of the sale and of the articles to be sold by advertisement in one or more newspapers, and he shall give notice of the sale at auction of any real estate at least twenty days before such sale. Upon such sales the assignee shall sell by printed catalogue in parcels, and shall file a copy of such catalogue, with the prices obtained for the goods sold, with his final account.

Subd. 21. — When any notice is served on the creditors of the insolvent pursuant to the provision of the statute or these rules, by mail, every envelope containing such notice shall have upon it a direction to the postmaster at the place to which it is sent to return the same to the sender within ten days unless called for. Upon every application made to the court upon such service an affidavit shall be presented showing whether any such notices have been returned.

Subd. 22. — Upon an application made for a general citation the assignee shall file with his petition his account with the vouchers.

Subd. 23. — The assignee must file an account in all cases which shall be referred for examination.

Discharge. — No discharge shall be granted an assignee who has not advertised for claims pursuant to section 4 of the statute and the 30th subdivision of this rule.

No discharge can be granted an assignee and his sureties in any case, whether the creditors have been paid or have released or have entered into composition or not, except in a regular proceeding for an accounting, under section 20 of the act, commenced by petition for citation and citation thereon to all persons interested in the estate.

Subd. 24. Substituted assignee. — Whenever an assignee shall have been removed, either on his own petition or on the petition of any person interested in the estate, and another person appointed as assignee in his place and stead, a certified copy of the order made on such petition shall be filed and recorded in the clerk's office of the county wherein the original assignment was recorded, and the clerk of the county shall make such suitable entry on the margin of the record of the original assignment as will show the appointment of such substituted assignee, and the said certified copy of the order shall be attached to the original assignment.

Subd. 25. Account of assignee. — The account of the assignee shall be in the nature of a debit and credit statement; he shall debit himself with the assets as shown in the schedules as filed and credit himself with any decrease as well as expenses.

Subd. 26. — The statement of expenditures shall be full and complete, and the vouchers for all payments shall be attached to the account.

Subd. 27. — The affirmative on the accounting shall be with the assignee, and objections to the account may be presented to the referee in writing, or be brought out on a cross-examination, and in the latter case they must be specifically taken and entered in the minutes.

Subd. 28. — The testimony taken shall be signed by the several witnesses, and attached to and filed with a report of the referee.

Subd. 29. Report of referee. — The report of the referee shall show all the jurisdictional facts necessary to confer power on the court, such as a proper execution and acknowledgment of the assignment, the recording of the same, the filing of the schedules and bond, the advertising for creditors, the issuing of the citation, the presenting of the account, and, when any items may be disallowed in the account of the assignee, the same shall be fully set out in the report.

Subd. 30. Notice to present claims. — A copy of the notice of advertisement requiring creditors to present their claims must be mailed to each creditor whose name appears on the books of the assignor, with the postage thereon prepaid, at least thirty days before the days specified in such advertisement, and proof of such mailing must be required on the application for a final decree, unless personal service thereof is made upon such creditors.

Subd. 31. — The decision of the referee after the trial of a disputed claim, under section 26 of the General Assignment Act, shall be filed with the clerk of the court and a copy served on the defeated party. The court shall, on application of either party, confirm the said report, and the decision of the referee shall be reviewed only by appeal from the order confirming the report to the Appellate Division.

RULE VII.

Special Terms for trial of issues of law and of fact; when held. — There shall be six Special Terms of the Supreme Court in the County of New York for the trial of issues of law and issues of fact triable by the court, and for the hearing and decision of other matters and special proceedings not otherwise provided for, to be known re-

spectively as Parts III, IV, V, VI, VII and VIII. Each term shall commence on the first Monday of each month and shall continue until the Friday preceding the first Monday of the succeeding month. (As am'd November 16, 1914.)

RULE VIII.

General calendar of issues of fact triable by court; special calendar for tax assessment cases; special preferred calendar; special calendar of issues of law; what causes placed on these calendars; judgments in divorce and annulment cases. — A General Calendar of all the issues of fact triable by the court without a jury in the County of New York shall be made from time to time as shall be ordered by the Appellate Division of the Supreme Court in the First Department. Such calendar shall continue to be the General Calendar for every successive Special Term until a new General Calendar is ordered as aforesaid. New cases, as they are noticed for trial, shall be placed at the foot of this General Calendar upon filing a note of issue as required by the Code of Civil Procedure. A motion to correct this General Calendar, or to add to it any cases which had theretofore been upon the calendar of the Superior Court or Court of Common Pleas, may be made on two days' notice to the opposing party at Part III of the Special Term on the call of any Friday Calendar.

There shall also be made up a Special Calendar upon which shall be placed all proceedings to review assessments for the taxation of real and personal property in the County of New York which are now pending or which shall hereafter be brought for that purpose. There shall also be made up a Special Calendar upon which shall be placed all proceedings to review the assessment for taxation of special franchises or to enforce the payment of taxes based thereon or proceedings to review the assessment thereof under section 46 of the Tax Law (chap. 62 of the Laws of 1909). These Special Calendars shall be called and disposed of in Part VI of the Special Term. There shall also be made up a Special Calendar upon which shall be placed all issues of law now at issue, and upon which shall be placed, at the foot thereof, new issues of law hereafter noticed for trial. There shall also be made up a Special Calendar which shall be known as the Preferred Calendar, upon which shall be placed all undefended actions for divorce or for annulment of marriage or for a separation; all actions entitled under the Code or the General or Special Rules of Practice to a preference; all applications for judgment in actions where issues have been framed and sent to a jury for trial; all applications for final judgment where an interlocutory judgment has been entered and an account has been taken or other

proceedings had before a referee; all motions for a new trial upon exceptions or on the ground of surprise or newly discovered evidence; and exceptions to and motions to confirm a referee's report in special proceedings, including surplus money proceedings, and in actions in which an issue of fact has been tried by a referee where application to the court for final judgment or a final order is necessary; all applications for the appointment of commissioners, for a final order or final judgment in proceedings to condemn real estate for public use; all applications for final order in certiorari proceedings or proceedings where an alternative writ of mandamus has been issued; all applications for judgment upon the pleadings under section 547 of the Code of Civil Procedure, and all trials of an issue of law brought on as a contested motion under section 976 of the Code of Civil Procedure. The Special Preferred Calendar and the Special Calendar of issues of law herein provided for shall be called and disposed of in Part III of the Special Term; provided, however, that the justice assigned to Part III may from time to time assign preferred cases and issues of law from such calendars to the other parts of the Special or Trial Terms for hearing and decision.

Applications for final judgment in actions to annul a marriage or for a divorce shall be made at Special Term, Part III, upon the judgment roll, a certificate of the county clerk that no order has been entered in the action since the entry of the interlocutory judgment, or, if any such order or orders have been entered, that copies thereof are annexed to his certificate and proof by affidavit that no application has been made for an order to the knowledge of the party making application or his attorney, except where an order has been granted and a certified copy of such order is annexed to the certificate of the county clerk. Where in such an action a party other than the party making the application has appeared in the action, five days' notice of such application, with the papers upon which the same was made and a copy of the proposed final judgment, shall be served upon the attorney who has appeared in the action. In a proceeding for the revocation of a liquor tax certificate, where the issue has been joined, the proceeding shall be placed upon the Preferred Calendar called in Special Term, Part III, and disposed of as other cases upon the said calendar. In case, however, that issue is joined in such a proceeding too late to place it on the calendar of the June Special Term in any year, it may be brought on by either party during July, August or September, at Special Term, Part II, and there heard and determined. In case a proceeding is not so brought on in Part II as hereinbefore provided before the first Monday in October, it shall be placed upon the Preferred Calendar to be called

at Special Term, Part III, for the October term. (As am'd December 17, 1909, February 1, 1914 and November 11, 1914.)

RULE IX.

Calendar of causes from general calendar for trial at Special Term; when and where called and tried; when cause on day calendar will be passed; effect of engagements of counsel. — The clerk of Part III of the Special Term, with the assistance of the special deputy clerk assigned to such part and of the clerk of Part IV, shall each week make up a calendar of causes from the general calendar for trial at Special Term, which calendar shall be published at least two days before the same is called. This calendar shall be called by the justice assigned to the Special Term, Part III, on Friday of each week at 2 o'clock P. M., unless another day is specifically fixed by him to call such calendar. Causes on such calendar may be set down for trial on any day in the week following. In case it should appear, upon the call of the calendar on Friday, that the number of causes set down for trial on the following week will not be sufficient to occupy the available time of all the Special Terms of the court assigned to the trial of equity causes, the justice of the Supreme Court assigned to the Special Term, Part III, shall order a calendar of causes from the general calendar to be made up and to be called upon Wednesday morning following at 10 o'clock. Upon the call of such calendar, causes may be set down for any day of the week in which the calendar is so called or for the succeeding week. The said clerks shall make up a day calendar for each day from the General Special Term calendar of the court, upon which shall be placed all the causes set down for that day or remaining undisposed of from previous days, which day calendar shall be called in Part III of the Special Term at 10.15 A. M. of each day, and causes therefrom shall be assigned to the several parts of the Special Term (except Part VI) for trial. In case Part VI shall not have business enough to occupy it during court hours, causes from Part III shall be sent to it for trial.

When a cause thus set down on the call of the calendar on any Friday or Wednesday for trial appears upon the day calendar, it must be tried or go to the foot of the general calendar, unless it appears by affidavit to the satisfaction of the court calling the day calendar that, in consequence of the happening of any event since the cause was so set down for trial, the trial cannot, with justice to one of the parties, proceed. The court may then by order set the cause down for trial on another day in the term or place the cause on the Friday calendar.

If it shall appear by affidavit to the satisfaction of the court that counsel who is to try any cause upon a day calendar expects to argue a cause upon a day calendar of the Supreme Court of the United States, or the Court of Appeals of the State of New York, or the United States Circuit Court of Appeals, or any Appellate Division

of the Supreme Court, or is actually engaged in the trial of a cause in a Federal or State court of record, except the Municipal Court, sitting in the County of New York, Bronx, Kings, Queens, Nassau or Richmond, the cause shall be adjourned until such argument or trial is concluded, unless the trial in which the counsel is engaged is likely to be protracted. In no other event shall a cause upon the day calendar be passed for the day. (As am'd May 2, 1916.)

RULE X.

Length of stay for engagements of counsel; how many causes held ready for one counsel on day calendar. — In no event shall a cause on the day calendar be passed from day to day on account of the engagement of counsel for more than three days.

Not more than two causes shall be held ready on the day calendar for one counsel in addition to the cause in which he is engaged, and in all causes the counsel who is to try the same must be designated, if required by the court, on the call of the day calendar.

RULE XI.

Actions for foreclosure of mortgages or mechanics' liens may be placed on preferred calendar. — In all actions brought for the foreclosure of a mortgage or for the foreclosure of mechanics' liens either party may apply to the Special Term, Part III, upon notice of two days to the adverse party to have the case placed upon the preferred calendar, to be called in Part III of the Special Term, and if it shall appear to the court upon such application that the trial will not be a protracted one, or that for any special reason the case should be promptly disposed of, it shall be placed upon the preferred calendar for trial.

RULE XII.

Order to place causes on preferred calendar. — In all actions in which a preference is given by express provision of law, or by the General Rules of Practice or by special rules, the party entitled to such preference may, upon two days' notice, apply to Special Term, Part III, for an order placing the cause upon the preferred calendar. In case such preference is granted, the case shall be placed upon the preferred calendar as of the date when the motion was made, and shall be called in its order.

RULE XIII.

Duration of Special Term. — No Special Term shall be continued beyond the Friday preceding the commencement of a new term, except for the purpose of completing a trial already commenced during the term, in which case immediately upon the completion of the trial, the court shall adjourn for the term.

RULE XIV.

Regulating the procedure upon applications for naturalization in the First Judicial District. — All applications of aliens to be admitted to become citizens of the United States must be heard and final action had thereon at Part II of the Special Term. Such hearing shall be had at 2 o'clock P. M. of each day of each week during the year, which days are hereby designated as the stated terms of the court for such applications. The application which is required by chapter 927 of the Laws of 1895 to be filed with the clerk of the court shall be so filed with the assistant clerk of such Special Term assigned to that branch of the business. Such application shall specify the stated day (more than fourteen days thereafter) when such application will be brought on for hearing and final action.

The assistant clerk assigned to naturalization business shall make up a calendar of such applications for each of said stated days, upon which he will place all such applications, in the order of filing, for the days specified in the applications. The calendar will be called at 2 o'clock in the afternoon upon each stated day. The hearing upon such applications shall be had upon the call of the calendar, and the testimony of the applicant and the witnesses on each application shall be thereupon taken in open court. Such testimony shall be taken down by the stenographer assigned to the branch of the court, and shall be written out and filed with the application. If the applicant fail to appear upon the call of the calendar the application will be dismissed, without prejudice to a fresh application. The special deputy to the Clerk of the City and County of New York, in Part VIII of the Special Term, is hereby directed at all times, until a justice is assigned to hold said part, to act as an additional assistant to the clerk assigned to naturalization business, and to devote his entire time to the duties of what is known as the Naturalization Bureau, under the general direction of the special deputy in Part II of the Special Term and of the assistant to such special deputy in said Naturalization Bureau. (As am'd June 9, 1911.)

RULE XV.

Sales of real estate upon a judgment or order; diagram to be published; notice of liens and charges. — All sales of real estate, or interest or estate therein made in pursuance of any judgment, decree or order, or by an officer of the court under its direction must be made as directed by section 1678 of the Code, and notice of such sale must be given as prescribed in that section. The ref-

eree or officer making such a sale shall cause to be published with the notice of sale a diagram of the property to be sold, or of which an interest therein is to be sold, showing the street or avenue upon which such property is located, its street or avenue number, if any, and specifying the number of feet to the nearest cross street or avenue. Where such sale is made to satisfy any lien or charge upon the real property sold, the approximate amount of such lien or charge shall be stated in a note annexed to such notice of sale, and where there are taxes, assessments or other liens upon the said property which are to be allowed to the purchaser out of the purchase money, or which are to be paid by the referee, the referee or officer making such sale shall also state in a note annexed to such notice of sale the approximate amount of such charge or lien. An unintentional error, however, in such diagram, or in the amount of the lien or charge for which the property shall be sold, or the amount of such taxes or other lien to be allowed to the purchaser upon the sale, shall not invalidate the sale, nor authorize the court to relieve the purchaser or order a new sale.

RULE XVI.

Official examiners of title. — A. An official examiner of title, before he is licensed and admitted to practice as such, must file the bond required by Rule III of the Rules of the Court of Appeals relating to applications to practice as official examiners of title, approved by the Presiding Justice of the Appellate Division of the Supreme Court in this department. All bonds executed by individual sureties must have annexed thereto an affidavit of each surety stating his age and residence, with the street and number, and specifically stating the property owned by the surety, with a brief description thereof. and its value and the liens or incumbrances thereon, with a description of such liens or incumbrances, and the business, if any, of the surety, and stating the amount of his indebtedness, whether there are any existing judgments against him, and the amount of his property over and above such indebtedness. In case of the death of a surety the official examiner of title must within thirty days thereafter file a new bond with new sureties fully complying with this rule. Each applicant for a license as an official examiner of title must also produce a certificate of the committee on character certifying that he is of good moral character and as to his standing in regard to financial transactions.

B. An application for registration of title to real property made under the Real Property Law (chapter 52 of the Laws of 1909)

must be made at Special Term, Part II, of the Supreme Court, which is hereby designated the "Title Part" of the said court under section 371 of the said act, and the justice of the Supreme Court from time to time assigned to Part II of the Special Term is hereby designated as the justice to have general supervision and control of the business coming under the said act in the County of New York, and all applications to register title to real property under the said act must be returnable at said Title Part, Special Term, Part II, of the Supreme Court.

C. After the time provided in the summons to appear and answer the complaint shall have expired, if there has been no appearance or answer, the applicant may apply to the Special Term, Part II, for a final judgment as provided for in section 390 of the act, as amended by chapter 627 of the Laws of 1910. If there has been an appearance in the action under the said act, but no answer has been interposed, he may apply to the court for final judgment on eight days' notice to all who have appeared in the action. In all applications for judgment the applicant must present to the court proof by affidavit of the service of the summons as required by the said act, and of the appearances or answers, if any, in the action, and that all the provisions of the act entitling the applicant to such judgment have been complied with.

D. Where an answer is interposed which raises an issue of fact which in an action relating to the title of real property would be triable by a jury, either party to the action who is entitled to have such issue determined may apply to the Title Part of the Special Term within twenty days after issue has been joined by the service of the pleadings to have the issues framed to be tried by a jury, as provided by section 970 of the Code of Civil Procedure. The trial of such issues shall be had and the subsequent proceeding in relation thereto shall be such as is prescribed by the Code of Civil Procedure. After such issues are disposed of, either party to the action may apply to the Title Part of the Special Term upon eight days' notice to all who have appeared in the action for final judgment, and on such application the court shall try all other issues in the action not disposed of by the jury, or may refer any such issues undisposed of to be tried by a referee. Where all issues have been disposed of, either party may then upon notice of eight days to all who have appeared in the action apply for final judgment at the Title Part of the Special Term.

E. All applications to the court after a certificate of registration has been issued under the provisions of the said act must be made at the Title Part of the Special Term hereinbefore desig-

nated, upon notice of eight days to all persons interested in the application. All applications to the court under section 422 of the act shall be made at the Title Part, Part II, of the Special Term, upon eight days' notice to all persons in interest, as provided in that section. All applications made under section 428 of the act shall also be made at the Title Part of the Special Term, upon eight days' notice to the city chamberlain and all other parties who have appeared in the action to recover for loss or damage or deprivation of real property out of the assurance fund provided for by the said act. (Added April 22, 1909; am'd Dec. 28, 1910.)

RULE XVII.

Investment of money paid into court. — The chamberlain of the city of New York, within thirty days after it shall have been received by him, shall invest all money paid into court by deposit with him in bonds of the United States, bonds of the State of New York or bonds or stock of the city of New York, and cause the same to be duly registered in his name as such chamberlain; and hereafter no money so paid into court shall be invested in securities other than those hereinbefore specified. And the chamberlain is hereby required to file in the office of the clerk of the Appellate Division of the Supreme Court in the First Department, on or before the 1st day of February in each year, a report showing the securities in which money that has been paid into court has been invested and the date at which the investment was made. (Added Jan. 11, 1911.)

AMENDED FORM IN FORECLOSURE CASES.[1]

(*Adopted by the First Department, October 13, 1910.*)

The following form has been approved by the justices of the Supreme Court:

To comply with the Amended Rules of Practice in foreclosure cases the judgment should contain immediately following the direction to sell and in substitution for the provisions now in use the following provisions:

Under the direction of ....., Esq., who is hereby appointed referee for that purpose; the said referee give public notice of the time and place of such sale according to law and the course and practice of this court; that the plaintiff or any other party to this action may become the purchaser or purchasers on such sale; that said referee execute to the purchaser or purchasers on such sale a deed of the premises sold; that such referee on receiving the proceeds of sale forthwith pay therefrom the taxes, assessments and water rents which are or may become liens on the premises at the time of sale. The said referee then deposit the balances of such proceeds of sale in[2]..... and shall thereafter make the following payments,

[1] The purpose of this Form, it has been said (per Hon. Edward E. McCall, former Justice of the Supreme Court, First Department) has been "to give official sanction to proper payments to be made by referees, without which embarrassing complications might arise upon the closing of the title, if insistence was made of strict adherence to Rules 69 and 79 of the General Rules of Practice."

[See memoranda in the American Mortgage Company v. Kneeland (Law Journal, October 5, 1910), and McCutcheon v. Heubener (Law Journal, October 18, 1910).]

[2] A bank or trust company authorized to receive on deposit court funds.

and his checks drawn for that purpose shall be paid by the said depository:

First. — The sum of $50 to the said referee for his fees herein.

Second. — Advertising expenses as shown on the bills presented and certified by the said referee to be correct, and duplicate copies of which shall be left with said depository.

Third. — Said referee shall also pay to the plaintiff the sum of ..... dollars, adjudged to the plaintiff for his costs and disbursements in this action, with interest thereon from the date hereof, together with an additional allowance of ..... dollars, hereby awarded to the plaintiff, in addition to costs, with interest thereon from the date thereof; and also ..... dollars, the said amount so reported due as aforesaid, together with the legal interest thereon from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same.

Fourth.—If such referee intends to apply for a further allowance for his fees, he may leave upon deposit such amount as will cover such additional allowance, to await the further order of the court thereon, after application duly made.

RULES OF THE APPELLATE TERM OF THE SUPREME COURT IN THE FIRST JUDICIAL DEPARTMENT.

Rules for the Hearing of Appeals from the City Court of the City of New York and from the Municipal Court in the Boroughs of Manhattan and the Bronx.

(Amended to May, 1916.)

RULE I.

Appellate Term; how constituted; when and where held. — There shall be a term of the Supreme Court for the hearing of appeals from the City Court and the Municipal Court of the city of New York in the boroughs of Manhattan and the Bronx, which shall commence on the first Monday of October, November, December, January, February, March, April, May and June in each year, and shall continue from day to day during each of said months until all appeals ready for hearing are heard and disposed of. This term of the court shall hold its sessions in the Court House in the county of New York, and shall be held by three justices of the Supreme Court duly designated to hold said term, and shall be known as the Appellate Term.

RULE II.

Calendar of appeals; filing and service of return; failure to appear on call of calendar; entry of judgment or order. — The clerk of such term of the Supreme Court shall make up a calendar of all appeals to be heard each term and publish the same in the Law Journal at least eight days before the commencement of the term.

All appeals from the City Court in which the return duly printed as required by the General Rules of Practice has been duly filed with the clerk of such term at least ten days before the first day of the term, with ten printed copies thereof and an admission of service or an affidavit showing the service of three printed copies upon the attorney for the respondent, shall be placed upon such calendar.

All appeals from the Municipal Court in which the return made

up as required by Rule IV of this court has been filed with the clerk of such term at least ten days before the commencement thereof shall be placed upon such calendar.

Appeals shall be placed upon the calendar in the order in which the same are filed and shall continue thereon until disposed of. An appeal may be brought to a hearing upon notice by either party of not less than eight days, which notice must be filed as provided by Rule V of this court. If, after being regularly placed upon the calendar, neither party brings it to a hearing until after the same has been on the calendar for at least two terms, the court must dismiss the appeal unless it directs the same to be continued for cause shown.

If the appellant does not appear upon the call of the calendar, the judgment or order appealed from shall be affirmed. If the appellant appears and the respondent fails to appear, the appellant may either argue or submit his case, but judgment of reversal by default will not be allowed.

Upon an appeal from the City Court the judgment or order of the court shall be entered in the office of the clerk of the Supreme Court; a certified copy of such judgment or order shall be annexed to the return from the City Court, which certified copy and return shall be transmitted to the City Court as required by § 1345 of the Code of Civil Procedure.

Upon an appeal from the Municipal Court the judgment or order of the Appellate Term shall be entered in the office of the clerk of the Supreme Court in the county embracing the district of the Municipal Court from which the appeal is taken, and a certified copy thereof annexed to the return received from the Municipal Court, which return and certified copy of the judgment or order shall be returned to the district of the Municipal Court from which the appeal was taken. (As am'd July 7, 1915.)

RULE III.

Failure to file printed papers and motion for dismissal therefor. — In appeals from the City Court, in case the appellant does not cause the printed papers to be filed with the clerk of the Appellate Term and serve three copies thereof upon the attorney for the respondent, as required by the General Rules of Practice, within twenty days after the settlement of the case on appeal, and in case of an appeal from an order of the City Court within fifteen days after service of the notice of an appeal upon the attorney for the respondent, the respondent may move, upon three days' notice on any day of the term, to dismiss the appeal, and the appeal shall be dismissed unless the time of the appellant to cause such printed papers to be filed and copies thereof to be served be extended by the justices assigned to hear such appeals, or one of them, for good cause shown.

In appeals from judgments, final orders or orders of the Municipal Court of the City of New York, in which a case is settled as provided in subdivisions 1 and 3 of § 161 of the Municipal Court Code, the appellant must, within five days after service of the notice of appeal, deposit with the clerk the fees of the stenographer for a transcript of the minutes; the stenographer must within ten days thereafter file said transcript with the clerk, who shall immediately notify the appellant or his attorney of the receipt of same; the appellant or his attorney must within two days after receipt of such notice procure

the case to be settled on a written notice of at least three days to the clerk and to the attorney for the respondent or to the respondent, if he has not appeared by attorney, returnable before the justice who tried the case; and the clerk must within two days after the settlement of the case by the trial justice file the return made up as required by Rule IV of this court with the clerk of the Appellate Term; and in case of an appeal from a judgment, final order or order of the Municipal Court, in which no case is settled, the clerk must file the return made up as required by Rule IV of this court within fifteen days after service upon him of the notice of appeal; upon failure by the appellant to procure compliance with the above requirements, the respondent may move upon three days' notice on any day of the term to dismiss the appeal, and such appeal shall be dismissed unless the justices assigned to hear such appeal, or one of them, for good cause shown, shall extend the time. (As am'd July 7, 1915.)

RULE IV.

Returns upon appeals; what to contain. — Returns upon appeals from judgments, final orders and orders of the Municipal Court in which a case is made and settled shall consist of true copies of the originals to be furnished by the appellant, typewritten on suitable paper, eight inches wide and ten and one-half inches long, numbered at the bottom of each page, fastened at the left-hand edge, bound with a substantial cover and appropriately indexed, in the following order:

A statement showing the court and district thereof from which the appeal is taken, the date of entry of the judgment, final order or order appealed from, the date of the beginning of the action and of service of the respective pleadings; the names of the original parties in full and any change in the parties if such has taken place; the names of the attorneys appearing for the respective parties on the appeal. The notice of appeal, the summons, the complaint, the answer, the bill of particulars, if any, any intermediate order and the papers upon which the same is based, if brought up for review by the notice of appeal; the judgment, final order or order appealed from; the original transcript of the stenographer's minutes, which shall be transcribed in conformity with the standard page adopted by the Society of Certified Shorthand Reporters, on paper of the size above mentioned, the lines thereon to be consecutively numbered on the left-hand margin; copies of the exhibits in the order in which they are marked, unless they are voluminous and only a part of their contents are material, in which case the parties may stipulate or the justice below may upon notice settle a statement respecting the same or the parts thereof to be returned upon appeal; the opinion of the court or a statement that no opinion was rendered; the settlement and allowance of the case by the trial justice and the certificate of the clerk, which may be made upon the stipulation of the respective parties or their attorneys.

Returns upon appeals from judgments, final orders or orders in which no case is settled shall consist of true copies of all papers used upon the hearing or recited in the order appealed from, to be furnished by the appellant, typewritten in the manner above indicated in the following order:

A statement showing the court and district thereof from which the appeal is taken, the nature of the judgment, final order or order appealed from and the date of entry of the same; the names of the respective parties and the attorneys appearing on the appeal. The notice of appeal; the judgment, final order or order appealed from; in an appeal from a judgment or final order the papers upon which the same is based; in an appeal from an order the notice of motion or order to show cause; the moving affidavits, the opposing affidavits, the opinion of the court or a statement that no opinion was rendered, the certificate of the clerk, which may be made upon the stipulation of the parties or their attorneys. (As am'd July 7, 1915.)

RULE 7.

Cases and points; printing, filing, and service thereof; dismissal of appeal for omission; hearing or submission of appeals. — The cases and points and all other papers furnished to the Appellate Term on an appeal from the City Court shall be printed as provided for in Rule XLIII of the General Rules of Practice. The points on an appeal from the Municipal Court shall be printed as therein provided, or typewritten. In every case on appeal from the City Court or the Municipal Court the appellant must, on or before the Monday preceding the first day of the term at which the appeal is noticed for argument, file with the clerk of the Appellate Term the requisite number of copies of his points to be used upon the hearing, indicating thereon the number of the appeal on the calendar published in the Law Journal, and shall also, on or before the Monday preceding the first day of said term, serve a copy of said points upon the attorney for the respondent. Upon failure so to do the appeal may, when called for argument in its regular order on the calendar, be dismissed, or the hearing thereof adjourned to the next term, as the court may determine. Not later than twelve o'clock noon on the Saturday preceding the first day of the term the respondent must serve a copy of his points upon the attorney for the appellant, or upon the appellant's counsel, and file with the clerk the requisite number of copies thereof to be used upon the argument, said copies also to contain the number of the case upon the calendar, as published in the Law Journal. No further time for filing points will be granted and no other points will be received or considered, unless the court shall, by its own motion, direct further points to be submitted.

No appeal will be heard or received on submission unless it has been noticed for argument, and proof of service thereof filed with the clerk of the Appellate Term on or before the Monday preceding the first day of the term. All appeals must be heard or submitted when regularly called for argument, unless the court, for cause shown, shall adjourn the hearing until a subsequent term; and no appeals shall be submitted without argument unless the points have been filed and served as hereinbefore provided. In the argument of an appeal from an order, or from a judgment of the Municipal Court, not more than fifteen minutes shall be occupied by counsel on either side; and in the argument of an appeal from a judgment of the City Court not more than thirty minutes shall be occupied by counsel on either side, except by express permission of the court. (As am'd July 1, 1908.)

RULE VI.

Application to appeal from orders rendered upon objections to pleadings. — Applications to a justice of the Appellate Term for leave to appeal from an order sustaining or overruling an objection taken to a pleading as prescribed in §§ 88 and 89 of the Municipal Court Code must be made within five days after denial of an application for such leave by the trial justice upon any day during the term upon three days' notice to the opposite party or parties. The papers upon which such application is made must contain a copy of the pleadings, the order entered in the court below and the papers recited therein; a concise statement of the grounds of alleged error, a copy of the opinion of the justice below, if any, and proof of due service of the papers upon which the application is founded. (As am'd July 7, 1915.)

RULE VII.

Application to appeal to Appellate Division; motions for reargument. — Motions for reargument and applications for leave to appeal from a determination of the Appellate Term to the Appellate Division, under section 1344 of the Code of Civil Procedure, must be made upon any day of the term on five days' notice to the adverse party, and must be returnable within twenty days after the entry of the order determining said appeal; all papers to be used on such motion, together with a copy of the opinion, if any, and briefs of counsel, must be delivered to the clerk of the court and submitted, without argument. Such motions must be based upon an affidavit or a statement setting forth concisely the points claimed to have been overlooked or misapprehended by the court, with proper reference to the authorities relied upon, and the reason why such reargument should be granted or appeal allowed. The briefs may be either printed or typewritten.

An appeal to the Appellate Division from an order granting a new trial will not be allowed unless the appellant files with his notice of application for leave to appeal a stipulation that if the order appealed from be affirmed, or the appeal therefrom dismissed, judgment absolute may be rendered against him.

A party desiring an order staying proceedings pending a motion for reargument or an application for leave to appeal must serve the notice provided for in this rule. Upon an affidavit showing the service of such notice, a copy of the moving papers and a statement in such affidavit setting forth the reasons why a stay should be granted, an application for a stay will be entertained. Application for such order must be made to the justices of the Appellate Term who heard the appeal, or one of them, by filing the same with the clerk of the Appellate Term, by whom it will be brought to the attention of the court. (As am'd December 31, 1909 and November 27, 1914.)

RULE VIII.

Motions generally; practice. — Motions may be noticed for any day of the term and must be submitted without argument. Five days' notice of motion must be given, except motions for leave to appeal to this court under Rule VI and to dismiss an appeal. A notice of such motion, whether founded upon an order to show cause

or a regular notice of motion, with proof of service thereof, and the opposing affidavits must be filed with the clerk of the Appellate Term at or before 12 o'clock upon the day on which the same is returnable.

All decisions will, when announced, be accompanied by an order duly signed, unless the court shall otherwise direct. Motions for resettlement of orders must be made upon two days' notice. (As am'd July 7, 1915.)

(Note. — Another series of Rules in the First Department has been established "to regulate the attendance and prescribe the duties of the clerks, assistant clerks, criers, interpreters, stenographers, librarians, and assistants of the Supreme Court." These rules are not included here because they are only of importance to these officers and assistants.)

Calendar Rules Adopted by the Appellate Term.

(Adopted July 12, 1915.)

Rule I. — The calendar of appeals from orders and judgments of the City Court will be called in the forenoon of the first day of the term at 10 o'clock A. M. The calendar of appeals from orders and judgments of the Municipal Court will be called on the second day of the term at 10 o'clock A. M.

Rule II. — In motion for leave to appeal or for reargument an indorsement must be made upon the motion papers stating the term of the court at which the case was argued or submitted. If an appeal upon the calendar is affected by a motion, the motion papers must be indorsed with the calendar number of such appeal.

Rule III. — The points on appeal from judgments and orders of the City Court shall be printed as provided for by Rule 43 of the General Rules of Practice. The points on appeals from the Municipal Court shall be printed or typewritten upon white paper of uniform size, viz., 10½ inches in length and 8 inches in width, and fastened on the left-hand edge thereof. Upon the right-hand corner of the points submitted to the court shall appear the name of counsel arguing or submitting the same. Upon the left-hand corner of the points submitted shall appear the calendar number of the case on appeal. All points, briefs and motion papers must be filed flat. The County Clerk's number of the Clerk of the County, embracing the court from which the appeal is taken, must be indorsed on all motion papers.

In appeals from judgments and orders of the City Court, ten copies of the points or briefs must be filed, and three copies upon appeals from the Municipal Court must be filed.

Briefs of counsel, when reference therein is made to the testimony given upon the trial, must give the number of the folio in the printed case, if an appeal from the City Court, or the number of the page and the line thereof in the record, if an appeal from the Municipal Court.

If the appellant's brief fails to comply with this rule, the appeal may be dismissed. If the respondent's brief is deficient in this respect, the appeal may be considered on the appellant's brief alone.

Rules of Surrogate's Court, County of New York.

(Amended to May, 1916.)

RULE I.

Papers. — Each petition, decree, order, objection, answer, affidavit, stipulation and other paper submitted to the court shall be indorsed with the title of the proceeding to which it relates, and a description of the paper and the name and post office address of the attorney presenting it.

No decree or paper on file in this court will be intrusted to the attorneys or parties except for the purpose of proper examination in the office where it is deposited, and if any such document or paper shall be needed on a hearing before any referee appointed by this court the same shall be intrusted to a clerk or messenger of this court and delivered to the referee, who shall execute a receipt therefor.

No paper will be received for consideration by the surrogate, or for filing in his office, unless it is of the weight prescribed by Rule XIX, General Rules of Practice, or unless it is written or printed in black characters and conforms in all other respects, so far as practicable, to the requirements of said rule.

No paper will be received by the clerk of the court after argument or submission of a matter subsequent to the date fixed by the surrogate for the receipt of the same, and no such paper shall be received unless a copy has been served upon the attorney or attorneys for the other party or parties who have appeared in the proceeding.

RULE II.

Motion calendar. — A Motion Calendar will be called on Tuesday and Friday of each week at 10:30 o'clock A. M., except that during the month of July there will be a calendar on Tuesdays only, and from the last Tuesday in July until the first Tuesday after the 15th of September there will be no calendar.

RULE III.

When motion or proceeding may be entered on calendar; adjournment of motion. — To entitle a motion or proceeding to be placed upon the Motion Calendar proof of service of all orders, citations and other papers on which the motion or application is made shall be furnished to the clerk of the court at or before one o'clock on the day preceding the motion day. Except where a written stipulation of all the parties to the proceeding has been filed with the clerk of the court, a motion shall be adjourned only upon the return day thereof, upon showing legal grounds therefor to the satisfaction of the surrogate.

Proceedings or motions which have been marked "reserved generally" may be restored to the calendar upon two days' notice to all parties who have appeared in the proceeding.

RULE IV.

Probate; will and copy to be filed. — The will, if not lost or destroyed, shall be filed with the petition for probate, unless, upon good cause shown by affidavit, the surrogate dispenses therewith, in which case the will must be filed at least two days before the return day of the citation.

In all cases a copy of the will must be filed with the petition. With such copy there must also be filed an affidavit of two adult persons that they have compared the copy with the original will and that the copy is a true and correct one.

RULE V.

Probate proceedings, when service of citation waived. — In probate proceedings when all parties in interest have waived the service of citation, notice of at least two days must be given to the probate clerk before the testimony of the subscribing witnesses will be taken.

RULE VI.

Contested Probates. — A copy of any objections filed to the probate of a last will and testament shall be served upon the proponent or his attorney in case the proponent shall have appeared by attorney.

In a contested probate proceeding notice of trial shall be served and a note of issue filed as prescribed by section 977 of the Code of Civil Procedure.

In cases of contests in probate proceedings, where a notice of objection filed is required by section 2618, C. C. P., and within five days after objections to the probate are filed, the proponent shall present a verified petition for and procure and enter an order directing such notice. If the proponent fails to present such petition and fails to procure and enter such order within five days after objections are filed, any other party to the proceeding may present such petition and order.

RULE VII.

Jury trials of probate cases. — Within five days after a jury trial is demanded in the objections filed to the probate of a will the party making the demand shall present on two days' notice of settlement to the attorneys of all parties who have appeared by attorney a proposed order directing such trial by jury. Such order shall state plainly and concisely the controverted questions of fact to be tried by jury. If a party demanding a trial by jury fails to serve and present a proposed order as aforesaid, such order may thereafter be presented by any party to the proceeding.

RULE VIII.

Accountings. — When a petition for a voluntary account is presented, the account to which it relates must be filed therewith. Upon

an accounting of any executor, administrator c. t. a. or testamentary trustee a copy of the will must be filed with the petition and account.

Where a representative of an estate is required by law to pay a transfer tax, no petition for a final accounting by such representative will be received or filed in this office, and no decree in any such accounting will be signed, except upon the production of a receipt for the payment of transfer tax, sealed and countersigned, as provided in § 236 of the Tax Law. Exemption from payment of transfer tax must be shown by a copy of an order of exemption. (As am'd Feb. 3, 1916.)

RULE IX.

Contested accountings. — On an accounting by an executor, administrator, guardian or trustee any party interested or a creditor desiring to contest the account shall file specific objections thereto and shall serve a copy thereof on the accounting party or upon his attorney in case he shall have appeared by attorney within eight days after the filing of the account, where the accounting is a compulsory one, and within eight days after the return of the citation or within eight days after the proceeding is marked for decree where the accounting is a voluntary one, or within such further or other time in either case as shall be allowed by the surrogate. A special guardian in an accounting proceeding shall file his report or objections within eight days after his appointment, unless for cause shown his time to file such report or objections be extended by the surrogate.

The contest of the account shall be confined to the items or matter objected to.

RULE X.

Affidavit of regularity. — With every proposed decree on an accounting there must be submitted an affidavit of regularity setting forth the necessary jurisdictional facts.

RULE XI.

Entry of decrees against infants in accountings. — In any proceeding for a judicial settlement of an account, wherein a special guardian shall be appointed or a general guardian shall appear to protect the interests of an infant party to such accounting, no decree shall be entered upon default against such infant, but such decree shall be so entered only on the written report of the guardian appearing for such infant that he has carefully examined the account and finds it correct, and upon two days' notice to the guardian of the settlement thereof.

RULE XII.

Administration. — Upon an application for letters of administration where it appears that the intestate was at the time of his death the subject of a foreign power, notice of the application shall be given to the consul or consular representative of such foreign power.

RULE XIII.

Guardianship. — A petition for the application by a guardian for an infant's property, or any portion thereof, to the support, maintenance and education of the infant, shall show the terms of any previous order for the application of any portion of the infant's property.

When the application is made by a person other than the guardian of the property or a parent of the infant, the duly acknowledged con-

sent of such guardian or parent shall be annexed to the petition, or the application must be made on notice to such guardian or parent.

RULE XIV.

Notice of appearance. — A respondent who files an answer or objection shall file therewith a notice of appearance.

RULE XV.

Appearance of a general guardian or committee. — Where an infant appears by his general guardian or where a lunatic, idiot or habitual drunkard appears by his committee the general guardian or the committee shall show that such general guardian or such committee is competent to protect the rights of the infant or incompetent and has no interest adverse to that of the infant or incompetent, and is not connected in business with the attorney or counsel of or any party to the proceeding. It must appear whether or not such general guardian or committee is entitled to share in the distribution of the estate or fund in which the infant or incompetent is interested, and if the general guardian or committee is in any way interested in the estate or fund the nature of such interest must be disclosed. Where a general guardian appears for an infant, the name, residence and relationship to the infant of the person with whom the infant is residing must be disclosed, and also whether or not the infant has a parent living, and if a parent is living, whether or not such parent has knowledge of and approves such appearance, and such knowledge and approval should be shown by the affidavit of such parent. If the infant has no parent living, like knowledge and approval of such appearance by the person with whom the infant resides must be shown in like manner.

If the foregoing provisions of this rule are not strictly complied with, the surrogate will appoint a special guardian for the infant or incompetent, as provided in section 2534, C. C. P., notwithstanding the appearance by the general guardian or committee.

RULE XVI.

Referee's Report. — A referee shall file with his report all the testimony taken and all the papers and exhibits that were before him in the proceeding in which the report is filed.

When a referee's report has been filed said report shall be confirmed as of course unless exceptions thereto be filed by a party interested in the accounting or proceeding within ten days after a written notice of such filing and a copy of such report shall have been served upon the opposing party; and in case exceptions shall be so filed, any party may bring on the hearing of said exceptions on any stated motion day on the same notice that would be required for the hearing of a motion.

RULE XVII.

Justification of sureties to undertaking on appeal. — The respondent on any appeal from a decree or order of this court may within ten days after the filing of the undertaking required on such appeal

serve upon the attorney for the appellant a written notice that he excepts to the sufficiency of the sureties therein; whereupon and within ten days thereafter such sureties, or other sureties in a new undertaking to the same effect, must justify before the surrogate, or a clerk designated for that purpose, on five days' notice of such justification, to be served upon the respondent's attorney, by each surety appearing in person before said surrogate or designated clerk and submitting to an examination, under oath, on the part of the appellant, touching his sufficiency. If such sureties shall be found sufficient, said surrogate or designated clerk will indorse an allowance thereof upon the undertaking or a copy thereof, and a notice of such allowance shall be served upon the attorney for the exceptant; and the effect of any failure to so justify and procure such allowance shall be to avoid the undertaking.

RULE XVIII.

Justification of sureties to bond of executor, administrator, guardian, etc. — Principals and sureties upon bonds and undertakings, if natural persons, must appear and qualify before the clerk designated for that purpose by the surrogate. Whenever a bond with sureties shall be filed by an executor, administrator, guardian or trustee any person interested in the estate may apply to the surrogate for an order requiring the sureties in said bond to appear before him or a clerk designated for that purpose and submit to an examination under oath as to their sufficiency as such sureties. If it shall appear to the satisfaction of the surrogate that such examination is necessary he will make an order prescribing the time and place where such examination shall take place, a copy of which order shall be served upon such executor, administrator, guardian or trustee at least five days before the time fixed for such examination. If on such examination the surrogate shall be satisfied of the sufficiency of such surety he will indorse his approval upon the bond or a copy thereof; and in case such surety on such examination shall not in the opinion of the surrogate be sufficient the surrogate will make an order requiring the substitution of new sureties within five days after the service of a copy of said order upon the executor, administrator, guardian or other trustee, or his attorney, if he shall have appeared by attorney on such examination.

RULE XIX.

Notice of settlement of orders and decrees in litigated motions. — Two days' notice of the settlement of an order on a litigated motion or of a decree or decision shall be given in writing to all the parties who have appeared and to any special guardian in the proceeding in which such order, decree or decision is to be made.

RULE XX.

Costs and allowances. — Whenever a party to a decree shall deem himself entitled to costs the matter will be considered and determined by the surrogate on two days' notice of adjustment. With said notice shall be served a statement showing the items of costs and disbursements to which the party may deem himself entitled, which

disbursements shall be duly verified both as to their amount and necessity. The disbursements for referee's and stenographer's fees must be sustained by affidavits or detailed proof.

At the same time and on like notice the surrogate will pass upon any application for an additional allowance. Such application must be accompanied by an affidavit setting forth the number of days necessarily occupied in the hearing or trial, in preparing the account for settlement and in the preparation for the trial, the time occupied on each day in the rendition of the services, their nature and extent in detail, including the services necessarily rendered or to be rendered in the drawing, entering or excuting of the decree. In case such trial shall have been had before a referee the time necessarily occupied in such trial before him may be shown by a certificate of such referee.

RULE XXI.

Prior proceeding pending for probate or grant of letters. — No petition for the probate of a will or for the grant of letters of administration or of guardianship will be entertained during the pendency of a prior proceeding for the same or like relief respecting the same estate or fund or the estate or person of the same infant, except where there is unusual delay in prosecuting such proceeding, and then only upon application to the surrogate, with notice to the prior applicant.

RULE XXII.

Compromise. — Upon application for leave to compromise it should appear by the affidavit of the petitioner's attorney that he has investigated the subject-matter of the compromise or the facts of any alleged cause of action. If the attorney has become concerned in the application or its subject-matter at the instance of the party with whom the compromise is proposed, or at the instance of any representative of such party, that fact must be disclosed.

RULE XXIII.

Transfer tax proceeding. — Upon the filing of the appraiser's report in a transfer tax proceeding the surrogate will enter the order (upon the submission thereof) determining the value of the property and the amount of tax. The matter will not appear on the calendar at this stage, nor will the court then consider objections to the report.

A party having objections to the report, or the order entered thereupon, may, within sixty days, file a notice of appeal, which must specify the grounds of objection. Upon filing said notice of appeal with the clerk of the court, together with proof of service of said notice upon all parties that appeared before the appraiser, the proceeding will be placed upon the calendar for the next regular motion day without further notice.

Upon the return of the appraiser's notice of time and place of appraisal a special guardian will be appointed to protect the interests of infants if it appears that their rights are involved and they are not otherwise adequately represented.

Rules of Surrogate's Court, Bronx County.

(Adopted January 2, 1915; amended to May, 1916.)

RULE I.

Papers. — Every paper to be used in the court shall be indorsed with the title of the proceeding to which it relates, a description of the paper and the name and post office address of the attorney presenting it.

No paper on file shall be intrusted to any attorney, party or other person except for proper examination thereof in the clerk's office.

If any referee appointed by this court shall request the delivery to him of any such paper for use before him, the same shall be delivered to him by a messenger of the court upon his receipt therefor.

RULE II.

Service of process; proof of. — In all proceedings the proofs of service of process, notice of hearing, notices of motion and orders to show cause shall be filed on or before 1 o'clock of the day preceding the day therein named for the return day thereof.

RULE III.

Calendars. — A calendar of motions and of matters to be tried by the court without a jury will be called at 10 o'clock A. M. on Monday and Wednesday of each week, except in the month of August.

A term for the trial of controverted questions of fact with a jury, including contested probates, in which a jury trial of such questions has been ordered, shall begin on the first Monday of February, April, June, October and December. A calendar of such contested matters will be called on said first Monday and on each day thereafter while the court shall sit for the purpose. Such matters will then be tried in their order, unless adjournment is granted, upon proof of legal excuse. (As am'd Nov. 26, 1915.)

When all parties in interest have waived the service of citation all papers in the matter must be filed with the probate clerk at least two days before the day fixed for the taking of proof.

RULE IV.

Probate. — In a proceeding for the probate of a will not lost or destroyed, the will and a copy thereof shall be filed with the petition. The correctness of said copy shall be shown by the affidavit of two persons of full age, who shall have compared the copy with the original will.

RULE V.

Administration. — Upon an application for letters of administration, where it appears that an intestate was at the time of death the subject of a foreign power, notice of the application shall be given to the consul representing such foreign power.

RULE VI.

Guardianship. — A petition for the application by a guardian of an infant's property, or any portion thereof, to the support, maintenance and education of the infant, shall show that an annual accounting has been duly filed or that good cause exists for disregarding the omission.

The petition shall show the terms of any previous order for the application of any portion of the infant's property. And if no previous order has been made that fact shall be stated. When the infant is over fourteen years of age he shall join in, subscribe and verify the petition. When the application is made by a person other than the guardian of the property or a parent of the infant, the consent of such guardian or such parent shall be submitted or the application made on notice to him.

When an infant over fourteen years of age applies for the appointment of a special guardian, or where an infant appears by his general guardian, or where a lunatic, idiot or habitual drunkard appears by his committee, the general or special guardian or the committee shall show that such general or special guardian or such committee is competent to protect the rights of the infant or incompetent and has no interest adverse to that of the infant or incompetent and is not connected in business with any party to the proceeding or the attorney or counsel of such party. It must appear whether or not such general or special guardian or committee is entitled to share in the distribution of the estate or fund in which the infant or incompetent is interested, and if the general or special guardian or committee is in any way interested in the estate or fund, the nature of such interest must be disclosed.

No party to a proceeding will be appointed special guardian of any other party thereto. The petition for the appointment of such special guardian as well as the appearance filed by a general guardian of the infant must in every instance disclose the name, residence and relationship to the infant of the person with whom the infant is residing and whether or not said infant has a parent living. If a parent is living, it must be shown by the affidavit of the parent whether or not such parent has knowledge of and approves such application or appearance. In case the parent has an interest adverse to the infant, the petition on the application for the appointment of such special guardian must be accompanied by the affidavit of the parent, showing in addition to such knowledge aforesaid that such parent has not influenced the infant in the choice of the special guardian.

If the foregoing provisions of this rule are not strictly complied with the Surrogate will, on his own motion, appoint a special guardian for such infant or incompetent, as provided in § 2534, C. C. P., notwithstanding the application of such infant or the appearance by the general guardian or committee. (As am'd Sept. 18, 1915.)

RULE VII.

Accounting. — On an accounting by an executor, testamentary trustee or administrator with the will annexed, a sworn copy of the will shall be filed with the petition and account.

When an account is filed for settlement the accountant shall file therewith a copy of any statement of a claim which has been presented to him and allowed, and which remains unpaid.

RULE VIII.

Contested accounting; statement of items. — Before evidence is taken on a contested accounting the accountant shall present to the court a statement in writing of the items for which no voucher is filed, the items as to which he holds the affirmative, the objections which he concedes to be well taken, and the modifications of the account to which the parties consent, and the objectant shall present to the court a like statement of the objections which he withdraws.

RULE IX.

Contested accounting; service of copy of objections. — Upon a contested accounting any party interested, or a contesting creditor, shall serve a copy of his objections upon the accounting party, or upon his attorney in case he shall have appeared by attorney, within eight days after the filing of the account in the office of the clerk of the court where the accounting is a compulsory one, and within eight days after the return of the citation where the accounting is a voluntary one, or within such further or other time in either case as shall be allowed by the surrogate. The contest shall be confined to the items or matter so objected to. If it shall appear to the satisfaction of the court, by affidavit or petition, that an examination of the accounting party will be necessary to enable the contesting party to interpose his objections, such examination may be ordered by the court.

RULE X.

Settlement of account; how infant's interests protected. — In a proceeding for a judicial settlement of an account, wherein a special guardian shall be appointed to protect the interests of an infant party, no decree will be entered on default against such infant, but such decree shall be so entered only on the written report of the guardian appearing for such infant to the effect that he has carefully examined the account and finds it correct, and upon two days' notice of the settlement thereof to the guardian.

RULE XI.

Affidavit of regularity on accounting. — With every proposed decree on an accounting there must be submitted an affidavit of regularity, setting forth the necessary jurisdictional facts. A copy of the form of the affidavit required will be furnished by the clerk of the court.

RULE XII.

Trials by jury. — When on a contested probate the objections contain a demand for a trial of controverted questions of fact with a jury and when in any other proceeding such trial is demanded, the

party making such demand shall pay a jury fee of $3 at the time of the demand and shall, within two days thereafter, serve on the opposing party or parties, with a two days' notice of settlement, a proposed order which, in addition to directing such trial with a jury, shall also state the questions of fact which he deems controverted and desires tried with a jury. And in default of the service of such order any opposing party may within three days after such demand is filed serve such proposed order stating the questions of fact, if any, which he deems controverted and desires tried with a jury with like notice of settlement.

RULE XIII.

Id.; notice of trial and note of issue; notice of hearing of objections on contested probates. — Notice of trial of such controverted questions of fact must be served at least fourteen days before the first day of the term at which the trial is to be had, and a note of issue stating in addition to the usual requirements the date of entry of the order directing the controverted questions of fact to be tried with a jury, must be filed at least twelve days before the first day of such term. Where a party has served a notice of trial and filed a note of issue, for a term at which the matter is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the matter will remain on the calendar until it is disposed of.

A petition for an order for notice of hearing under § 2618 of the Code of Civil Procedure shall in all cases where such notice is required be presented by the proponent within five days after the filing of the objections, and on his failure so to do any contestant may present such petition.

Notices of hearing of objections on contested probates where a jury trial has been demanded, as required by § 2618 of the Code of Civil Procedure, shall specify as the day of trial the same date specified in the notice of trial.

RULE XIV.

Submission of papers to opposing counsel. — If upon a trial any party shall offer in evidence a paper in his control, without having before trial submitted the same to opposing counsel for inspection, the court may place the matter at the foot of the calendar or otherwise postpone the trial, in order that all papers intended for use on the trial, except such as may be reasonably reserved for the examination or contradiction of a witness, may be submitted to opposing counsel for inspection.

RULE XV.

Reports of referees. — When a referee's report is filed with the testimony said report shall be confirmed as of course, unless exceptions thereto are filed by any party interested within eight days after a written notice of such filing and a copy of such report has been served upon the opposing party; and in case exceptions are filed

any party may bring on the hearing of the same on any stated motion day on eight days' notice.

RULE XVI.

Orders, decrees and settlement thereof. — Two days' notice of the settlement of an order on a litigated motion or of a decree or decision shall be given in writing to all the parties who have appeared by attorney in the proceeding in which such order, decree or decision is to be made, and to any special guardian appointed therein.

When a proposed order, decree or decision is served, with notice of settlement thereof, the party served shall not submit any complete substitute therefor, but may submit proposed amendments thereto, properly referring by page and folio to the papers sought to be amended and containing after each amendment a statement of the grounds therefor.

RULE XVII.

Miscellaneous. — No petition for the probate of a will or for the grant of letters of administration or of guardianship, or for the appointment of a testamentary trustee, will be entertained during the pendency of a prior proceeding for the same or like relief, respecting the same estate or fund, or the estate or person of the same infant.

RULE XVIII.

Notice of appearance. — A respondent who files an answer or objection shall file therewith a notice of appearance.

RULE XIX.

Reports of special guardians. — Special guardians shall file their reports within eight days from the time of their appointment, except where an answer is filed and an adjournment is had or the time to file the report is extended by order. Where a contest has taken place he shall file an affidavit stating in detail the work done by him and the number of days spent in its performance.

RULE XX.

Costs. — No costs will be allowed to the petitioner who takes proceedings to compel the filing of an inventory by an executor or administrator, unless such executor or administrator shall have unreasonably delayed to make and file such inventory after having been duly requested to do so by or in behalf of the petitioner.

Whenever a party to a decree shall deem himself entitled to costs, the application will be considered and determined by the surrogate on two days' notice of adjustment. With said notice shall be served a statement showing the items of costs and disbursements to which the party may deem himself entitled, which disbursements shall be duly verified, both as to their amount and necessity. The dis-

bursements for referee and stenographer's fees must be sustained by affidavits or detailed proof.

At the same time, and on like notice, the surrogate will pass upon any application for an additional allowance. Such application must be accompanied by an affidavit setting forth the number of days necessarily occupied in the hearing or trial, in preparing the account for settlement and in the preparation for the trial; the time occupied on each day in the rendition of the services, their nature and extent in detail, including the drawing, entering or executing of the decree. In case such trial shall have been had before a referee, the time necessarily occupied before him may be shown by his certificate.

RULE XXI.

Compromise. — Upon application for leave to compromise the petitioner's attorney, if any, shall state the total amount of compensation he has received or is to receive from all sources; the net amount to be received by the petitioner as a result of the settlement; whether or not he has become concerned in the application or its subject-matter at the instance of the party with whom the compromise is proposed, and whether or not he has received or is to receive compensation from such party, and the amount thereof, if any.

Notice of the application must be given to the next of kin of the decedent of full age within the State who are entitled to share in the proceeds of the compromise, or the consent of such next of kin must be submitted with the application. (As am'd June 11, 1915.)

RULE XXII.

Transfer tax proceeding. — A special guardian will be appointed to protect the interests of infants upon the return of the appraiser's notice of time and place of appraisal, if it appears that their rights are involved and they are not otherwise adequately represented.

Upon the filing of the appraiser's report in a transfer tax proceeding the petitioner shall submit an order determining the value of the property and the amount of the tax in accordance with the said report; upon the failure of the petitioner so to do within five days after the filing of the report any other party to the proceeding may submit such order upon notice thereof to the petitioner. The surrogate, upon the presentation of such order, will immediately enter the same. The matter will not appear on the calendar at this stage, nor will the court then consider objections to the report.

A party having objections to the report or the order entered thereupon may, within sixty days after the entry of such order, file a notice of appeal. Said notice must specify the grounds of objection, be served upon all parties appearing before the appraiser and be filed, with proof of service, in the office of the clerk of the court. Thereupon the proceeding will be placed upon the calendar for a motion day not less than eight days after the date of the filing of the notice of appeal, and may be noticed for hearing on at least eight days' notice thereof. (As am'd April 26, 1915.)

Rules of Surrogate's Court,—Kings County.

(Amended to May, 1916.)

RULE I.

When court open; calendar days. — The Surrogate's Court is open for the transaction of business on every secular day as follows: From September 1 to June 30, from 9 A. M. to 4 P. M., except on Saturday; from July 1 to August 31, from 9 A. M. to 2 P. M., except on Saturday; on Saturday, from 9 A. M. to 12 M.

RULE II.

Papers used in court, how endorsed. — Every paper to be used in the Court shall be endorsed with the title of the proceeding to which it relates, a description of the paper and the name and post-office address of the attorney presenting it.

RULE III.

Petitions; to be open to public inspection. — Every petition received in the office of the Court, unless an order to the contrary shall be endorsed thereon, shall be forthwith marked with the date of its receipt and placed in a repository suitably labelled and displayed. Until disposed of by the Court such petition shall there remain, open to the inspection of the public, except when removed for proper examination.

RULE IV.

When papers entrusted to attorneys or parties, or delivered to referees. — No paper in the office of the Court will be intrusted to any attorney, party or other person except for proper examination thereof in the said office.

If any referee appointed by this Court shall request the delivery to him of any such paper for use before him, the same shall be delivered to him upon his execution of a receipt therefor and by a clerk or messenger of the Court.

RULE V.

Probate proceeding; will or copy, when filed. — In a proceeding for the probate of a will, not lost or destroyed, a copy of the will shall be filed with the petition and on or before the return of the citation the original will shall be filed.

RULE VI.

Who to be cited, when more than one instrument is offered for probate. — Where two or more instruments are offered for probate, citation shall issue to each legatee, devisee or other beneficiary in being

named or indicated in any one of such instruments, if any other of such instruments purporting to have been made after the instrument in which he is so named or indicated contains provisions which might adversely affect his interest.

RULE VII.

Letters of administration upon estates of foreigners. — Upon application for letters of administration, where it appears that an intestate was at death the subject of a foreign power whose Consul is entitled by treaty to the right of administration or intervention, notice of the application shall be given to the Consul whose right is concerned.

RULE VIII.

Prior proceeding pending for probate or grant of letters. — No petition for the probate of a will, or for the grant of letters of administration or of guardianship will be entertained during the pendency of a prior proceeding for the same or like relief respecting the same estate or the same infant.

RULE IX.

Copy of will to be filed with petition and account. — On an accounting by an executor, testamentary trustee or administrator with the will annexed, a copy of the will shall be filed with the petition and account.

RULE X.

Settlement of account; statement of unpaid claims. — When an account is filed for settlement, the accountant shall file therewith a copy of any statement of a claim which has been presented to him and allowed, and which remains unpaid.

RULE XI.

Proof of service of process or motion papers; when filed. — In all proceedings the proofs of service of process shall be filed on or before the day preceding the return, and the proofs of the service of any notice of motion or order to show cause shall be filed on or before the day preceding the day therein named for the hearing of a motion.

RULE XII.

Notice of appearance. — A respondent who files an answer or objection shall file therewith a notice of appearance.

RULE XIII.

Submission of papers to opposing counsel for inspection. — If upon trial any party shall offer in evidence a paper in his control, without having before trial submitted the same to opposing counsel

for inspection, the Court will in a proper case place the cause at the foot of the calendar, or otherwise postpone the trial, in order that all papers intended for use on the trial, except such as may be reasonably reserved for the examination or contradiction of a witness, may be submitted to opposing counsel for inspection.

If any party shall offer in evidence any paper in his control without having previously submitted the same to opposing counsel for inspection, or if any party shall vexatiously question the authenticity of any paper which has been submitted to his counsel for inspection, the failure so to submit the paper or the making of such question will be regarded by the Court in the adjustment of costs or the consideration of any matter of discretion.

RULE XIV.

Trial of proceeding for accounting; statement of items to be presented. — At the opening of the trial of a proceeding for accounting the accountant shall present to the Court a statement in writing of the items for which no voucher is filed, the items as to which he holds the affirmative, the objections which he concedes to be well taken and the modifications of the account to which the parties consent; and the objectant shall present to the Court a like statement of the objections which he withdraws.

RULE XV.

Reports of special guardians. — Special guardians shall file their reports within eight days from the time of their appointment, except where an answer is filed and an adjournment is had, or the time to file the report is extended by order. The report or an accompanying affidavit must state in detail the work done and the number of days spent in its performance.

RULE XVI.

Allowance to accountant for services. — No allowance will be made to an accountant on the settlement of his account unless there is contained in or appended to his bill of costs a verified statement of the services for which he seeks allowance.

Such statement shall show in detail the number of days upon which services were rendered in preparing the account, the time occupied on each day in such services and the nature of such services.

If the accountant seeks allowance for services to be rendered in drawing, entering or executing the decree, such statement shall show the nature of such services.

RULE XVII.

Notice of settlement of orders, decrees, or decisions. — Two days' notice of the settlement of any order on a litigated motion or of any decree or decision in writing shall be given to all the parties who have appeared in the proceeding in which such order, decree or decision is to be made and to any special guardian appointed therein.

RULE XVIII.

Settlement of orders, decrees, or decisions. — When a proposed order, decree or decision shall be served, with notice of settlement thereof, the party served shall not submit any complete substitute therefor, but may submit proposed amendments thereto, properly referring by page and folio to the portions of the paper sought to be amended and containing after each amendment a statement of the grounds therefor.

RULE XIX.

When court sits for litigated business. — The Court will sit for the disposition of litigated business during the weeks commencing on the first, second and third Mondays of each month, except July, August and September, and during the week commencing on the third Monday of September.

RULE XX.

Calendar of returns of process and of motions; when called; adjournments. — A calendar of returns of process and of motions will be called on each secular day of the year except Friday and Saturday.

Upon the call of the Calendar on any day not appointed for the disposition of litigated business, all cases in which an issue is joined and all motions which are opposed, except such cases or motions as shall be submitted or specially set down for early hearing by order, shall be adjourned to a day thereafter appointed for the disposition of litigated business.

RULE XXI.

Calendar of cases for jury trial. — A Calendar of cases in which orders shall have been made for the trial of any question before the Court and a jury will be called on the first Monday of each month, except July, August and September, and on each day thereafter while the Court shall sit for the purpose. Such cases, so far as any question therein shall require trial by jury, will then be tried in their order unless adjournment is granted upon proof of legal excuse.

RULE XXII.

Calendar of motions, and of cases to be tried without a jury. — A Calendar of motions and of cases to be tried by the Court without a jury will be called on the third Monday of September and on the second Monday of each other month, except July and August, and on each day thereafter while the Court shall sit for the purpose. Such motions and cases will then be heard unless the Court is occupied with the Calendar of Jury Cases, or adjournment is granted upon proof of legal excuse.

RULE XXIII.

Order for trial by jury.—Where a trial by jury has been lawfully demanded, the order therefor shall state distinctly and plainly each question of fact to be tried and if the trial is to be had in the Surro-

gate's Court, the order shall set down the trial for a day therein appointed.

Such order must be submitted for settlement at the time of the demand for a trial by jury or in default thereof it may be thereafter settled at the instance of any party in the same manner as if it was an order upon a litigated motion.

RULE XXIV.

Principals and sureties on bonds and undertakings; how to qualify. — Principals and sureties upon bonds and undertakings, if natural persons, must appear and qualify at the same time before the Administration Clerk. No bond for a sum less than fifty dollars will be approved. No bond given by a surety company, the penalty of which is more than two thousand dollars, will be approved unless it shall be accompanied by the certificate of the surety that the principal has made an agreement with it for the deposit of the moneys and other depositable assets of the estate in the manner declared to be lawful by section 818 of the Code of Civil Procedure, and that such agreement has provided for such deposit with one or more depositaries previously designated in writing by the Surrogate.

RULE XXV.

Petition for application of infant's property to his support or education. — A petition for the application by a guardian of an infant's property or any portion thereof to the support or education of the infant shall show that an annual accounting has been duly filed or that good cause exists for disregarding the omission.

The petition shall show the terms of any previous order for the application of any portion of the infant's property. The order thereon shall state the period during which the application of the infant's property shall continue and if an order for its continuance for more than one year is sought the petition must show the circumstances which justify such order.

When the infant is over fourteen years of age he shall join in, subscribe and verify the petition, and when the petition is made by a person other than the guardian of the property, a copy of the petition, together with two days' notice of the time when it will be presented to the Court, shall be served upon such guardian.

RULE XXVI.

Application for leave to compromise. — Upon application for leave to compromise, the petitioner's attorney, if any, shall state whether or not he has become concerned in the application or its subject-matter at the instance of the party with whom the compromise is proposed and whether or not he has received or is to receive compensation from such party.

Rules of Surrogate's Court, Queens County.

(Adopted February 1, 1914; Amended to May, 1916.)

RULE I.

Business hours. — The Surrogate's office is open for the transaction of business, except on Sundays, Saturdays and Holidays, as follows: From September 1 to June 30, from 9 A. M. to 4 P. M.; from July 1 to August 31, from 9 A. M. to 2 P. M.; on Saturdays from 9 A. M. to 12 M.

RULE II.

Calendar. — The regular calendar will be called at 10 A. M. on Tuesday of each week, except during the months of August and September.

A calendar of cases in which orders shall have been made for the trial of any controverted questions of fact by the court, with a jury, will be called on the last Tuesday of each month, except July, August, and September and on each day thereafter while the court shall sit for the purpose. Such cases will then be tried in their order unless adjournments be granted upon proof of legal excuse. (As am'd Feb. 11, 1915.)

RULE III.

Cases not answered. — Cases appearing on the calendar and not answered will be marked adjourned for one week; if not answered on the adjourned day they will be marked "off calendar" and can then be restored only upon two days' notice to, or the written consent of all parties.

RULE IV.

Proofs of service. — Proofs of service of citations or orders to show cause in all proceedings must be filed on or before the day next preceding the return day in order to have the cases placed on the calendar.

RULE V.

Form of papers. — All petitions, decrees, orders, objections and other papers must be written or printed in black ink and endorsed with the title of the proceeding, indicating the nature of the application, and the name and post office address of the attorney. A proposed order must not be attached to any other paper.

All petitions, bonds, proposed orders and other papers must be filed and entered in the office before being submitted to the Surrogate.

RULE VI.

Appearances. — Parties to proceedings may appear personally or by attorney. An attorney appearing for a party duly cited must file a written notice of appearance, and when appearing for a party not cited he must, in addition to the notice of appearance, file a written authorization from such party, duly executed and acknowledged as a deed to be recorded.

RULE VII.

Objections; trial by jury. — Objections in probate, accounting or other proceedings must be in writing, duly verified, and a copy

must be served upon the petitioner, or upon his attorney, in case he has appeared by attorney.

Within five days after a jury trial has been demanded, the party making the demand shall present, on two days' notice of settlement to the attorneys of all parties who have appeared, a proposed order directing such trial which order shall state the controverted questions of fact to be tried by jury. If a party demanding a trial by jury should fail to serve and present such order, it may be presented by any party to the proceeding. (As am'd Feb. 23, 1915.)

RULE VIII.

Stipulations for adjournments. — Stipulations for adjournments must be in writing, signed by all parties who have appeared in the proceeding and filed on or before the day next preceding the date set for hearing.

RULE IX.

Probate proceedings. — In probate proceedings the original will and a sworn copy thereof must be filed with the petition, unless upon good cause shown by affidavit the Surrogate dispenses with the filing of the original will, in which case it must be filed at least two days before the return day of the citation.

RULE X.

Foreign wills. — All exemplified copies of foreign wills shall be accompanied by a petition and an order for recording the same.

RULE XI.

Letters of administration. — No letters of administration will be issued while another application for letters on the same estate is pending.

RULE XII.

Citizens of foreign countries. — Upon application for letters of administration, where it appears that an intestate was at the time of his death the subject of a foreign power whose Consul is entitled by treaty to the right of administration or intervention, notice of the application shall be given to the Consul whose right is concerned.

RULE XIII.

Contest of probate of will. — A party seeking to contest the probate of a last Will and Testament must file with the Clerk of the Court, a written and verified answer, containing a concise statement of the grounds of his objection to such probate, and any facts he may allege tending to establish a want of jurisdiction of the Court to hear such probate. In case such jurisdiction shall be denied or the right of any objecting party to appear and contest shall be questioned, the Court will first hear and pass upon the question of jurisdiction, or the status of the contestant, unless, for the convenience of the parties or the Court, it shall be ordered otherwise.

In all cases of contests in probate proceedings, the proponents shall, within five days after objections to the probate are filed, present a verified petition for and procure and enter an order directing notice of the time and place of hearing of such objections to be given, and prescribing the manner of giving such notice, to all persons in being who would take any interest in any property

under the provisions of the will, and to the executor or executors, trustee or trustees named therein, if any, who have not appeared in the proceeding, as required by § 2617 of the Code, and such petition shall contain the names and addresses of such parties, and state whether any, and which of them, are infants or of unsound mind. In case the proponents shall not present such petition and enter such order within the time aforesaid, such petition may be presented and order entered by or on behalf of any party or parties interested in the estate.

RULE XIV.

Certain persons must be made parties in probate proceedings. — Whenever a party shall put in issue on probate the validity, construction, or the effect of any disposition of personal property under § 2624 of the Code, if it shall appear that all persons interested in such construction are not before the Court, the determination of such question shall be suspended until such persons shall be made parties; and the executor named in the will shall not be held to represent the legatees therein for the purpose of such construction.

RULE XV.

When person not executor entitled to costs. — Whenever any person shall appear in support of the will propounded under § 2617 of the Code, such person shall not thereby become entitled to recover any costs on the probate of said will unless it shall appear to the satisfaction of the Court that the interest of such person was not sufficiently represented and prosecuted by the executor named in the will and his counsel.

RULE XVI.

Accounting. (Petition.) — When a petition for a voluntary accounting is presented the account and vouchers to which it relates shall be filed therewith.

RULE XVII.

Statement of unpaid claims. — When an account is filed for settlement, the accountant shall file therewith a copy of any statement of a claim which has been presented to him and allowed, and which remains unpaid.

RULE XVIII.

Account. (Copy of Will to accompany.) — On an accounting by an executor, testamentary trustee, or administrator with the will annexed, a copy of the will shall be filed with the petition and account.

RULE XIX.

Appointment of special guardian for infant. — In the absence of a petition by an infant over fourteen years of age for the appointment of a special guardian in any proceeding, the Surrogate will appoint a special guardian upon his own motion. No special guardian to represent the interest of an infant in any proceeding will be appointed on the nomination of the petitioner or his attorney, or upon the application of a person having an interest adverse to that of the infant. To authorize the appointment of a person as a special guardian on the application of an infant or otherwise in a proceeding in this Court, or to entitle a general guardian of such infant to appear

for him in such proceeding, it must appear that such person, or such general guardian, is competent to protect the right of the infant, and that he has no interest adverse to that of the infant and is not connected in business with the attorney or counsel of any party to the proceeding. Whenever an infant interested in any proceeding in said Surrogate's Court has a general guardian no decree will be entered without appointing a special guardian to represent said infant's interest therein, unless such general guardian shall file his appearance in writing and his affidavit of no adverse interest, with the Clerk of said Surrogate's Court.

RULE XX.

Reports of special guardians. — Special guardians in accounting proceedings shall file their reports within five days from the time of their appointment, except where objections are filed and an adjournment is had, or their time to file report is extended by the Surrogate. The report or an accompanying affidavit must state in detail the work done and the number of days spent in its performance.

RULE XXI.

Bill of costs. — No allowance will be made to an accountant on the judicial settlement of his account unless the bill of costs contains a detailed statement of the days employed in connection with the account, showing the time occupied on each day in the rendition of the services, and their nature and extent in detail.

RULE XXII.

Notice of settlement of decree. — In a proceeding where a notice of appearance and demand has been filed, or a special guardian appointed, two days' notice of settlement of decree must be given, unless all parties who have appeared consent to the entry of the decree.

RULE XXIIa.

Proof, on an accounting, of having paid the transfer tax. — Where a representative of an estate is required by law to pay a transfer tax, no decree judicially settling the account of such representative will be entered in this court unless there has been filed in my office a receipt for the payment of such tax, sealed and countersigned as provided by § 236 of the Tax Law, or it has been shown that the estate is exempt from taxation. (Added Feb. 16, 1916.)

RULE XXIII.

Hearing of disputed claim. — Where the parties consent that the Surrogate may hear and determine a disputed claim against the estate of a decedent upon the judicial settlement of the account of an executor or administrator, as provided by § 1822 of the Code of Civil Procedure, the attention of the Court must be directed to this fact on filing the petition for accounting in order that the matter may be placed on the appropriate calendar.

RULE XXIV.

Amendment of proposed decree, etc. — When a proposed order, decree or decision shall be served, with notice of settlement thereof, the party served shall not submit any complete substitute therefor, but may submit proposed amendments thereto, properly referring by page and folio to the portions of the paper sought to be amended

and containing after each amendment a statement of the grounds therefor.

RULE XXV.

Papers not to be removed from office. — No record or paper on file in this Court will be intrusted to the custody of the attorneys or parties, except for the purpose of proper examination, in the office where it is deposited; and if any such document or paper shall be needed before any Referee appointed by this Court, the same shall be entrusted to a Clerk or messenger of this Court and delivered to the Referee, who shall execute a receipt therefor, and for its redelivery.

RULE XXVI.

Allowance for support of infants. — No allowance will be made to infants for support or education under § 2846, Code of Civil Procedure, unless the petition shows that an annual accounting has been properly filed or good cause is therein shown why it has not been filed. The petition shall show also the terms of any previous order in the same estate, or, if none has been made, that fact shall be stated. Except in exceptional cases, an allowance will be made for the period of one year only, and the order must so provide. Where the infant is over fourteen years of age, he shall join in the petition; and when application is made by any person other than the guardian of the property it shall be made on at least two days' notice to such guardian.

RULE XXVII.

Motions for reargument. — All motions for reargument must be submitted on papers, showing clearly that some question decisive of the case, and which was presented by counsel upon the argument, has been overlooked by the Court; or that the decision is inconsistent with some statute, or with a controlling decision to which, through the neglect or inadvertence of counsel, the attention of the Court was not drawn.

RULE XXVIII.

Transfer Tax Proceeding. — 1. Upon the filing of the appraiser's report in a transfer tax proceeding the Surrogate will immediately enter the order determining the value of the property and the amount of tax. The matter will not appear on the calendar at this stage, nor will the Court then consider objections to the report.

2. A party having objections to the report, or the order entered thereupon, may, within sixty days, file a notice of appeal. Said notice to be served upon all parties appearing before the appraiser, and proof of service must be filed with the clerk, with the notice of appeal. Thereupon the proceeding will be placed upon the calendar for the next regular calendar day. This notice must specify the grounds of objection.

3. A special guardian will be appointed to protect the interests of infants upon the return of the appraiser's notice, if it appears that their rights are involved and they are not otherwise adequately represented.

4. A proposed order on a motion to exempt an estate from taxation, must be accompanied by a copy thereof.

Rules of the City Court of New York City.

(Adopted December 6, 1911, to take effect January 1, 1912. As amended to May, 1916.)

RULE I.

Trial terms. — Each trial term shall begin on the first Monday of the month for which it is assigned, and be continued until and including the Friday preceding the first Monday of the following month, unless the justice presiding shall continue the term. No Trial Term shall be held during the months of July, August and September, except as hereinafter prescribed. The justice assigned to the Special Term during the months of July, August and September, with a jury, or without where none is required by the parties, may try "marine cases" or any case in which the defendant may by order of a justice of this court be actually confined in jail and unable to furnish bail, and when the circumstances of the case are, in the judgment of said justice, such as to demand a speedy trial in furtherance of justice, and in such cases the justice assigned to the Special Term during those months may hold such trial in that branch of the court. (As am'd Jan. 1, 1916.)

RULE II.

Special calendar for short causes. — There shall be a Special Calendar to be called in Part I, Trial Term, for the trial of actions placed thereon, pursuant to the following direction: The justice assigned to Part I, Trial Term, shall send such causes as are placed on this Special Calendar to Part II, Trial Term, for trial. In case Part II shall not have business enough to occupy it during court hours, causes from the Regular Calendar at Part I shall be sent to it for trial. (In effect April 1, 1915.)

In actions on contract, of replevin, or for conversion, where a note of issue has been filed and the cause noticed for trial, either party may apply to the Special Term on two days' notice to the adverse party for an order placing the cause on the Special Calendar. Upon such application, if it satisfactorily appear by affidavit and the pleadings that the trial of the action will not occupy more than two hours and that no good reason exists why the same should not be promptly tried, the court may by order place the cause on the Special Calendar for trial. The order shall specify the number of the cause on the General Calendar, and a copy thereof must be filed

with the calendar clerk. If the trial shall actually occupy more than two hours, the court may in its discretion send the cause to the foot of the General Calendar.

No action brought for the recovery of less than $250, which could have been brought in the Municipal Court of the City of New York, will be advanced to the Special Calendar.

All actions hereafter advanced to the Special Calendar shall be called and tried or otherwise disposed of in the order in which the same are placed thereon, unless postponed for legal cause shown by affidavit.

Subd. 2. Special Calendar for Commercial Causes. — In any action now on the General Calendar, or which may hereafter be placed thereon, wherein the plaintiff seeks to recover a specific sum of money upon a bond or undertaking or other written obligation or upon a negotiable instrument or for the rent or hire of real or personal property or for money had and received or for money loaned or for goods sold and delivered or on a guaranty, any party to a cause may upon proof of service of a copy thereof upon the attorneys for all parties who have appeared in the action file with the calendar clerk a notice to the effect that the cause is one of those enumerated hereinabove and that the same is moved as a Commercial Calendar cause, and thereupon the calendar clerk shall place the cause upon the Special Calendar for Commercial Causes in the order in which such notices are filed. Such calendar shall be called in Part III and the causes thereon tried and disposed of at Parts III and IV. If the party who has moved the cause as a Commercial Calendar Cause shall not be ready to proceed with the trial when the cause is called for trial, the court in its discretion may allow an adjournment or send the cause to the foot of the Trial Calendar or direct a dismissal or inquest or otherwise dispose of the same as justice may require. Whenever there shall not be sufficient causes on the Calendar for Commercial Causes to occupy the time of the courts held in Parts III and IV, causes shall be sent to such part or parts for trial from the Day Calendar by the justice holding Part I. (This subdivision in effect November 2, 1914.)

RULE III.

Preferred causes. — Application for a preference under section 791 of the Code of Civil Procedure must be made in Trial Term, Part I, and notice thereof served with the notice of trial, agreeably to section 793.

RULE IV.

Actions transferred from other courts. — In actions transferred to this court by consent from other courts of record, the party filing the order of transfer shall file with the clerk of this court engrossed copies of the summons and pleadings in such action, and the clerk shall, on filing such process and pleadings, enter said cause on the Trial Calendar.

RULE V.

Pleadings furnished to court; duty of attorney. — It shall be the duty of the attorney by whom the copy of the pleadings shall be furnished for the use of the court on a trial to plainly designate on each pleading the part or parts thereof which are claimed to be admitted or controverted by the succeeding pleading.

RULE VI.

Cases in which a new trial is ordered at appellate court. — In lieu of the pleadings in actions wherein a new trial is granted the party moving the case for trial must furnish the Justice with a printed copy of the appeal book and a copy of the opinion of the appellate court on whose order the case is remanded for the new trial.

RULE VII.

Marine cases. — Marine cases must be commenced (under the Code) by summons, and if the plaintiff applies for an order of arrest to accompany the summons it must be in the form and to the effect required by section 3178. The pleadings may be oral or in writing; if oral, the clerk must enter the substance thereof in the minutes. If a jury is demanded, the Justice presiding at Special Term may in his discretion transfer the action to any one of the Trial Terms or he may cause to be impanelled a jury for the purpose and try the cause at Special Term, and said tribunal is hereby declared to be a Trial Term for the special purpose of considering and determining such cases.

RULE VIII.

Jurisdiction. — Torts committed on board a foreign ship on the high seas must be considered as having occurred within the territorial limits of the foreign nation to which the vessel belongs, and the parties having the ship's equipage, though actually here, are still deemed within the foreign jurisdiction. In such case the court, having discretion to exercise the power, will decline jurisdiction unless it is made to appear either: First, that the plaintiff or defendant has been regularly discharged from his ship by competent authority; or, second, that either of the parties is a resident or citizen of the United States. In the excepted cases only will process be allowed.

RULE IX.

Special term for litigated motions; when held. — There shall be a Special Term of this court for the hearing of litigated motions, to commence on the first Monday of each month and to continue until the Friday preceding the first Monday of the succeeding month, which term shall be held every day, except Saturday, Sunday and legal holidays. Court shall open at 10 o'clock in the morning and

shall continue until all business before the court has been disposed of. This Special Term shall be known as Special Term, Part I. During the months of July, August and September the Justice assigned thereto shall also be assigned to hold Special Term, Part II. Demurrers shall be heard and determined at Special Term, Part I, and may be brought on for hearing upon the usual notice of argument and the filing of the note of issue provided for in Rule XII.

RULE X.

Special term for ex parte business; time of sessions. — There shall be a Special Term of this court for the transaction of ex parte business, to be held on the first Monday of each month, and to continue to and including the Saturday prior to the first Monday of the following month. Court shall open at 10 o'clock in the morning and shall continue in session until 4 o'clock in the afternoon, except Saturday, on which day the court may be adjourned at 12 o'clock noon, and shall be open every day in the year except Sundays and legal holidays. This Special Term shall be known as Special Term, Part II. The Justice assigned to Special Term, Part II, shall also attend to the drawing of jurors for the Trial Terms of the City Court.

Nature of Motions and Proceedings to Be Determined at the Special Term for Ex Parte Business.

Application for all court orders, ex parte or by consent, or where notice is not required or has been waived, must be made to Special Term, Part II. All applications for judgment in actions where the defendant has failed to appear or has waived notice of motion for judgment or has consented thereto shall be made to Special Term, Part II. All orders for the examination of parties or witnesses in supplementary proceedings or to perpetuate testimony or for the examination of parties before trial shall be made returnable before the Justice assigned to hold Special Term, Part II. No ex parte order of reference in supplementary proceedings will be made by this court or any Justice thereof.

RULE XI.

Extension of time to answer. — No extension of time to answer for more than two days will be granted, unless upon notice to plaintiff's attorney.

RULE XII.

Daily motion calendar. — The clerk assigned to Special Term for litigated motions shall prepare a motion calendar for each day of the term, other than Saturdays, and place thereon all causes in which notes of issue have been filed not later than 4 P. M. of the day previous to the return day of the motion, and furnish a copy thereof to the New York Law Journal for publication. The Justice presiding at Special Term may add to the calendar on a day for which it is noticed any motion not appearing thereon. Motions must be made returnable at 10 A. M., at which hour the calendar will be called and defaults noted.

RULE XIII.

Order to punish for contempt in supplementary proceedings. — Orders in supplementary proceedings to punish a judgment debtor for contempt shall not be made returnable in less than three days from the time of service thereof.

RULE XIV.

Calendar practice: *Trial calendar.* — At least eight days before the first Monday of a trial term or whenever the justice assigned to Trial Term, Part I, shall direct, the calendar clerk shall prepare a Trial Calendar containing so many of the pending causes on the General Calendar as the justice holding Trial Term, Part I, shall direct, and such Trial Calendar shall be posted in the calendar clerk's office and published in the New York Law Journal four days preceding the day set for filing the notice hereinafter mentioned. Any party to a cause appearing on such Trial Calendar may serve notice on the calendar clerk and on the attorneys for the other parties to the cause at or before 4 o'clock on a day to be set, following not less than four days after the first publication of the calendar in the Law Journal, to the effect that the cause is to be marked ready for trial, but if no party shall serve such notice the cause shall be marked off and restored to the General Calendar and shall not be again published upon a Trial Calendar until the last number of such calendar which is marked ready shall have been reached on the Day Calendar for trial. Causes appearing more than three times upon the said Trial Calendar shall, unless such notice is served, be placed upon such future Trial Calendar as the justice assigned to Part I, Trial Term, may designate. (This paragraph amended September 1, 1914.)

Day calendar.—Said clerk shall make up a Day Calendar for each day from the causes for which a notice is served as aforesaid, upon which shall be placed all such causes marked ready from the previous Trial Calendars or remaining undisposed of from Trial Calendars theretofore posted and published. Such Day Calendar shall be called at Trial Term, Part I, of this court at 9:45 A. M. each day. Three causes therefrom shall be assigned to each of the several trial parts, except Part II, for trial. (This paragraph amended September 1, 1914.)

Equity Causes. — Equity causes for the foreclosure of mechanic's liens, and in the nature of interpleader, shall be placed upon the Equity Calendar upon five days' notice of trial and upon filing a note of issue therefor with the calendar clerk. Causes shall be placed on such calendar in the order in which notes of issue are received. Such calendar shall be called in Trial Term, Part III, on the second Monday of each term and the causes thereon shall be assigned for trial during the two latter weeks of the term at Trial Term, Part IV. All applications for postponement or delay of the trial of equity causes shall be governed by the rules applicable to causes on the Trial Term Calendar. (This paragraph added Sept. 1, 1914; amended Jan. 1, 1916.)

When a cause thus set down on the call calendar on any Friday as "ready" appears upon the day calendar, it must be tried or go to the foot of the general calendar, unless it appears by affidavit to the satisfaction of the justice calling the day calendar that the trial cannot with justice to one of the parties proceed. The court may then by order set the cause down for trial on another day in the term or place the cause on the call calendar for a subsequent call.

In a cause upon the day calendar for trial, where it shall appear to the court by affidavit that counsel who is to try the cause is to argue a cause on the day calendar of the Supreme Court of the United States, or upon the day calendar of the Court of Appeals of the State of New York, or upon the day calendar in the Appellate Division of the Supreme Court, or is actually engaged in the trial of a cause in a court of record of the counties of New York or Kings, the cause shall be passed for the day, or until such argument or trial is concluded, unless the trial in which counsel is engaged is a protracted one. In no other event shall a cause upon the day calendar be passed for the day.

In no event shall a cause on the day calendar be passed from day to day on account of the engagement of counsel for more than two days. Not more than two causes shall be held "ready" on the day calendar for one counsel in addition to the cause in which he is engaged, and in all causes the counsel who is to try the same must be designated, if required by the court, on the call of the day calendar. Actions in which new trials are ordered will, upon application to the Special Term for Litigated Motions, upon two days' notice, be placed upon the call calendar without filing a new note of issue.

RULE XV.

Miscellaneous; fees paid to the clerk not returnable. — Fees paid upon filing notes of issue are, so soon as they reach the hands of the clerk, in the constructive possession of the City of New York, and it is made the official duty of that clerk to pay them, with other lawful fees collected by virtue of his office, into the city treasury.

RULE XVI.

Special rules concerning the duties and obligations of the clerk of the City Court of the city of New York. — 1. The clerk, on assuming office, shall make and file, in duplicate, his oath of office, one of which duplicates shall be filed in the office of the city clerk and the other in the clerk's office of this court, and give a bond as now prescribed by law.

2. The clerk, or, in his absence, the deputy, shall make statements in writing, duly verified by his oath, of all moneys received for fees or otherwise by him as said clerk, and shall pay into the Finance Department of the City of New York all such moneys so received by him for the use of or belonging to the city, as required by law; and these acts shall be done once in each and every month, and a duplicate of such statements in writing, also duly verified, shall be at the same time delivered to the chief justice of this court, or, in his absence, to the justice then presiding at the Special Term, Part II, accompanied by a voucher from the said finance department showing that such money has been actually so paid over after the auditing and approval of the monthly statement by the department.

RULE XVII.

Complaint dismissed at Trial Term; restoration. — Where a complaint is dismissed or an inquest allowed at a Trial Term, the cause will not be restored on consent of the parties, but the facts may be

presented to the justice presiding in the part where the cause was disposed of, or at the Special Term, by motion for action thereon.

RULE XVIII.

Clerk to keep alphabetical index of actions and special proceedings; papers to be filed must bear index number. — The clerk of the City Court of the City of New York is hereby authorized to inaugurate and maintain in his office an alphabetical index of the actions and special proceedings commenced in the City Court, which shall be numbered consecutively for the year in which such action or special proceeding is commenced, and each pleading, order, affidavit, judgment, final order or other paper filed in such action or special proceeding shall be filed under the same number, so that in the index book provided for that purpose the record of the filing shall appear. After the action or special proceeding shall have received a number, each paper filed therein shall have indorsed thereon the number assigned thereto, and the clerk is authorized to refuse to receive or file any such pleading, order, affidavit or other paper, including the judgment roll or final order, upon which such number does not plainly appear.

RULE XIX.

Settlement of orders on remittitur. — At least three days' notice of settlement of all orders upon remittiturs from the Appellate Term and Appellate Division, Supreme Court, shall be given before presenting the same for signature and entry.

SPECIAL RULE.

Notes of issue. — Counsel are directed to file only typewritten notes of issue for motions or for trials. (Added June 2, 1914.)

MUNICIPAL COURT OF THE CITY OF NEW YORK.

TABLE I.

*Table showing where sections of the former Municipal Court Act (Laws of 1902, chapter 580) which was in force until August 31, 1915, may be found in the present Municipal Court Code (Laws of 1915, chapter 279) which went into effect September 1, 1915.**

Section of Former Act	Section of Present Code
1	6
2 Omitted.	
3 Repealed in 1907.	
4–8g Superseded by	13
9	14
10	2 (last par.)
11	7
12	7, 8
13 In part in	7
14, 15 Omitted.	
16	9
17	10
18	11
19	12
20	15
25	17
26	18
27	19
28	20
29	175
30 (First sentence)	18
31 Superseded by	21
32–34	23
35 Superseded by	129
36	22
37 Omitted.	
38	24
39	25
40 Omitted.	
41	26
42, 43 Superseded by	27
44	174
45–53 Superseded by	28
55 Superseded by	151
56 Superseded by	29
57 Superseded by	30
58	31
59	32 (subd. 1)
60 Omitted.	
61	33
62 Omitted.	
63 Superseded by	30
64	34, 35
65	32 (subd. 1), 34
66	32 (subd. 2)
67 Omitted.	
68	37
69, 70 Omitted.	
73 Superseded by	39
74	40
75	41
76	42
77 Superseded by	43, 44
78 Superseded by	45
79, 80 Superseded by	46
81 Superseded by	47
82 Covered by	151
83	48
84	49
85	50
86	51
87	52
88	53
89 Superseded by	54
90 Omitted.	
91	55, 135 (subd. 3)
92	56
93 Superseded by	57
94–100 Superseded by	58
101	59
102, 103 Superseded by	60
104 Superseded by	67
105	61
106	62
107	63
108	64
109	65
110	66
111–115 Superseded by	67
115a	68
116 Superseded by	67
117	69
118 Superseded by	67
119 Omitted.	
120–124 Superseded by	67
125 Omitted.	
126 Superseded by	67
127–131 Omitted.	
137	70
138	71
139	70, 73
140 Omitted.	
141	74
143	77
145 (Subds. 1, 2, 5, 6)	78
" (Subds. 3, 4) Superseded by	90

* Many of the sections of the former Act have been amended or rewritten in the new Code, and in some instances two or more sections have been consolidated into one, or one has been broken up into two or more. But so far as there is a correspondence between the original and the new sections, this Table shows it.

Section of Former Act	Section of Present Code
146	79
" (Last sentence)	137
147 Superseded by	80
148	81
149	82
150	83
151-156 Superseded by	84, 85
157 Superseded by	86
158-160 Superseded by	88
161 Superseded by	87, 88
162 Superseded by	88
163, 164 Omitted.	
165 Superseded by	78 (subd. 6)
166	93 (subd. 2)
167-169 Omitted.	
170	93 (subd. 1)
171-177 Omitted.	
178 In part in	6 (subd. 2)
179-186 Omitted.	
187 Superseded by	27 (subd. 3)
193	96, 32 (subd. 2)
194, 195 Omitted.	
196	97
197	98
198, 199	99
200	100
205 Superseded by	101, 102
206	103
207, 208 Superseded by	101, 102
209-211 Superseded by	105
212	106
213 Superseded by	105
214	104
215 Superseded by	105
216	107
217	108
218	107
219	109
220	110
221	111
222	112
223	113
224	114
225	115
226	116
230	118 (subd. 2), 119
231 (1st four sentences)	118 (subd. 1)
" (Remainder of) Superseded by	121
231a, 231b Superseded by	121
232 (First sentence)	118 (last sentence)
233 Superseded by	121
234	120
235-237 Superseded by	121
238 Repealed in 1911.	
239, 240 Covered by	15
241-243	124
248, 249 Superseded by	125
250 Omitted.	
251	128
252 Omitted.	
253	129 (subds. 1 and 6)
254	129 (subd. 3)
255	129 (subd. 4)
256	129 (subd. 6)
257 In part in	154
260	130
261	131
262, 263 Omitted.	
264-268 Superseded by	132
269	133

Section of Former Act	Section of Present Code
270	134
271	135
272	136
273	138
274	139
275	140
276	141
277	142
282	143 (subds. 1-5)
283	143 (subd. 7)
284-286 Superseded by	143
287	143 (subd. 8)
288 Superseded by	143
289 Omitted.	
293 Omitted.	
294	146
295, 296 Superseded by	147
297 (with § 270)	134
298	148
299	149
300	50
301	146 (subd. 2)
302-305	151
306	152
307	153
310 In part in	154, 155 (1st par.), 156
311 In part in	156, 157
312 Superseded by	157
313 Superseded by	158
314	159 (subd. 1)
315	160
316 In part in	159 (subd. 1)
317-319 Superseded by	161
320-322 Superseded by	162
323	129 (subd. 2)
324-326 Omitted.	
327	163
330	170
331 (First 3 subds.) Omitted.	
331 (Subd. 4)	165
332	164
333	166
334 Superseded by	167 (subd. 2)
335	167 (subd. 3)
336	167 (subd. 4)
337-339 Omitted.	
340	168
341 Superseded by	169
342	171
343, 344 Superseded by	169
345 Omitted.	
346	172
347	173
348	174
349 Omitted.	
350 (Repealed in 1903.)	
351	118 (subd. 1)
351a Omitted.	
352	176
353	177
354	178
355, 356 Omitted.	
360	179
361	181
362	182
363	183
364	184
365	185
366	186

TABLE II.

Table showing where sections of the present Municipal Court Code (Laws of 1915, chapter 279) which went into effect September 1, 1915, may be found in the former Municipal Court Act (Laws of 1902, chapter 580) which was in force until August 31, 1915; also showing the other sources from which some sections of said Code have been derived.

Section of Present Code	Section of Former Act
1	From N. Y. City Charter, §§ 1350–1352, 1356.
2	From N. Y. City Charter, §§ 1353, 1354.
" (Last par.)	10
3	From N. Y. City Charter, § 1355.
4	" " " " § 1357.
5	" " " " §§ 1358–1363.
6	1
" (Subd. 2)	178 (in part)
7	Parts of 11, 12, 13
8	12 (in part)
9	16
10	17
11	18
12	19
13	4–8g
14	9
15	20, 239, 240
17	25
18	26; 1st sentence of 30
19	27
20	28
21	Supersedes 31
22	36
23	32–34
24	38
25	39
26	41
27	Supersedes 42, 43
" (Subd. 3)	supersedes 187
28	Supersedes 45–53
29	Supersedes 56
30	Supersedes 57 and 63
31	58
32	(Subd. 1) 59, 65
" (Subd. 2)	66, 193
33	61
34	Parts of 64 and 65
35	Supersedes part of 64
36	New.
37	68
38	New.
39	73
40	74
41	75
42	76
43	Supersedes part of 77
44	" " " 77
45	Supersedes 78
46	Supersedes 79, 80
47	Supersedes 81
48	83
49	84
50	85
51	86
52	87
53	88
54	Supersedes 89
55	91
56	92
57	Supersedes 95
58	Supersedes 96–100
59	101
60	Supersedes 102, 103
61	105
62	106
63	107
64	108
65	109
66	110
67	Supersedes 104, 111–116, 118, 120–124, 126
68	115a
69	117
70	Parts of 137 and 139
71	138
72	New.
73	139
74	141
75	New.
76	New.
77	142
78	145 (subds. 1, 2, 5, 6)
" (Subd. 6)	supersedes 165
79	146 (except last sentence)
80	Supersedes 147
81	148
82	149
83	150
" (Subd. 3).	From § 521, C. C. P.
84, 85	Supersedes 151–156
86	Supersedes 157
87	161 (except last sentence)
88	Supersedes 158–160, 162, and last sentence of 161
89	New.
90	145 (subds. 3, 4)
91	From § 547, C. C. P.
92	New.
93	(Subd. 1) 170
" (Subd. 2)	166
" (Subd. 3.)	From § 725, C. C. P.
94	New. (See § 1778, C. C. P.)
95	New.
96	193
97	196
98	197
99	198, 199
100	200
101, 102	Supersede 205, 207, 208
103	206
104	214
105	Supersedes 209–211, 213, 215
106	212
107	216, 218
108	217
109	219
110	220
111	221
112	222
113	223
114	224

Section of Present Code	Section of Former Act
115	225
116	226
117	From § 873, C. C. P.
118 (Subd. 1)	231 (1st 4 sentences), 351
" (Subd. 2)	230 (last sentence), 232 (1st sentence)
119	230
120	234
121	Supersedes 231 (in part), 231a, 231b, 233, 235–237
122	New.
123	New.
124	241–243
125	Supersedes 248, 249
126	New.
127	From §§ 1204, 1205, 521, C. C. P.
128	251
129 (Subd. 1)	Part of 253
" (Subd. 2)	Supersedes 35, 323
" (Subd. 3)	Part of 254
" (Subd. 4)	255
" (Subd. 5)	New.
" (Subd. 6)	Parts of 253, 256
130	260
131	261
132	Supersedes 264–268
133	269
134	270, 297
135 (Subd. 3)	91
" (Other subds.)	271
136	272
137	Last sentence of 146
138	273
139	274
140	275
141	276
142	277
143 (Subds. 1–5)	282
" (Subd. 7)	283
" (Subd. 8)	287
" (Remainder)	Supersedes 284–286, 288
144	New.
145	New.
146	294, 301
147	Supersedes 295, 296
148	298
149	299
150	300
151	Supersedes 55, 82, 302–305
152	306
153	307
154	From § 1294, C. C. P., and parts of 257 and 310.
155	From § 1347, C. C. P., and part of 310.
156	Parts of 310 and 311
157	Part of 311; supersedes 312
158	Supersedes 313
159 (Subd. 1)	314, 316 (last sentence)
160	315
161	Supersedes 317–319
162	Supersedes 320–322
163	327
164	332
165	331 (subd. 4)
166	333
167 (Subd. 2)	supersedes 334
" (Subd. 3)	335
" (Subd. 4)	336
168	340
169	Supersedes 341, 343, 344
170	330
171	342
172	346
173	347
174	44, 348
175	29 (and from N. Y. City Charter, § 1384.)
176	352
177	353
178	354
179	360
180	New.
181	361
182	362
183	363
184	364
185	365
186	366

NEW YORK CITY MUNICIPAL COURT CODE.

AN ACT in relation to the municipal court of the city of New York, its justices and officers.

(LAWS OF 1915, CHAPTER 279.)

(To take effect September 1, 1915.) [1]

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Title I. Organization and jurisdiction. (§§ 1–16.)
II. Venue and commencement of actions, parties. (§§ 17–28.)
III. Provisional remedies and actions to foreclose liens on chattels. (§§ 29–77.)
Article I. Arrest. (§§ 29–38.)
II. Attachment. (§§ 39–56.)
III. Replevin. (§§ 57–69.)
IV. Action to foreclose a lien on a chattel. (§§ 70–77.)
IV. Pleadings. (§§ 78–94.)
V. Proceedings between joinder of issue and trial. (§§ 95–117.)
Article I. Bringing cause on for trial; adjournments; subpœnas; attachment against and liability of defaulting witness. (§§ 95–100.)
II. Commission to take testimony; depositions; physical examination. (§§ 101–117.)
VI. Trial; jurors; submission of controversy. (§§ 118–124.)
VII. Judgment and execution. (§§ 125–142.)
Article I. Judgments. (§§ 125–129.)
II. Execution. (§§ 130–142.)
VIII. Clerks and marshals. (§§ 143–153.)
Article I. Clerks. (§§ 143–144.)
II. Marshals. (§§ 145–153.)
IX. Appeals. (§§ 154–163.)
X. Costs and fees. (§§ 164–178.)
XI. Definitions; construction and effect of act. (§§ 179–186.)

TITLE I.

Organization and jurisdiction.

Sec. 1. The court and justices continued; term of office.
2. Qualifications and duties of justices; oath of office.
3. Salaries of justices.
4. Vacancy in the office of justice.
5. Districts and number of justices therein.
6. Jurisdiction.
7. Board of justices.
8. Rules of court.
9. Death or removal of justice not to affect proceedings.
10. Time and place of holding court.
11. Seals.
12. Access to courthouses; expenses of court, how paid.
13. Criminal and civil contempt.
14. Process; where service may be made.
15. Conformity to supreme court practice.

[1] The former Municipal Court Act (L. 1902, c. 580), which will remain in force until August 31, 1915, will be found in the 1914 edition of this Code.

§ 1. The court and justices continued; term of office.

The municipal court of the city of New York, as it exists on the 31st day of August, 1915, shall be continued; provided, however, that from and after the first day of September, 1915, it shall be a court of record. The justices thereof in office when this act takes effect shall continue to hold office until the expiration of their respective terms. The successors of said justices shall be elected for terms of ten years by the electors of the several municipal court districts, as hereby constituted, at the general election to be held in the years at the end of which the respective terms of said justices shall expire.

§ 2. Qualifications and duties of justices; oath of office.

No one shall be eligible to the office of justice of this court, after the first day of September, 1915, unless he be a resident and elector in the district for which he shall be elected or appointed and shall have been an attorney and counselor-at-law of the state of New York for at least five years or unless he shall have served as a justice of such municipal court. No justice shall engage in any other business or profession, or hold any other public office, or act as referee or receiver, but each justice shall devote his whole time and capacity, so far as the public interest demands, to the duties of his office. Before entering upon his duties each justice elected or appointed pursuant to this act, shall take and file with the city clerk the oath of office prescribed by the constitution.

The justices may, by virtue of their offices, administer oaths, take depositions and acknowledgments within the city of New York, and certify the same in the manner and with like effect as justices of other courts of record.

§ 3. Salaries of justices.

The salary of each justice, except those appointed or elected from the boroughs of Queens and Richmond, shall be eight thousand dollars a year, to be paid in equal monthly installments by the proper officers of the city and the salary of each justice appointed or elected for the boroughs of Queens and Richmond shall be seven thousand dollars a year, to be paid in the same manner; provided, however, that whenever a justice elected or appointed for the borough of Queens or the borough of Richmond shall hold court in either of the boroughs of Manhattan, Brooklyn or The Bronx, he shall receive the additional sum of ten dollars for each day on which he shall so hold court, not exceeding, however, such sum as shall, together with his said salary, make the amount received by him in any one year equal to the salary of a justice of one of the other boroughs. Such additional sum shall be paid on the certification of the president of the board of justices that the holding of court by such justice was necessary, in consequence of the illness or necessary absence of the justice regularly assigned to hold the same, or on account of pressure of business.

§ 4. Vacancy in the office of justice.

A vacancy occurring in the office of justice of this court otherwise than by expiration of term, shall be filled at the next ensuing general election for the unexpired term commencing on the first day of

January next after said election; and the mayor of the city of New York shall appoint a duly qualified attorney to fill such vacancy in the interim, within twenty days after the same occurs.

§ 5. [Am'd, 1916.] Districts and number of justices therein.

The several boroughs composing the city of New York are hereby divided into districts, in each of which sessions of the court shall be held, and justices shall hold office therein in number as follows:

a. In the borough of The Bronx there shall be two districts, as follows:

1. The first district embracing the territory described in chapter 934 of the laws of 1895; in which district there shall be one justice.

2. The second district embracing the remainder of said borough; in which district there shall be two justices.

b. In the borough of Manhattan there shall be nine districts, as follows:

1. The first district embraces the territory bounded on the south and west by the southerly and westerly boundaries of the said borough; on the north by the center line of Fourteenth street and the center line of Fifth street, from the Bowery to Second avenue; on the east by the center lines of Fourth avenue, from Fourteenth street to Fifth street, Second avenue, Chrystie street, Division street and Catharine street; in which district there shall be three justices.

2. The second district embraces the territory bounded on the south by the center line of Fifth street, from the Bowery to Second avenue, and on the south and east by the southerly and easterly boundaries of the said borough; on the north by the center line of East Fourteenth street; on the west by the center lines of Fourth avenue, from Fourteenth street to Fifth street, and of Second avenue, Chrystie street, Division street and Catharine street; in which district there shall be four justices.

3. The third district embraces the territory bounded on the south by the center line of Fourteenth street; on the east by the center line of Seventh avenue, from Fourteenth street to Fifty-ninth street, and by the center line of Central Park West, from Fifty-ninth street to Sixty-fifth street; on the north by the center line of Sixty-fifth street and the center line of Fifty-ninth street, from Seventh to Eighth avenues; on the west by the westerly boundary of the said borough; in which district there shall be two justices.

4. The fourth district embraces the territory bounded on the south by the center line of East Fourteenth street; on the west by the center line of Lexington avenue and by the center line of Irving place, including its projection through Gramercy park; on the north by the center line of Fifty-ninth street; on the east by the easterly line of said borough; excluding, however, any portion of Blackwell's island; in which district there shall be two justices.

5. The fifth district embraces the territory bounded on the south by the center line of Sixty-fifth street; on the east by the center line of Central Park West; on the north by the center line of One Hundred and Tenth street; on the west by the westerly boundary of said borough; in which district there shall be three justices.

6. The sixth district embraces the territory bounded on the south

by the center line of Fifty-ninth street, and by the center line of Ninety-sixth street from Lexington avenue to Fifth avenue; on the west by the center line of Lexington avenue, from Fifty-ninth street to Ninety-sixth street, and the center line of Fifth avenue, from Ninety-sixth street to One Hundred and Tenth street; on the north by the center line of One Hundred and Tenth street; on the east by the easterly boundary of said borough; including, however, all of Blackwell's island and excluding any portion of Ward's island; in which district there shall be two justices.

7. The seventh district embraces the territory bounded on the south by the center line of One Hundred and Tenth street; on the east by the center line of Fifth avenue to the northerly terminus thereof, and north of the northerly terminus of Fifth avenue, following in a northerly direction the course of the Harlem river on a line coterminous with the easterly boundary of said borough; on the north and west by the northerly and westerly boundaries of said borough; in which district there shall be three justices.

8. The eighth district embraces the territory bounded on the south by the center line of One Hundred and Tenth street; on the west by the center line of Fifth avenue; on the north and east by the northerly and easterly boundaries of said borough, including Randall's island and the whole of Ward's island; in which district there shall be two justices.

9. The ninth district embraces the territory bounded on the south by the center line of Fourteenth street and by the center line of Fifty-ninth street, from the center line of Seventh avenue to the center line of Central Park West; on the east by the center line of Lexington avenue and by the center line of Irving place, including its projection through Gramercy park, and by the center line of Fifth avenue, from the center line of Ninety-sixth street to the center line of One Hundred and Tenth street; on the north by the center line of Ninety-sixth street, from the center line of Lexington avenue to the center line of Fifth avenue, and by One Hundred and Tenth street, from Fifth avenue to Central Park West; on the west by the center line of Seventh avenue and Central Park West; in which district there shall be four justices.

c. [Am'd, 1916.] In the borough of Brooklyn there shall be seven districts, as follows: [1]

1. The first district embraces the territory bounded by and within the following: The center line of Flushing avenue from Washington avenue to Navy street; the westerly side of the United States navy yard from Flushing avenue to the point where it touches the waters of Wallabout channel; a line drawn from the said point to and along the center line of the southwesterly branch of the Wallabout channel from the said point to the westerly boundary of said borough; the

[1] In L. 1916, c. 479, amending this subdivision, it is further provided as follows: "This act shall not affect any action or proceeding in the municipal courts as presently constituted, now pending, or affect any of the districts mentioned in said section c of said act before this amendment thereof, or affect in any wise the justices of the districts now existing who shall until the expiration of their respective terms be and continue as justices of said court for the districts for which they were elected, and of the districts by this act territorially changed and altered bearing the same number as that in and for which they were respectively elected. All acts and parts of acts inconsistent herewith are hereby repealed."

westerly boundary of the said borough from its intersection with the said center line of Wallabout channel to a point where it would be intersected by the center line of Gowanus bay, if continued thereto; the said center line of Gowanus bay and the center line of Gowanus canal from the said point of its said intersection with said westerly boundary to the center line of Hamilton avenue; the center line of Hamilton avenue from the said point of its intersection with the center line of Gowanus canal to Prospect avenue; the center line of Prospect avenue from Hamilton avenue to Fifth avenue; the center line of Fifth avenue from Prospect avenue to Flatbush avenue; the center line of Flatbush avenue from Fifth avenue to Fulton street; the center line of Fulton street from Flatbush avenue to Bridge street; the center line of Bridge street from Fulton street to Myrtle avenue; the center line of Myrtle avenue from Bridge street to Hudson avenue; the center line of Hudson avenue from Myrtle avenue to Johnson street; the center line of Johnson street from Hudson avenue to Navy street; the center line of Navy street from Johnson street to Myrtle avenue; the center line of Myrtle avenue from Navy street to Raymond street; the center line of Raymond street from Myrtle avenue to Bolivar street; the center line of Bolivar street from Raymond street to Saint Edwards street; the center line of Saint Edwards street from Bolivar street to Willoughby street; the center line of Willoughby street from Saint Edwards street to Raymond street; the center line of Raymond street from Willoughby street to Lafayette street; the center line of Lafayette street from Raymond street to Navy street; the center line of Navy street from Lafayette street to DeKalb avenue; the center line of DeKalb avenue from Navy street to Washington park; the center line of Washington park from DeKalb avenue to Myrtle avenue; the center line of Myrtle avenue from Washington park to Washington avenue; the center line of Washington avenue from Myrtle avenue to Flushing avenue; in which district there shall be one justice.

2. The second district embraces the territory bounded and within the following: The center line of Flushing avenue from Washington avenue to Broadway; the center lines of Broadway and Stuyvesant avenue from Flushing avenue to Fulton street; the center line of Fulton street from Stuyvesant avenue to Schenectady avenue; the center line of Schenectady avenue from Fulton street to Atlantic avenue; the center line of Atlantic avenue from Schenectady avenue to Grand avenue; the center line of Grand avenue from Atlantic avenue to Lefferts place; the center line of Lefferts place from Grand avenue to Saint James place; the center line of Saint James place from Lefferts place to Atlantic avenue; the center line of Atlantic avenue from Saint James place to Washington avenue; the center line of Washington avenue from Atlantic avenue to Flushing avenue; in which district there shall be two justices.

3. The third district embraces the territory bounded by and within the following: the center line of Flushing avenue from Navy street to Broadway; the center line of Broadway from Flushing avenue to Willoughby avenue; the center line of Willoughby avenue from Broadway to Bushwick avenue; the center line of Bushwick avenue from Willoughby avenue to Suydam street; the center line

of Suydam street from Bushwick avenue to Central avenue; the center line of Central avenue from Suydam street to Starr street; the center line of Starr street from Central avenue to the boundary of said borough; the easterly, northerly and westerly boundaries of the said borough from Starr street to the point of intersection of said westerly boundary with the center line of the southwesterly branch of the Wallabout channel, if continued thereto; the said center line of the southwesterly branch of the Wallabout channel to and along a line drawn to the point where the westerly side of the United States navy yard touches the waters of said Wallabout channel; the said westerly side of the United States navy yard to Flushing avenue; in which district there shall be two justices.

4. The fourth district embraces the territory bounded by and within the following: the center line of Fulton street from Broadway to Sackman street; the center line of Sackman street from Fulton street to Atlantic avenue; the center line of Atlantic avenue from Sackman street to Eastern parkway; the center line of Eastern parkway from Atlantic avenue to Howard avenue; the center line of Howard avenue from Eastern parkway to East New York avenue; the center line of East New York avenue from Howard avenue to Montgomery street; the center line of Montgomery street from East New York avenue to Franklin avenue; the center line of Franklin avenue from Montgomery street to Atlantic avenue; the center line of Atlantic avenue from Franklin avenue to Schenectady avenue; the center line of Schenectady avenue from Atlantic avenue to Fulton street; the center line of Fulton street from Schenectady avenue to Stuyvesant avenue; the center line of Stuyvesant avenue from Fulton street to Broadway; the center line of Broadway from Stuyvesant avenue to Willoughby avenue; the center line of Willoughby avenue from Broadway to Bushwick avenue; the center line of Bushwick avenue from Willoughby avenue to Suydam street; the center line of Suydam street from Bushwick avenue to Central avenue; the center line of Central avenue from Suydam street to Starr street; the center line of Starr street from Central avenue to the northeasterly boundary of said borough; the said boundary of said borough from Starr street to Stockholm street; the center line of Stockholm street from the said boundary to Bushwick avenue; the center line of Bushwick avenue from Stockholm street to Kossuth place; the center line of Kossuth place from Bushwick avenue to Broadway; the center line of Broadway from Kossuth place to Fulton street; in which district there shall be one justice.

5. The fifth district embraces the territory bounded by and within the following: the center line of Hamilton avenue from the center line of Gowanus canal to Prospect avenue; the center line of Prospect avenue from Hamilton avenue to Terrace place; the center line of Terrace place from Prospect avenue to Gravesend avenue; the center line of Gravesend avenue from Terrace place to Fort Hamilton parkway; the center line of Fort Hamilton parkway from Gravesend avenue to Thirty-seventh street; the center line of Thirty-seventh street from Fort Hamilton parkway to Tenth avenue; the center line of Tenth avenue from Thirty-seventh street to Thirty-ninth street; the center line of Thirty-ninth street from Tenth avenue to Twelfth avenue; the center line of Twelfth

avenue from Thirty-ninth street to Fortieth street; the center line of Fortieth street from Twelfth avenue to Thirteenth avenue; the center line of Thirteenth avenue from Fortieth street to Forty-first street; the center line of Forty-first street from Thirteenth avenue to Fourteenth avenue; the center line of Fourteenth avenue from Forty-first street to Forty-second street; the center line of Forty-second street from Fourteenth avenue to Fifteenth avenue; the center line of Fifteenth avenue from Forty-second street to Forty-third street; the center line of Forty-third street from Fifteenth avenue to Seventeenth avenue; the center line of Seventeenth avenue from Forty-third street to West street; the center line of West street from Seventeenth avenue to Eighteenth avenue; the center line of Eighteenth avenue from West street to Gravesend avenue; the center line of Gravesend avenue from Eighteenth avenue to Avenue J; the center line of Avenue J from Gravesend avenue to Ocean parkway; the center line of Ocean parkway from Avenue J to Foster avenue; the center line of Foster avenue from Ocean parkway to East Seventeenth street; the center line of East Seventeenth street from Foster avenue to Avenue R; the center line of Avenue R from East Seventeenth street to Nostrand avenue; the center line of Nostrand avenue from Avenue R to Avenue U; the center line of Avenue U from Nostrand avenue to Gerritsen avenue; the center line of Gerritsen avenue from Avenue U to Avenue U; the center line of Avenue U from Gerritsen avenue to the center line of Gerritsen basin, or millpond; the center line of Gerritsen basin or millpond from Avenue U to Sheepshead bay to the line dividing the borough of Brooklyn from the borough of Queens; the southerly and westerly boundaries of the said borough of Brooklyn from the said dividing line between the boroughs of Brooklyn and Queens to a point on the southwesterly boundary of the borough of Brooklyn where it would be intersected by the center line of Gowanus bay, or canal, if continued thereto; the said center line of Gowanus bay, or canal, from the said westerly boundary of the borough of Brooklyn to the center line of Hamilton avenue; in which borough there shall be one justice.

6. The sixth district embraces the territory bounded by and within the following: The center line of Foster avenue from Ocean parkway to East Thirty-first street; the center line of East Thirty-first street from Foster avenue to Farragut road; the center line of Farragut road from East Thirty-first street to East Fifty-eighth street; the center line of East Fifty-eighth street from Farragut road to Church avenue; the center line of Church avenue from East Fifty-eighth street to Remsen avenue; the center line of Remsen avenue from Church avenue to Linden avenue; the center line of Linden avenue from Remsen avenue to East Ninety-eighth street; the center line of East Ninety-eighth street from Linden avenue to Tapscott street; the center line of Tapscott street from East Ninety-eighth street to East New York avenue; the center line of East New York avenue from Tapscott street to Montgomery street; the center line of Montgomery street from East New York avenue to Franklin avenue; the center line of Franklin avenue from Montgomery street to Atlantic avenue; the center line of Atlantic avenue from Franklin avenue to Grand avenue; the center line of Grand avenue from Atlantic avenue to Lefferts place; the center line of Lefferts place

from Grand avenue to Saint James place; the center line of Saint James place from Lefferts place to Atlantic avenue; the center line of Atlantic avenue from Saint James place to Washington avenue; the center line of Washington avenue from Atlantic avenue to Myrtle avenue; the center line of Myrtle avenue from Washington avenue to Washington park; the center line of Washington park from Myrtle avenue to DeKalb avenue; the center line of DeKalb avenue from Washington park to Navy street; the center line of Navy street from DeKalb avenue to Lafayette street; the center line of Lafayette street from Navy street to Raymond street; the center line of Raymond street from Lafayette street to Willoughby street; the center line of Willoughby street from Raymond street to Saint Edwards street; the center line of Saint Edwards street from Willoughby street to Bolivar street; the center line of Bolivar street from Saint Edwards street to Raymond street; the center line of Raymond street from Bolivar street to Myrtle avenue; the center line of Myrtle avenue from Raymond street to Navy street; the center line of Navy street from Myrtle avenue to Johnson street; the center line of Johnson street from Navy street to Hudson avenue; the center line of Hudson avenue from Johnson street to Myrtle avenue; the center line of Myrtle avenue from Hudson avenue to Bridge street; the center line of Bridge street from Myrtle avenue to Fulton street; the center line of Fulton street from Bridge street to Flatbush avenue; the center line of Flatbush avenue from Fulton street to Fifth avenue; the center line of Fifth avenue from Flatbush avenue to Prospect avenue; the center line of Prospect avenue from Fifth avenue to Terrace place; the center line of Terrace place from Prospect avenue to Gravesend avenue; the center line of Gravesend avenue from Terrace place to Fort Hamilton parkway; the center line of Fort Hamilton parkway from Gravesend avenue to Thirty-seventh street; the center line of Thirty-seventh street from Fort Hamilton avenue to Tenth avenue; the center line of Tenth avenue from Thirty-seventh street to Thirty-ninth street; the center line of Thirty-ninth street from Tenth avenue to Twelfth avenue; the center line of Twelfth avenue from Thirty-ninth street to Fortieth street; the center line of Fortieth street from Twelfth avenue to Thirteenth avenue; the center line of Thirteenth avenue from Fortieth street to Forty-first street; the center line of Forty-first street from Thirteenth avenue to Fourteenth avenue; the center line of Fourteenth avenue from Forty-first street to Forty-second street; the center line of Forty-second street from Fourteenth avenue to Fifteenth avenue; the center line of Fifteenth avenue from Forty-second street to Forty-third street; the center line of Forty-third street from Fifteenth avenue to Seventeenth avenue; the center line of Seventeenth avenue from Forty-third street to West street; the center line of West street from Seventeenth avenue to Eighteenth avenue; the center line of Eighteenth avenue from West street to Gravesend avenue: the center line of Gravesend avenue from Eighteenth avenue to Avenue J; the center line of Avenue J from Gravesend avenue to Ocean parkway; the center line of Ocean park-

way from Avenue J to Foster avenue; in which district there shall be two justices.

7. The seventh district embraces the territory bounded by and within the following: The center line of Fulton street from Broadway to Sackman street; the center line of Sackman street from Fulton street to Atlantic avenue; the center line of Atlantic avenue from Sackman street to Eastern parkway; the center line of Eastern parkway from Atlantic avenue to Howard avenue; the center line of Howard avenue from Eastern parkway to East New York avenue; the center line of East New York avenue from Howard avenue to Tapscott street; the center line of Tapscott street from East New York avenue to East Ninety-eighth street; the center line of East Ninety-eighth street from Tapscott street to Linden avenue; the center line of Linden avenue from East Ninety-eighth street to Remsen avenue; the center line of Remsen avenue from Linden avenue to Church avenue; the center line of Church avenue from Remsen avenue to East Fifty-eighth street; the center line of East Fifty-eighth street from Church avenue to Farragut road; the center line of Farragut road from East Fifty-eighth street to East Thirty-first street; the center line of East Thirty-first street from Farragut road to Foster avenue; the center line of Foster avenue from East Thirty-first street to East Seventeenth street; the center line of East Seventeenth street from Foster avenue to Avenue R; the center line of Avenue R from East Seventeenth street to Nostrand avenue; the center line of Nostrand avenue from Avenue R to Avenue U; the center line of Avenue U from Nostrand avenue to Gerritsen avenue; the center line of Gerritsen avenue from Avenue U to Avenue U; the center line of Avenue U from Gerritsen avenue to Gerritsen's basin, or millpond; the center line of Gerritsen's basin, or millpond, to Sheepshead bay, to the line dividing the borough of Brooklyn from the borough of Queens in Rockaway inlet; the said line dividing the borough of Brooklyn from the borough of Queens from the said intersection in said Rockaway inlet to Stockholm street; the center line of Stockholm street from the said dividing line to Bushwick avenue; the center line of Bushwick avenue from Stockholm street to Kossuth place; the center line of Kossuth place from Bushwick avenue to Broadway; the center line of Broadway from Kossuth place to Fulton street; in which district there shall be two justices.

d. In the borough of Queens there shall be four districts, as follows:

1. The first district embraces the territory bounded by and within the canal, Rapelye avenue, Jackson avenue, Old Bowery Bay road, Bowery bay, East river and Newtown creek; in which district there shall be one justice.

2. The second district embraces the territory bounded by and within Maspeth avenue, Maurice avenue, Calamus road, Long Island railroad, Trotting-course lane, Metropolitan avenue, boundary line between the second and fourth wards, boundary line between the second and third wards, Flushing creek, Ireland Mill road, Lawrence avenue, Bradford avenue, Main street, Lincoln street, Union street, Broadway, Parsons avenue, Lincoln street, Percy street, Sanford avenue, Murray lane, Bayside avenue, Little Bayside road, Little Neck bay, East river, Bowery bay, Old Bowery Bay road, Jackson avenue, Rapelye avenue, the canal and Newtown creek; in which district there shall be one justice.

3. The third district embraces the territory bounded by and within Maspeth avenue, Maurice avenue, Calamus road, Long Island railroad, Trotting-course lane, Metropolitan avenue, boundary line between the second and fourth wards, Vanderveer avenue, Jamaica avenue, Shaw avenue, Atlantic avenue, Morris avenue, Rockaway road, boundary line between Queens and Nassau counties, Atlantic ocean, Rockaway inlet, boundary line between Queens and Kings counties and Newtown creek; in which district there shall be one justice.

4. The fourth district embraces the territory bounded by and within the boundary line between the second and fourth wards, the boundary line between the second and third wards, Flushing creek, Ireland Mill road, Lawrence avenue, Bradford avenue, Main street, Lincoln street, Union street, Broadway, Parsons avenue, Lincoln street, Percy street, Sandford avenue, Murray lane, Bayside avenue, Little Bayside road, Little Neck bay, boundary line between Queens and Nassau counties, Rockaway road, Morris avenue, Atlantic avenue, Shaw avenue, Jamaica avenue and Vanderveer avenue; in which district there shall be one justice.

e. In the borough of Richmond there shall be two districts, as follows:

1. The first district embraces wards one and three of said borough; in which district there shall be one justice.

2. The second district embraces wards two, four and five of said borough; in which district there shall be one justice.

Am'd by L. 1916, c. 479 (in effect May 9, 1916).

§ 6. Jurisdiction.

The municipal court of the city of New York shall have jurisdiction:

1. Of the following actions when the amount claimed in the summons does not exceed one thousand dollars, exclusive of interest and costs: an action upon a contract, express or implied, other than a contract to marry; an action to recover a fine or penalty; an action to establish a mechanic's lien on real property and to recover a personal judgment for the amount due; an action to foreclose a lien on a chattel; an action to recover damages for an escape from the jail liberties of any county within the city of New York; an action to recover damages for fraud or deceit, or for a personal injury or an injury to property, except actions to recover damages for assault, battery, malicious prosecution, false imprisonment, libel, slander, criminal conversation, seduction, or loss of society of husband or wife; an action to take, state and determine the account between partners after dissolution or other termination of their partner-

ship relation, and to render judgment for the amount so found to be due, but in no event for more than one thousand dollars.

2. Of the following actions and proceedings: an action to recover a chattel or chattels the aggregate value of which does not exceed one thousand dollars, with or without damages for the taking or detention thereof; a summary proceeding authorized by the code of civil procedure to recover possession of real property situated wholly or partly within the district where the application is made, and in such a proceeding it shall not be necessary for the court to sign the warrant, but it may be signed by the clerk; an action in behalf of the people of the state or the city of New York, brought by the direction of a commissioner of public charities or an overseer of the poor, upon a bastardy or abandonment bond; an action upon the bond of a marshal of the city of New York.

3. To issue or vacate a requisition to replevy, a warrant of attachment, a warrant to seize a chattel and an order of arrest; to grant or vacate a stay of execution or of other proceedings, including a warrant in summary proceedings to recover possession of real property, provided that in summary proceedings no stay shall be granted for more than five days; to render judgment in an action, or to make a final order in a summary proceeding, upon confession or upon the consent of both parties.

4. Of actions and summary proceedings, within the foregoing limitations, by or against the city of New York; by or on behalf of the people of the state of New York; by or against a domestic corporation or a foreign corporation; by or against a domestic or foreign executor or administrator in his representative capacity; by or against a committee of an incompetent.

5. Of actions and proceedings of which the municipal court of the city of New York had jurisdiction on the 31st day of August, 1915.

6. To provide systems of conciliation and arbitration and to enter judgment upon an award of arbitrators.

7. To open a default; to direct or set aside a verdict; to vacate, amend, correct or modify any process, mandate, judgment, order or final order, in furtherance of justice, for any error in form or substance; to grant a new trial upon any of the grounds for which a new trial may be granted by the supreme court in an action pending therein, including the grounds of fraud and newly discovered evidence.

§ 7. Board of justices.

1. The justices of this court shall constitute the board of justices and shall discharge the functions thereof. They shall elect from their own number a president of the board of justices, and may at pleasure remove him and elect a successor in his place. The meetings of the board shall be public, and, so far as practicable, shall be held at regular intervals; and all its proceedings shall be recorded by its secretary and shall be preserved. A majority of all the members of the board shall constitute a quorum. The board may by resolution provide for the conduct of its meetings, the keeping and preservation of its minutes and the public inspection thereof at reasonable times; for the order of judicial business, the manner of its discharge and the maintenance of order in and about

the courts; for the establishment of parts of the court and for the yearly assignment of justices to hold the several parts so established; provided, however, that no justice shall sit in any one district for two successive months, or in the borough of Manhattan for more than three months in any one year, or in the other boroughs for more than the minimum number of months under a system of complete rotation by the justices within such boroughs respectively.

3. The president of the board of justices shall preside and be entitled to a vote at all meetings of the board. In addition to all the other powers of a justice, he shall exercise general supervision of the business of the court and have such other powers as may be conferred by resolutions of the board. He shall, whenever he deems it necessary for the prompt disposition of business, assign, in the borough from which he was elected, any justice temporarily to hold court in any district in said borough other than that in which he had been assigned by the board, and may assign a justice, with his consent, regardless of borough lines, to any district within the city, and transfer cases for trial from one district to another in the same borough. The acts or directions of the president of the board of justices may be vacated, amended or modified by a majority vote at a regular or special meeting of the board.

4. The board of justices may designate a clerk of said court for one of said districts to act as secretary of said board and from time to time substitute another and fix a compensation to be paid for such service, not exceeding the sum of one thousand dollars per annum. The secretary of the board of justices shall have charge of such administrative work and perform such duties as may be assigned to him by the board. He shall maintain an office where he shall keep such records as the board may direct.

§ 8. Rules of court.

The board of justices may adopt and amend rules relating to the following subjects:

1. The hours during which the court shall be open.

2. The duties of the secretary of the board, clerks, deputy-clerks, assistant clerks, stenographers, interpreters, attendants and employees; the manner of keeping records and papers, the collection and disposition of moneys and accounts thereof.

3. The forms and practices of the court, including forms of pleading and all matters of procedure not specifically provided for in this act.

4. The calendar practice and the designation of a part or parts of the court where special classes of cases shall be brought or tried,

5. The establishment of a system of conciliation whereby controversies may be submitted by consent of the parties to a justice of the court for informal hearing and decision without entry of judgment.

6. The establishment of a system of arbitration and the procedure thereof.

Such rules shall be submitted to the presiding justices of the appellate divisions of the supreme court for the first and second departments, or to the justices presiding therein, and, when approved by them, shall have the force of law.

§ 9. Death or removal of justice not to affect proceedings.

No process, action, judgment, execution or proceeding shall abate or be discontinued by reason of the death, removal from office or vacancy in office of any justice, but another justice shall proceed to hear, try, determine and give judgment in and upon the same, and upon all matters and things pending and undecided or not acted upon.

§ 10. Time and place of holding court.

It shall be the duty of the commissioners of the sinking fund to provide a suitable place for holding court in each district in the city of New York; and more than one place in any district may be provided by them if the board of justices shall certify that the public convenience requires such additional places.

The justices assigned by the board of justices shall hold court in one or more parts in each district as established, and on such days as fixed, by said board and at the places provided by the commissioners of the sinking fund. In each district in the boroughs of Manhattan and Brooklyn, and in the second district of the borough of The Bronx, on every day of the year except Saturdays, Sundays, legal holidays and during the months of July and August, at least one part of the court with a justice in attendance shall be open for the transaction of judicial business. During the months of July and August the court in each district shall be in session for at least two days in each week and shall try summary proceedings, actions for wages and, on good cause shown, other actions where the rights of the parties may be jeopardized by delay, and such other actions as the court may deem proper to be tried.

§ 11. Seals.

The court in each district shall have an official seal on which shall be engraved the arms of the state of New York, the name of the court, the borough and the district. Such seals shall be furnished at the expense of the city of New York.

§ 12. Access to court houses; expenses of court, how paid.

The justices of the court shall have access to and possession of the court houses. It shall be the duty of the board of aldermen of the city of New York and its several officers charged with duties in that behalf, to supply and pay for whatever may be necessary for the transaction of the business of said court and the justices thereof, to supply all proper accommodations, books, stationery and furniture, and to pay all salaries, compensations and expenses and disbursements herein authorized; and the board of estimate and apportionment shall annually include in its final estimate such sums as may be necessary to pay the same.

§ 13. Criminal and civil contempt.

All of the provisions of the judiciary law relating to civil and criminal contempts shall apply to this court, except subdivision 7 of section 753 of said law and except that the provisions of said law relating to sheriffs shall apply to marshals, subject to the provisions of section 151 of this act.

§ 14. Process; where service may be made.

The court shall have power to send its process and other mandates in an action or special proceeding of which it has jurisdiction to any part of the city of New York for service or execution, and to enforce obedience thereto, and the power and authority of said court extends to the whole of said city of New York, except as otherwise expressly prescribed in this act.

§ 15. Conformity to supreme court practice.

Except as otherwise provided in this act or in the rules, the practice, pleadings, forms and procedure in this court shall conform, as nearly as may be, to the practice, pleadings, forms and procedure existing at the time in like causes in the supreme court, any statutory limitations, heretofore enacted, to the contrary thereof notwithstanding.

TITLE II.

Venue and commencement of actions; parties.

Sec. 17. Venue.
18. Commencement of action.
19. Requisites of summons.
20. Form of summons.
21. Method of serving summons.
22. Who may serve summons or precept; proof of service.
23. Substitutes for personal service of summons.
24. Endorsement upon summons in action for penalty.
25. Endorsement upon summons for execution against the person.
26. Guardian ad litem.
27. Joinder of parties; interpleader.
28. Prosecuting or defending as a poor person.

§ 17. Venue.

1. An action must be brought in a district in which either the plaintiff or defendant or one of the plaintiffs or one of the defendants resides, unless all the plaintiffs or all the defendants reside out of the city of New York, in which case the action may be brought in any district; but an action brought by the assignee of the cause of action shall, upon the demand of a defendant made as provided in subdivision two of this section, be transferred to the district in which the defendant resides, and the court must make an order for such transfer, as provided in said subdivision. The district in which is situated the place for the regular transaction of business of an individual who does not reside in the city of New York, and the place where a corporation transacts its general business or keeps an office or has an agency established for the transaction of business, or is established by law, shall be deemed the place of residence under the provisions of this section. The city of New York may sue or be sued in any district, except as provided in subdivision three of this section.

2. If the action is brought in the wrong district, it may nevertheless remain there unless the defendant demands that it be transferred. Such demand must be made in writing and filed with the clerk before or at joinder of issue and must specify the district to which the defendant desires the action to be transferred and facts under oath showing that such district is the proper one. The court must thereupon transfer the action to the proper district, and may in its discretion impose five dollars costs against the plaintiff.

3. All actions by or on behalf of the city of New York, or any department thereof, to recover a fine or penalty, must be brought in the district where the violation of law occurred.

4. An action or special proceeding may upon consent be transferred by the court to a district other than that in which it is pending.

5. Nothing in this section shall be construed to prevent the board of justices from designating a part or parts of the court where special classes of cases shall be brought or tried, or the president of the board of justices from transferring cases from one district to another in the same borough.

§ 18. Commencement of action.

An action must be commenced by the service of summons or by the voluntary joinder of issue by the parties; but for the pur-

pose of saving a cause of action from the operation of the statute of limitations an attempt to commence an action is equivalent to the commencement thereof when the summons is issued by the clerk, provided that actual service thereof is made with due diligence.

§ 19. Requisites of summons.

The summons must be addressed to the defendant by name, or, if his name is unknown, by a fictitious name, and must summon him to appear before the clerk of the court within five days from the date of service, exclusive of the day of service, and make answer to the complaint. If no written complaint is served with the summons, the plaintiff, or, in case of his inability to do so, the clerk, must indorse upon or attach to the summons a brief statement of the nature and substance of the cause of action, and the summons must state the amount for which the plaintiff will take judgment if the defendant fails to appear and make answer. The address of the plaintiff must be stated on the summons. The summons must be subscribed and issued by the clerk of the court of the district where the application for the summons is made, or by the plaintiff's attorney in his own name. When the summons is issued by the plaintiff's attorney, he must add to his signature his office and post-office address.

§ 20. Form of summons.

The summons must be in substantially the following form, the blanks being properly filled:

MUNICIPAL COURT OF THE CITY OF NEW YORK.

BOROUGH OF....., DISTRICT.

.....
plaintiff,
against
.....
defendant.

To the above-named defendant:

You are hereby summoned to appear in this action in the municipal court of the city of New York, borough of....., ... district, before the clerk of the said court at his office at....., in the borough of ....., in the city of New York, within five days after the service of this summons upon you, exclusive of the day of service, and to make answer to the complaint; and if you fail to make answer, judgment will be taken against you for the sum of $....., with interest thereon from the..... day of....., 19.., together with the costs of this action.

Dated, New York city, the....day of....., 19...

....., or .....,
Attorney for the plaintiff. Clerk.
(Office and post-office address.)
Plaintiff's address.....

§ 21. Method of serving summons.

1. The summons may be served upon the defendant within the city of New York in like manner as though the summons issued

out of the supreme court, except as otherwise provided in this act or in the rules, provided that it shall not be served by publication.

§ 22. Who may serve summons or precept; proof of service.

1. Personal service of summons or service of a precept in summary proceedings shall be made by a marshal or by any other person over the age of eighteen years and not a party to the action.

2. Proof of service shall be made by the certificate of the marshal or by the affidavit of the person by whom the service was made; and such certificate or affidavit shall be indorsed upon or annexed to the summons or precept.

3. Within two days after service, the summons, or the summons and complaint if the complaint was served with the summons, must be filed with proof of service in the office of the clerk in the district where the action is pending.

§ 23. Substitutes for personal service of summons.

An order for the service of a summons upon a defendant residing within the city of New York may be made by the court in the district in which the action is brought, upon satisfactory proof, by the affidavit of a person not a party to the action, that proper and diligent effort has been made to serve the summons upon the defendant, and that the place of his sojourn cannot be found, or if he is within the city that he avoids service so that personal service cannot be made. The contents of the order, the method of service of the summons, the proof of service thereof, and the method of filing the order and the papers on which it was granted shall be the same as though the summons were issued out of the supreme court, unless otherwise provided by the rules; except that the service must be made and the order and papers filed with the clerk within five days after the order is granted. On filing proof of due service, the summons is deemed served, and the same proceedings may be taken thereupon as if personal service thereof had been made, except that no execution against the person shall issue upon a judgment entered upon such service.

§ 24. Endorsement upon summons in action for penalty.

If no written complaint is delivered to the defendant in an action for a penalty or forfeiture, the summons and the copy thereof delivered to the defendant must bear an endorsement substantially in the following form: "according to the provisions of," adding such a description of the section of the statute or ordinance as will identify it with convenient certainty.

§ 25. Endorsement upon summons for execution against the person.

If no verified complaint is served with the summons in an action where execution against the person may issue upon the judgment, the summons and the copy delivered to the defendant must bear an indorsement substantially in the following language:

"Plaintiff claims defendant is liable to arrest and imprisonment in this case."

§ 26. Guardian ad litem.

When a guardian is necessary he must be appointed by the court as follows:

1. If the infant is plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he is of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed and to be liable for costs if he fails in the action, must be filed with the clerk of the court in the district where the action is brought, except that the guardian shall not be liable for costs where the plaintiff has received leave to prosecute as a poor person.

2. After the filing of proof of service of the summons against an infant defendant, no other proceeding shall be taken in the action until a person has been appointed as his guardian for the purpose of the action. Upon the nomination of the defendant, the court must appoint a proper person for that purpose, but if the defendant neglects or refuses to nominate, the court may, on application of the plaintiff, appoint any proper person as a guardian upon the filing of such person's written consent with the clerk. The guardian so appointed is not responsible for costs.

3. Where no guardian has been appointed, as in this section provided, the court shall, at any time before judgment, make such appointment. The guardian so appointed is not responsible for costs.

§ 27. [Am'd, 1916.] Joinder of parties; interpleader.

1. Except as otherwise expressly provided in this act, all questions as to the joinder of parties shall be determined by the provisions of law applicable to like cases in the supreme court.

2. No action shall be defeated by the nonjoinder or misjoinder of parties. The names of new parties may be added and the names of parties misjoined may be struck out, by order of the court, at any stage of the cause and upon such terms as justice may require.

3. Upon the application of the defendant in an action brought to recover upon a contract or to recover a chattel, the court may make an order of interpleader or an order joining adverse claimants as parties defendant, according to the provisions of law applicable to like cases in the supreme court.

4. [**Added, 1916.**] The deposition of a party to an action in this court or of a person who expects to be a party to an action about to be brought in this court may be taken at his own instance or at the instance of an adverse party, or by a co-plaintiff or co-defendant at any time before or during the trial, in the same manner as such depositions are taken under the provisions of law applicable to like cases in the supreme court.

Am'd by L. 1916, c. 610 (in effect Sept. 1, 1916).

§ 28. Prosecuting or defending as a poor person.

Except as otherwise expressly provided in this section or in the rules of the court, a person may obtain leave to prosecute or defend an action as a poor person and to have an attorney assigned to conduct his case, in accordance with the provisions of law applicable to like cases in the supreme court. The petition for such leave may be verified before the clerk of the court in the district where the action is brought, and the certificate of the clerk that he has inquired into the facts of the case and that in his opinion the plaintiff has a prima facie cause of action or that the defendant has a prima facie defense, as the case may be, shall have the same force and effect as the certificate of an attorney.

TITLE III.

Provisional remedies and actions to foreclose liens on chattels.

Article 1. Arrest.
2. Attachment.
3. Replevin.
4. Action to foreclose a lien on a chattel.

ARTICLE FIRST.

Arrest.

Sec. 29. Grounds of arrest.
30. Procedure.
31. Return of summons; directions in order.
32. Proceedings after arrest; detention of defendant; adjournment of trial.
33. Plaintiff to be notified of arrest.
34. Discharge on giving bail or making deposit; bond for jail liberties.
35. Qualifications of bail.
36. Papers to be delivered by marshal; notice of rejection of bail; notice of justification of bail.
37. Discharge on motion.
38. Motion to reduce bail or to increase security given by plaintiff.

§ 29. Grounds of arrest.

A defendant may be arrested in any case of which this court has jurisdiction and in which he might be arrested were the action brought in the supreme court.

§ 30. Procedure.

The procedure in cases of arrest, including the charging and exoneration of bail, shall conform as nearly as may be to the procedure in like cases in the supreme court, except as otherwise provided in this title; and the provisions applicable to a sheriff in such cases shall apply to the marshal. The order of arrest must be issued by the clerk when granted by the court or a justice thereof.

§ 31. Return of summons; directions in order.

When an order of arrest is issued to accompany the summons, the summons must be made returnable to the court immediately upon the arrest; the order of arrest must so direct and must fix the sum in which the defendant may be let to bail.

§ 32. Proceedings after arrest; detention of defendant; adjournment of trial.

1. The marshal, upon arresting the defendant by virtue of such an order, must at the same time serve upon him the summons and a copy of the order of arrest and of the papers upon which it was granted. Unless bail is given or the deposit made as prescribed by law, the marshal upon arresting the defendant must take him forthwith before the court in the district where the action is pending; but if the court is not then in session, he must take him to the jail of the county embracing said district, to be kept there until the next day when the court is in session, on which day the marshal must take him before the court; and thereafter the defendant must be kept in the jail until discharged by law, except that the court or a justice thereof must direct that he be brought into court at the trial and may direct that he be brought into court at any other time.

2. The detention of the defendant shall in no case exceed two days, excluding Sundays and legal holidays, from the time of his first being taken before the court, unless within that time the trial of the action is commenced and continued without unnecessary interruption or unless an adjournment is granted at the defendant's request. An adjournment for more than two days may be granted on application of the plaintiff, provided that the defendant be discharged from custody, in which event the action may proceed and the defendant will be liable to arrest on execution if judgment is recovered against him.

§ 33. Plaintiff to be notified of arrest.

The marshal making the arrest must immediately give notice thereof to the plaintiff and indorse on the order of arrest and subscribe a certificate, stating the time of serving and of giving notice to the plaintiff.

§ 34. Discharge on giving bail or making deposit; bond for jail liberties.

A defendant may be discharged from arrest by giving bail or depositing the sum of money specified in the order of arrest, or, when actually confined in jail by virtue of an order of arrest and judgment has been rendered in the action, he may at his election be admitted to the liberties of the jail on giving the necessary undertaking therefor, whether execution against his person has issued or not.

§ 35. Qualifications of bail.

The qualifications of bail shall be the same as those prescribed in like cases in the supreme court, except that each of them must be a resident of and a freeholder or a householder within the city of New York.

§ 36. Papers to be delivered by marshal; notice of rejection of bail; notice of justification of bail.

1. Within two days after bail is given the marshal must deliver to the plaintiff or his attorney copies certified by the marshal of the order of arrest, return and undertaking.

2. Notice that plaintiff does not accept the bail must be served upon the marshal within two days after said copies are delivered. Notice of justification of bail must be served within two days after the notice aforesaid, and the time of justification shall be not more than three days after the service of the notice thereof.

§ 37. Discharge on motion.

The defendant may move for his discharge from arrest as follows:

1. Without notice, on the plaintiff's appearance in court.

2. On two days' notice, at any time before judgment.

3. On one day's notice, if the plaintiff fails to issue execution within twenty-four hours after he is entitled to do so.

§ 38. Motion to reduce bail or to increase security given by plaintiff.

A motion to reduce the amount of bail or to increase the amount of the security given by the plaintiff, or both, may be made by the defendant on two days' notice at any time before judgment.

ARTICLE SECOND.

Attachment.

Sec. 39. In what actions granted.
40. Grounds; affidavit.
41. Issuance and contents of warrant.
42. Undertaking by plaintiff.
43. Execution of warrant; inventory.
44. Property subject to levy.
45. Manner of making levy; effect of levy and certificate of sale.
46. Certificate of defendant's interest in property.
47. Actions by marshal.
48. Service of summons, warrant and inventory.
49. Undertaking by defendant to reclaim property.
50. Claim by third person; bond and delivery thereupon.
51. Judgment on bond.
52. Action on undertaking when warrant vacated.
53. Return by marshal attaching.
54. Vacating or modifying warrant and increasing security.
55. Judgment when summons not personally served.
56. Exception to and justification of sureties; reclaimer of attached property.

§ 39. In what actions granted.

In an action of which this court has jurisdiction, a warrant of attachment against the property of one or more defendants may be granted on the application of the plaintiff, if such a warrant might be granted were the action brought in the supreme court.

§ 40. Grounds; affidavit.

To entitle the plaintiff to a warrant of attachment he must show by affidavit to the satisfaction of the court:

1. That a cause of action for which a warrant of attachment may be granted exists against the defendant; and if the action is based upon a breach of contract, that the plaintiff is entitled to recover a sum stated, in excess of all counterclaims known to him.

2. That the defendant is either a foreign corporation or not a resident of the state; or, if the defendant is a natural person and a resident of the city of New York, that he has departed or is about to depart therefrom with intent to defraud his creditors or to avoid the service of a summons, or keeps himself concealed with the like intent; or, if the defendant is a natural person or a domestic corporation, that he or it has removed or is about to remove property from the city of New York with intent to defraud his or its creditors, or has assigned, disposed of or secreted, or is about to assign, dispose of or secrete property with the like intent; or, where for the purpose of procuring credit or the extension of credit, the defendant has made a false statement in writing under his own hand and signature, or under the hand and signature of a duly authorized agent made with his knowledge and acquiescence, as to his financial responsibility or standing; or, that the defendant, being a natural person of full age and a resident of the state, has been continuously without the state for the space of six months or more immediately before the application, and either that he has not made a designation of a person upon whom to serve a summons in his behalf as prescribed in section 430 of the code of civil procedure, or that a designation so made no longer remains in force.

The affidavit must be filed in the office of the clerk of the court in the district in which the action is brought.

§ 41. Issuance and contents of warrant.

The warrant may be granted by the court or a justice thereof and must be issued by the clerk, when the summons is issued or at any time after the commencement of the action and before final judgment. It must briefly recite the grounds of the attachment and must require the marshal to whom it is delivered to attach and safely keep so much of the defendant's personal property as will satisfy the plaintiff's demand, together with the costs and expenses of the action, and forthwith make return of his proceeding thereon to the court. The amount of the plaintiff's demand must be specified in the warrant.

§ 42. Undertaking by plaintiff.

Before granting the warrant the court or a justice thereof must require the plaintiff to give an undertaking to the defendant, with one or more sureties approved by the court or a justice thereof to the effect that if the defendant recovers judgment or the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking, which must be at least twice the amount of the plaintiff's demand as stated in the warrant and in no case less than two hundred dollars, and that if the plaintiff recovers judgment he will pay to the defendant all money received by him from property taken by virtue of the warrant or upon any bond given therefor, above the amount of the judgment and interest thereon.

§ 43. Execution of warrant; inventory.

The marshal to whom the warrant of attachment is delivered must obey the directions therein contained and must immediately make an inventory of the property attached, stating therein the estimated value of each article or item.

§ 44. Property subject to levy.

An attachment may be levied upon any property within the city of New York upon which an attachment may be levied in an action in the supreme court, except real property and interests therein.

§ 45. Manner of making levy; effect of levy and certificate of sale.

The manner of making the levy, the effect thereof and the effect of the marshal's certificate of sale, shall be governed by the provisions applicable to like cases in the supreme court.

§ 46. Certificate of defendant's interest in property.

Upon application of a marshal holding a warrant of attachment, a certificate of the defendant's interest in property or in a debt or demand owing to him must be furnished to the marshal, and a person may be ordered to attend before the court and submit to an examination in respect thereto, according to the provisions applicable to like cases in the supreme court.

§ 47. Actions by marshal.

The duties and powers of a marshal with respect to the collection of debts, effects and things in action attached by him, and with re-

spect to the maintenance by him of actions and special proceedings to reduce personal property to his possession, shall be the same as those of a sheriff, subject to the provisions of section 151 of this act.

§ 48. Service of summons, warrant and inventory.

Immediately upon making the inventory the marshal must serve the summons, if it has not yet been served, together with the warrant of attachment and inventory, upon the defendant by delivering to him personally a copy of each, if he can with reasonable diligence be found within the city, or, if he cannot be so found, by leaving a copy of each, certified by the marshal, at the last place of residence of the defendant in the city, with a person of suitable age and discretion, or, if such person cannot be found there, by posting them on the outer door, and also depositing another copy of each in the postoffice, inclosed in a sealed post-paid wrapper, directed to the defendant at his residence; or, if the defendant has no place of residence in the city, by delivering them to the person in whose possession the property attached is found.

If personal service of the summons upon the defendant has previously been made, the marshal must serve the warrant and inventory as herein provided.

§ 49. Undertaking by defendant to reclaim property.

The defendant or his attorney or agent may at any time before judgment is rendered, execute and deliver to the marshal an undertaking to the plaintiff in a sum specified therein, at least twice the value of the property attached, as stated in the inventory, with one or more sureties approved by a justice of the court, and to the effect that if judgment is rendered against the defendant and an execution is issued thereon within six months after the giving of the undertaking, the property attached shall be produced to satisfy the execution. Thereupon the marshal must deliver the property to the defendant.

§ 50. Claim by third person; bond and delivery thereupon.

If a person not a party to the action claims any property attached, which is not reclaimed by the defendant as prescribed in the last section, he may at any time after the seizure and before execution is issued, execute and file with the clerk a bond to the plaintiff, with one or more sureties approved by a justice, in a penalty at least twice the value of the property claimed, and conditioned that, in an action upon the bond to be commenced within three months thereafter, the claimant will establish that he was the general owner of the property claimed at the time of the seizure; or, if he fails so to do, that he will pay to the plaintiff the value thereof, with interest. The marshal must thereupon deliver the property claimed to the claimant

§ 51. Judgment on bond.

A judgment for the plaintiff in an action on a bond given as prescribed in the last section must award to him the value of the property seized and delivered to the claimant, with interest thereon from the time of the delivery. If the amount so recovered exceeds

the amount which the plaintiff recovers in the action in which the warrant of attachment was issued, he is liable to the defendant for the excess.

§ 52. Action on undertaking when warrant vacated.

If the warrant of attachment is vacated or annulled the defendant may maintain an action upon the bond and undertaking specified in the last two sections, in his own name, in the same manner and with the like effect as the plaintiff might have done if the warrant had remained in full force.

§ 53. Return by marshal attaching.

The marshal executing the warrant of attachment must at the time when and the place where it is returnable make a return thereto under his hand, stating all his proceedings thereon. He must deliver to the clerk, with the return, each bond or undertaking delivered to him, pursuant to any of the foregoing provisions of this article, and a copy, certified by him, of the inventory of the property attached. The return must state the manner in which the warrant and inventory were served, and, if they were served otherwise than by delivering a copy thereof to the defendant personally, the reason therefor and the name of the person to whom the copy was delivered, unless his name is unknown to the marshal, in which case the return must describe him so as to identify him as nearly as may be.

§ 54. Vacating or modifying warrant and increasing security.

The court may of its own motion vacate a warrant of attachment at any time on the ground that the issuance of the warrant was unauthorized. A motion to vacate or modify a warrant of attachment or to increase the security given by the plaintiff may be made on at least one day's notice. In all other respects the motion shall be governed by the provisions applicable to such motions in the supreme court.

§ 55. Judgment when summons not personally served.

If the defendant has not appeared generally, and the summons has been served otherwise than personally, and his property has been duly attached by virtue of a warrant which has not been vacated, the judgment is only presumptive evidence of his indebtedness in an action subsequently brought.

§ 56. Exception to and justification of sureties; reclaimer of attached property.

The provisions of this act contained in sections 62 to 66, inclusive, shall apply as nearly as may be to cases of attachment of property.

ARTICLE THIRD.

Replevin.

Sec. 57. When action of replevin will lie.
58. When chattel may be replevied; affidavit and undertaking.
59. Requisition to replevy.
60. How executed and served.
61. Return to requisition.
62. Exception to and justification of sureties.
63. Defendant's reclaimer of chattel.
64. Qualifications of sureties.
65. Method of justifying.
66. Allowance of undertaking.
67. Practice in supreme court applicable.
68. Third party may interplead and defend.
69. Defendant may demand judgment for return of chattel.

§ 57. When action of replevin will lie.

An action to recover a chattel, with or without damages for the wrongful taking, withholding or detention thereof, is maintainable, when within the jurisdiction of this court, in the cases where such an action is maintainable in the supreme court.

§ 58. When chattel may be replevied; affidavit and undertaking.

At the time of issuing summons or at any time before joinder of issue, or, if the defendant makes default in pleading, at any time before entry of judgment, the plaintiff may cause the chattel for the recovery of which the action is brought, to be replevied by a marshal. For that purpose he must file with the clerk an affidavit and undertaking which shall be governed by the provisions of law applicable to such affidavits and undertakings in the supreme court, except as otherwise expressly provided in this act. The sureties on the undertaking must be approved by the court, or a justice thereof, as hereinafter provided.

§ 59. Requisition to replevy.

Upon submission of the affidavit and undertaking, the court, or a justice thereof, must endorse upon or attach to the affidavit a requisition requiring the marshal to replevy the property described in the affidavit. The requisition must be issued by the clerk. The affidavit, undertaking and requisition must be delivered to the marshal.

§ 60. How executed and served.

The requisition to replevy shall be executed and the requisition, affidavit and undertaking shall be served in the same manner as if the action were in the supreme court, subject to the provisions of section 151 of this act. If personal service of the summons has not been previously made, the summons must be served together with, and in the same manner as, the requisition, affidavit and undertaking.

§ 61. Return to requisition.

The marshal must make a prompt return to the requisition, stating all his proceedings thereon, and file it, with the affidavit, undertaking and requisition with the clerk. The return must state the manner in which the summons, affidavit, requisition and undertaking were served and the particulars of the service.

§ 62. Exception to and justification of sureties.

Within three days after the chattel has been replevied, the de-

fendant may serve upon the plaintiff or his attorney or upon the marshal a written notice that the defendant excepts to the sureties; otherwise, he is deemed to have waived all objections to them. If such notice is served upon the marshal he must immediately deliver it to the plaintiff or his attorney. Within three days after the service of such notice the plaintiff must serve upon the defendant or his attorney a notice that the sureties will justify before the court at a specified time which shall be not more than three days after the service of the notice of justification. At the time specified the sureties, or other sureties on a new undertaking to the same effect as the first, must appear and justify before the court.

§ 63. Defendant's reclaimer of chattel.

If the defendant does not except to the sureties he may file with the clerk, within four days after the chattel has been replevied, a notice that he requires the return of the chattel, and with the notice he must file the following papers:

1. An affidavit containing an allegation either that the defendant is the owner of the chattel or that he is lawfully entitled to the possession thereof by virtue of a special property therein, the facts with respect to which must be set forth.

2. An undertaking executed by at least two sureties or a duly authorized fidelity or surety company to the effect that they or it are bound in a specified sum, not less than twice the value of the chattel as stated in the affidavit of the plaintiff, for delivery thereof to the plaintiff, if delivery thereof is adjudged, and for the payment to him of any sum which the judgment awards against the defendant.

If the plaintiff has stated separately in his affidavit the value of one or more chattels, or classes of chattels, the defendant may require a delivery of any or all of the chattels replevied, and the undertaking shall be conditioned accordingly.

Upon filing the undertaking the defendant must serve upon the plaintiff or the latter's attorney a copy of the undertaking and a notice that the sureties named therein will justify before the court at a time specified, which shall be not more than three days after the service of the notice.

§ 64. Qualification of sureties.

A surety may be either an individual or a fidelity or surety company duly authorized by law to act as surety. Each individual surety must be:

1. A resident of the city of New York and a freeholder or a householder therein.

2. Worth twice the sum for which he becomes obligated in the undertaking, exclusive of property exempt from execution.

§ 65. Method of justifying.

For the purposes of justification, each individual surety must attend before the court at the time and place mentioned in the notice of justification and be examined on oath, touching his sufficiency, in such manner as the court in its discretion deems proper. If required by the adverse party, the examination must be reduced to writing and subscribed by the surety.

A fidelity or surety company shall justify through its officers or attorney in the manner required by law.

§ 66. Allowance of undertaking.

If the court finds the surety sufficient, it must annex the examination to the undertaking, endorse its allowance thereon and cause them to be filed with the clerk.

§ 67. Practice in supreme court applicable.

The provisions of law applicable to an action of replevin in the supreme court, in so far as they concern the duties and liabilities of a sheriff with respect to the taking, keeping and delivery of a chattel replevied, the proceedings upon a claim of title by a third person, the indemnity to be furnished by the plaintiff to the sheriff upon such a claim, the defendant's answer of title in a third person, the method of ascertaining damages on the defendant's default, the character and contents of the verdict or judgment and of the execution, and the respective rights of action of the plaintiff and defendant upon undertakings, shall apply to like matters in this court in so far as such provisions can be made applicable thereto and except as otherwise provided in this act; and subject to like exception, all such provisions relating to a sheriff shall apply to a marshal, as prescribed in section 151 of this act.

An undertaking to indemnify a marshal against a claim made by a third person to the chattel replevied must be substantially the same as that given to indemnify a sheriff in a similar case, except that the amount thereof need not be more than double the value of the chattel claimed and except that the sureties must possess the qualifications stated in section 64 of this act.

§ 68. Third party may interplead and defend.

At any time before a chattel which has been replevied is actually delivered to either party, a person not a party to the action who claims a right to the possession of the chattel so replevied or any part thereof, which right is claimed to have existed at the time when the said chattel was replevied, may make an affidavit and deliver the same to the court, stating that he makes such claim without collusion with the defendant, specifying in such affidavit the chattel to which he makes claim, setting forth the facts upon which his right depends, and praying to be impleaded as a defendant in the action. The court may thereupon grant leave to said party to appear and defend, and the provisions of this act in relation to the defendant originally proceeded against, so far as applicable, shall apply to the said party, and the court may in its discretion make such order or direct such delivery of the property as may be just, and thereupon the entire controversy may be determined in the action. Nothing in this section, however, shall be construed to affect the right of any party to maintain a separate action or to recover damages for the wrongful taking or detention of a chattel, unless judgment is awarded against him on the merits. In that case the court may grant leave to said third party to appear and defend, and the provisions of this act in relation to the defendant originally proceeded against then apply to said party.

§ 69. Defendant may demand judgment for return of chattel.

Where a chattel has been replevied and the defendant has not required the return thereof pending the action, he may in his answer demand judgment for the return thereof, either with or without damages for the taking, withholding or detention.

ARTICLE FOURTH.

Action to foreclose a lien on a chattel.

Sec. 70. What deemed lien on chattel.
71. Warrant of seizure.
72. Affidavit and undertaking.
73. When other actions not maintainable.
74. Judgment.
75. Marshal's power under execution.
76. Exception to and justification of sureties; reclaimer of chattel.
77. Application of this article.

§ 70. What deemed lien on chattel.

For the purpose of this article a chattel mortgage to secure the purchase price of chattels as well as a contract of conditional sale of personal property and a hiring of personal property, where title is not to vest in the person hiring until payment of a certain sum, shall be deemed a lien upon a chattel; and an action to foreclose such a lien may be maintained.

§ 71. Warrant of seizure.

In an action to foreclose a lien upon a chattel, a warrant commanding the marshal to seize the chattel and safely keep it to abide the judgment, may be granted by the court, or a justice thereof, and must be issued by the clerk. Sections 60 and 61 of this act shall apply, as nearly as may be, to a proceeding taken under this article.

§ 72. Affidavit and undertaking.

To entitle the plaintiff to such a warrant he must file with the clerk an undertaking and must show by affidavit to the satisfaction of the court that the plaintiff has a lien on the chattel, the amount thereof and the facts out of which the same arose and that the plaintiff is not in possession of the chattel. The affidavit must contain a description of the chattels so that they can be readily identified. The provisions applicable to an undertaking to procure a warrant of attachment shall apply, so far as practicable, to the undertaking required by this section.

§ 73. When other actions not maintainable.

No action of conversion or replevin arising on an instrument mentioned in section 70 shall be maintained against the conditional vendee, lessee or mortgagor.

§ 74. Judgment.

In an action to foreclose a lien, the judgment in favor of the plaintiff must specify the amount of the lien and, when the chattel is not in the custody of the marshal by virtue of a warrant, must command the marshal to seize the chattel. The judgment must direct a sale by a marshal of the chattel after fifteen days' personal service of the notice of sale upon the defendant, unless such service shall be dispensed with by order of the court, to satisfy the lien and the costs, if any, in like manner as where a marshal sells personal property by virtue of an execution, and the application by him of the proceeds of the sale less his fees and expenses, to the

payment of the amount of the lien and the costs of the action. It must also provide for the payment of the surplus, if any, to the owner of the chattel, and for the safekeeping of the surplus, if any, by the clerk of the court, until it is claimed by him. If a defendant upon whom the summons is personally served is liable for the amount of the lien or for any part thereof, the plaintiff may also have judgment for the deficiency, if any. The execution to be issued to the marshal shall be in accordance with the terms of the judgment.

§ 75. Marshal's power under execution.

For the purpose of seizing a chattel by virtue of an execution, the power of a marshal is the same as where he is required to replevy a chattel.

§ 76. Exception to and justification of sureties; reclaimer of chattel.

Sections 62 to 66, inclusive, of this act shall apply, as nearly as may be, to a proceeding taken under this article.

§ 77. Application of this article.

The provisions of this article shall not affect any right or remedy to foreclose or satisfy a lien upon a chattel without action, and do not apply to a case where another mode of enforcing a lien upon a chattel is specially prescribed by law.

TITLE IV.

Pleadings.

Sec. 78. Pleadings; bills of particulars; special appearance.
79. Joinder and severance of causes of action.
80. Judgment by default.
81. Offer of judgment.
82. Complaint.
83. Answer; contents thereof.
84. Counterclaim.
85. Joinder and severance of counterclaims.
86. Amount recoverable on counterclaim.
87. Reply to counterclaim.
88. Objections to jurisdiction and to pleadings.
89. Objections which may be taken by answer.
90. Disposal of objections.
91. Judgment upon the pleadings.
92. Signature to instrument; when deemed genuine.
93. Construction and amendments of pleadings, judgment and process.
94. Order that issues be tried unnecessary in action against corporation.

§ 78. Pleadings; bills of particulars; special appearance.

Pleadings in actions may be oral or written, verified or unverified, except that the pleadings in an action to establish a mechanic's lien must be verified. Pleadings shall consist of complaint and answer and, when ordered, a reply.

1. When an action is commenced by service of a summons only, a statement of the nature and substance of the plaintiff's cause of action shall be endorsed upon or annexed to the summons.

2. Issue must be joined within the time limited by the summons; provided, however, that when the last day falls on Saturday the defendant may answer on the next business day.

3. If a written complaint is served with the summons a written answer must be filed; and if the complaint is verified, the answer must be verified; provided, however, that in an action where the amount claimed is one hundred dollars or less, the defendant, if he appears in person, may answer orally. When a defendant answers orally a statement of the nature and the substance of the answer shall be endorsed upon or annexed to the summons. The address of the defendant, or the office and post-office address of his attorney, shall be endorsed upon the summons.

4. At any time before judgment, the court may direct the filing of a written pleading, verified or unverified.

5. On or before the defendant's last day to answer, his time to move or answer may be extended by filing with the clerk a written stipulation of the parties, or by order of the court upon cause shown.

6. The original or a copy of a contract or other writing on which a cause of action or a defense or a counterclaim is founded may be filed with the pleading and shall be deemed a part of the pleading. Within three days after service of a written demand by either party, the adverse party shall file with the clerk the original or sworn copy of any such contract or other writing specified in such demand. If the paper is not duly filed, the court may order that it be filed and may exclude it from evidence if not filed accordingly.

7. In a proper case a written demand for a bill of particulars of the complaint or counterclaim may be filed with the clerk. The defendant may file his demand at the time of answering. The plaintiff may file his demand three days after the counterclaim is

interposed. In either case a bill of particulars must be filed with the clerk within three days after the demand is filed and the court upon motion or notice may preclude the party failing to file such bill of particulars from giving evidence of the part or parts of his affirmative allegation of which particulars have not been filed. The court may order a written bill of particulars, with or without verification, to be filed and served by the plaintiff or by the defendant interposing a counterclaim.

8. For the purpose of raising a question not involving the merits of the action, a party may appear specially by filing with the clerk, on or before the last day for answering, a notice of special appearance stating the particular purpose for which he appears. In that event the case shall be set down for hearing, and the party thus appearing need not plead further until directed to do so by the court.

§ 79. Joinder and severance of causes of action.

The plaintiff may include in the same complaint any cause of action of which the court has jurisdiction, to the end that all matters of difference between the respective parties may, so far as practicable, be determined in one action; but if it appears to the court that causes of action so joined should not be tried or disposed of together, the court may order them to be tried separately, or that the action be severed, and may make such other and further orders as may be necessary or expedient for the separate disposal thereof.

§ 80. Judgment by default.

If the defendant fails to answer within the prescribed time, judgment for the plaintiff may be taken by default, without application to the court, in a case in which the complaint or the statement endorsed upon or annexed to the summons sets forth one or more causes of action upon which a judgment by default may thus be entered in an action in the supreme court.

In such a case, if a verified complaint has been filed and served with the summons, the clerk shall enter judgment forthwith; otherwise the clerk must at plaintiff's request ascertain the amount due and enter judgment therefor in the manner prescribed for like cases in the supreme court. In all other cases where the defendant makes default in pleading the plaintiff can recover judgment only on application to the court and proof of his cause of action.

§ 81. Offer of judgment.

At the time of answering the defendant may file with the clerk a written offer to allow judgment to be taken against him for a sum of money, or for property therein specified, with costs. If there are two or more defendants, and the action can be severed, a like offer may be made by one or more of them against whom a separate judgment may be taken. If the plaintiff thereupon, before taking any other proceeding in the action, files with the clerk a written acceptance of the offer, the clerk must enter judgment accordingly. If an acceptance is not filed, the offer cannot be given in evidence upon the trial; but if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs. Instead of making a written offer a defendant may deposit the amount of his offer with the clerk, if it be a sum of money, with like effect.

§ 82. Complaint.

The complaint must state in a plain and concise manner the facts constituting the cause of action.

§ 83. Answer; contents thereof.

The answer must contain:

1. A general or specific denial of each material allegation of the complaint intended to be controverted, or a denial of any knowledge or information thereof sufficient to form a belief. A denial must not be evasive, and unless the defendant intends in good faith to controvert all the allegations of the complaint or of a particular part thereof, the denial must be directed to the specific allegation intended to be controverted.

2. A plain and concise statement of any new matter constituting a defense or counterclaim.

3. When the judgment may determine the ultimate rights of two or more defendants as between themselves, a defendant must demand such a determination in his answer, which must be in writing; and a copy of such answer must be served at least two days before trial, or at such other time as the court shall direct, upon each defendant to be affected by the determination or upon his attorney in the action.

§ 84. Counterclaim.

Except as otherwise provided in this act, a counterclaim and judgment thereon shall be governed by the provisions of law applicable to like cases in the supreme court.

§ 85. Joinder and severance of counterclaims.

There may be included in the counterclaim any claims or causes of action mentioned in section six of this act, against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of one or more defendants between whom and the plaintiff a separate judgment may be had in the action. But if it appears to the court that any of the claims or causes of action so joined should not be tried or disposed of together, the court may order that they be tried separately, and may make such other and further orders as may be necessary or expedient for the separate disposal thereof; and if it appears to the court that any claim or cause of action alleged by way of counterclaim should not be tried or disposed of in the pending action, the court may strike it out, without prejudice to the bringing of another action or proceeding.

§ 86. Amount recoverable on counterclaim.

A counterclaim may be interposed and judgment thereon in favor of the defendant may be rendered for any sum not to exceed one thousand dollars exclusive of interest and costs.

§ 87. Reply to counterclaim.

A reply to a counterclaim is not necessary; but the court may order a written reply, verified or unverified, at any time before judgment. When no reply is filed, the allegations of the counterclaim shall be deemed denied, except as otherwise provided in this act.

§ 88. Objections to jurisdiction and to pleadings.

An objection that the court has no jurisdiction of the person of the defendant or no jurisdiction of the subject of the action may be taken by filing a notice of special appearance as hereinbefore provided. All other objections which heretofore might have been taken by demurrer may be taken by motion. The notice of motion must specify the grounds thereof and the particular defects or objections upon which the moving party relies.

§ 89. Objections which may be taken by answer.

An objection to the sufficiency of the complaint, or an objection which, if sustained, disposes of the action without putting the plaintiff to his proof, may be taken by alleging it as a defense in the answer in lieu of a motion, and on application of either party it must be disposed of before the trial. When an objection is thus taken, the answer must specify the particular objection or defect upon which the defendant relies.

§ 90. Disposal of objections.

1. If the court overrules a defendant's objection taken by motion, the court must allow him to answer; and as a condition thereof may impose costs.

2. If the court sustains an objection taken by a motion or answer upon the ground that the pleading is insufficient, the court must allow it to be amended; and as a condition thereof may impose costs; and if the party fails to amend, the defective pleading or part of pleading may be struck out.

§ 91. Judgment upon the pleadings.

If either party is entitled to judgment upon the pleadings, the court may, on motion at any time after issue joined, give judgment accordingly.

§ 92. Signature to instrument; when deemed genuine.

A signature to a written instrument which is pleaded shall be taken as admitted unless the party sought to be charged thereby files with the clerk, within eight days after joinder of issue, a specific denial of the genuineness of the signature and a demand that it be proved. Such denial and demand by a defendant may be included in his answer.

§ 93. Construction and amendments of pleadings, judgment and process.

1. The allegations of a pleading must be liberally construed for the purpose of doing substantial justice between the parties.

2. At any stage of the cause the court must allow amendment of any summons, process, mandate, pleading, order or judgment, including a petition, precept, answer and final order in a summary proceeding, if substantial justice will be promoted thereby; and as a condition thereof may impose such terms as may be just.

3. Upon like terms the court may direct that a return made by a marshal or other officer be amended in matter of form, either before or after judgment.

§ 94. Order that issues be tried unnecessary in action against corporation.

In an action against a corporation, an order directing that the issues presented by the pleadings be tried shall not be required.

TITLE V.

Proceedings between joinder of issue and trial.

Article 1. Bringing cause on for trial; adjournments; subpœnas; attachment against and liability of defaulting witness.
2. Commission to take testimony; depositions; physical examination.

ARTICLE FIRST.

Bringing cause on for trial; adjournments; subpœnas; attachment against and liability of defaulting witness.

Sec. 95. How cause brought on for trial; notice of trial.
96. Adjournment of trial.
97. Subpœna.
98. Service of subpœna.
99. Attachment against defaulting witness.
100. Liability of defaulting witness.

§ 95. How cause brought on for trial; notice of trial.

Upon joinder of issue the clerk shall place the case upon a general calendar. Where either party appears in person, the clerk shall fix a date for trial not less than five nor more than eight days after joinder of issue, and shall immediately notify the parties by mail of such date. Unless otherwise provided by the rules, where both parties appear by attorney either party may serve a notice on the other fixing a date for trial not less than five nor more than eight days after the service of such notice, and shall file such notice, with proof of service thereof, with the clerk, who shall thereupon place the case on the calendar for trial. When a jury trial is demanded and no day is fixed for the attendance of a jury within the time limited as above provided, the clerk shall set the case down for trial at the earliest practicable date on which a jury will be in attendance, and shall notify the parties or their attorneys by mail of such date.

§ 96. Adjournment of trial.

The trial of an action may be adjourned:

1. By the court for good cause shown and upon such terms and conditions as the court may deem just.

2. By stipulation of the parties, to be filed with the clerk; or upon request of the plaintiff where the defendant has made default or upon consent of the parties in open court.

§ 97. Subpœna.

A subpœna requiring a witness to appear and testify on the trial of an action or a special proceeding, shall be issued on the demand of either party, by the clerk of the court in the district where the action is pending; but when a party is represented by an attorney, the latter may issue the subpœna and shall subscribe thereto his name and his office and post-office address. The subpœna may be served anywhere in the city of New York and may require the witness to bring with him any book or paper relating to the merits of the action.

§ 98. Service of subpœna.

A subpœna may be served by any person over the age of eighteen years by delivering a copy thereof to the witness personally and by paying or tendering to him a fee of fifty cents for one day's attendance at court. No mileage need be paid or tendered to the witness.

§ 99. Attachment against defaulting witness.

1. Upon satisfactory proof by affidavit or otherwise that a person duly subpœnaed has refused or neglected to obey the subpœna, and upon the oath of the party in whose behalf the person was subpœnaed, or his attorney, that the testimony of such person is material, the court must issue a warrant of attachment directed generally to any marshal, to compel the attendance of such person.

2. Such a warrant of attachment must be executed in the same manner as an order of arrest. The fees of the marshal for serving it must be paid by the person against whom it is issued unless he shows just cause or a reasonable excuse for his omission to attend, in which case the party procuring the warrant must pay them and add them to his costs if he recover any.

§ 100. Liability of defaulting witness.

A person duly subpœnaed who neglects or refuses to obey the subpœna, is liable to the party in whose behalf he was subpœnaed for all damages which the party sustains by reason of the neglect or refusal, and fifty dollars in addition thereto, and is subject to any fine or punishment which may be imposed in accordance with the provisions of law governing contempts punishable civilly.

ARTICLE SECOND.

Commission to take testimony; depositions; physical examination.

Sec. 101. Commission to take testimony.
102. When commission may issue.
103. Open commission.
104. Power of commissioner.
105. Execution and return of commission.
106. Suppression of deposition.
107. Deposition to perpetuate testimony.
108. The same; affidavit on application.
109. Order for examination.
110. Witnesses' fees; punishment for disobeying order.
111. Service of order and affidavit.
112. Adjournment of examination.
113. Witness confined in prison.
114. Examination; manner of taking and returning deposition; refusal to answer.
115. When deposition may be read in evidence.
116. Effect of deposition.
117. Physical examination.

§ 101. Commission to take testimony.

When it appears by affidavit upon the application of either party to an action or special proceeding that the testimony of one or more witnesses, not within the city of New York, is material to the applicant's case, the court shall issue a commission to a competent person named therein, authorizing him to examine under oath the witness or witnesses named therein upon interrogatories annexed to the commission and to be settled by the court or by the written consent of the parties, and to take and certify the deposition of each witness and return the same and the commission by mail, addressed to the clerk.

§ 102. When commission may issue.

Such a commission may issue:

1. When the defendant has made default in pleading and the testimony is required upon the assessment of damages.

2. Before joinder of issue when there is reason to apprehend that before issue is joined, and an application for a commission can thereafter be made, the witness will die or become unable to give his testimony or remove so that his testimony cannot be taken.

3. When issue has been joined in an action or special proceeding and the testimony is material to the applicant in the prosecution or defense thereof.

4. When an appeal or a motion for a new trial is pending and the testimony may be material to the applicant upon a new trial.

§ 103. Open commission.

When issue has been joined in an action or special proceeding and application has been made as provided in section 101, a commission may, in the discretion of the court, issue without written interrogatories, or partly upon written interrogatories and partly upon oral questions.

§ 104. Power of commissioner.

When a commission is executed within the state, the commissioner

shall have the same power to issue a subpœna, to swear a witness and to compel his attendance that this court has in an action pending before it.

§ 105. Execution and return of commission.

Except as otherwise provided in this act or in the rules, all matters with respect to the issuance, execution and return of the commission, the disposal of it when returned and the effect of the deposition as evidence, shall be governed by the provisions applicable if the action were in the supreme court and the deposition taken without the state for use within the state.

§ 106. Suppression of deposition.

On proof by affidavit that a deposition has been improperly or irregularly taken or returned, or that the personal attendance of the witness at the trial could have been procured with due diligence by a subpœna or that either party or his attorney has practiced any fraud or unfair conduct to the prejudice of the adverse party in the course of the proceedings, the court may order the suppression of the deposition upon application of the party aggrieved, upon notice.

§ 107. Deposition to perpetuate testimony.

Upon proof by affidavit as prescribed in section 108, either party to an action or special proceeding may apply to the court in the district where the action or proceeding is pending, for an order that the testimony of a witness be taken to be used conditionally as hereinafter provided; or, except when the person to be examined is confined in a prison or jail within the state, such an order may be granted on written stipulation of the parties.

§ 108. The same; affidavit on application.

The party desiring to take a deposition as prescribed in the last preceding section, must present to the court in the district where the action or special proceeding is pending, an affidavit showing:

1. The title and nature of the action or proceeding and the name and residence of the person to be examined; and that the testimony of such person is material and necessary for the prosecution or defense of the action or proceeding.

2. That the person to be examined is about to depart from the city of New York, or that he is so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial, or that any other special circumstances exist which render it proper that he should be examined; but this subdivision does not apply where the person to be examined is a party to the action, except in case of his sickness or infirmity.

3. If the party sought to be examined is a corporation, the affidavit shall state the names of the officers or directors thereof whose testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired; and the order to be made in respect thereto shall direct the examination of such persons and the production of such books and papers.

§ 109. Order for examination.

The court to whom an affidavit is presented, as provided in sec-

tion 108, may, if the opposing party or his representative is not present, require that a reasonable notice of the application be given, or may act on the application at the time of such presentation, and must grant an order for the taking of the deposition, if satisfied of the truth of the matter stated in the affidavit, and may in its discretion designate and limit the particular matters on which the examination is to be conducted. The order may require that the examination be conducted before the court or at another place named in the order, in which event the order shall require the witness to be sworn before an officer authorized to take and administer oaths.

§ 110. Witnesses' fees; punishment for disobeying order.

Witnesses' fees, as provided in this act, for attendance upon a trial, must be paid or tendered when the order is served upon the party or person required to attend. If the party or person so served fails to obey the order his attendance may be compelled, and he may be punished in like manner, as if he failed to obey a subpœna issued from the court.

§ 111. Service of order and affidavit.

A copy of the order and of the affidavit upon which it was granted must be served at least two days before the time fixed for the examination, upon the attorney for each party to the action or special proceeding in like manner as a paper in the action; or if a party has not appeared they must be served upon him as directed by the order.

§ 112. Adjournment of examination.

The time for taking such examination may be adjourned in like manner as the trial of an action.

§ 113. Witness confined in prison.

Where the party or other person to be examined is confined in a prison or jail within the state, under sentence for a misdemeanor or felony, that fact must be stated in the affidavit, and his deposition may be taken as if he were not so confined, except that in such a case the granting or refusing of the order is always in the discretion of the court. The order must require the production of the prisoner by the person in charge of the prison or jail, at the prison or jail, but it may prescribe such regulations and restrictions with respect thereto as the court deems proper.

§ 114. Examination; manner of taking and returning deposition; refusal to answer.

The deposition shall be in the form of question and answer, and when completed must be carefully read to and subscribed by the person examined; and within three days thereafter, unless sooner required by the order, must be filed in the office of the clerk of the court in the district where the action or special proceeding is pending, together with the stipulation or the affidavit on which the order was granted, with proof of the service of the order and of the affidavit. If upon an examination, the person examined refuses to answer, that fact must be reported to the court, which must determine whether the question was relevant and the witness bound to answer.

§ 115. When deposition may be read in evidence.

The deposition may be read in evidence by either party at the trial if it be satisfactorily proved that the witness is dead or is unable to attend by reason of his insanity, sickness or other infirmity, or that he is confined in a prison or jail, or that he has been and is absent from the city of New York, so that his attendance could not, with reasonable diligence, be compelled by subpœna.

§ 116. Effect of deposition.

The deposition so read in evidence has the same effect, and no other, as the oral testimony of the witness would have; and an objection to the competency or credibility of the witness, or to the relevancy or substantial competency of a question put to him, or of an answer given by him, may be made as if the witness were then examined, and need not be noted upon the deposition.

§ 117. Physical examination.

Where a party alleges, either for a cause of action, defense or counterclaim, damages for personal injuries, the court shall have power to order that he submit to a physical examination by one or more physicians or surgeons under such conditions as the court shall deem proper; and the court must make such an order whenever the adverse party shall present proof to the satisfaction of the court that he is ignorant of the nature and extent of the injuries alleged. If the party to be examined is a female, she shall be entitled to have the examination made by physicians or surgeons of her own sex. The order must direct the service of a copy thereof within the city of New York not less than five nor more than eight days before the date fixed for the examination, except that a different time for service may be directed when special reasons therefor are shown to exist and are recited in the order.

Trial; jurors; submission of controversy.

Sec. 118. Jury trial; how obtained; jury fee.
119. Time for rendering judgment or decision.
120. Number of jurymen; fee for jury of twelve.
121. Jury term; trial jurors.
122. Special jury list; how such jurors summoned.
123. Trials by special jury.
124. Submission of controversy upon agreed facts.

§ 118. [Am'd, 1916.] Jury trial; how obtained; jury fee.

1. Either party at the time of pleading or within three days after joinder of issue may demand a trial by jury. The demand may be made in writing and filed with the clerk, or orally and endorsed upon the summons. In a special proceeding the demand may be made in open court on the return of the precept. The party demanding a trial by jury shall forthwith pay to the clerk the sum of three dollars, which shall be applied so far as necessary, to the payment of the lawful fees of the server for summoning the jurors, and of a fee of twenty-five cents to each juror, which payment shall be made to him by the clerk at the end of the trial.

2. Unless a demand is made and the jury fee paid as above provided, a jury trial is waived and the court must hear the evidence and decide all questions of fact and law; provided, however, that the court may in its discretion, at any time before or during the trial, direct that a trial be had by jury, and thereupon a trial by jury shall be had in the same manner as if either party had demanded it, and the jury fee shall be paid by the plaintiff.

3. If an action is settled or discontinued before trial, all jury and jurors' fees paid by any party as provided in this act shall be returned forthwith to such party by the clerk of the court to whom such jury fee was paid.

Am'd by L. 1916, c. 123 (in effect April 3, 1916).

§ 119. Time for rendering judgment or decision.

1. If a jury trial is not demanded or directed as provided in the last preceding section, the court must render judgment within fourteen days from the time when the case is submitted for that purpose, except when further time is given by the consent of the parties. If no decision is rendered within the time thus limited, the case shall be placed upon the calendar for causes reserved generally.

2. A motion must be decided within fourteen days after it is submitted for decision, except when further time is given by the consent of the parties; and if no decision is rendered within the time thus limited, the motion may be renewed.

§ 120. Number of jurymen; fee for jury of twelve.

1. Except as hereinafter provided, a jury shall be composed of six men.

2. In a special proceeding or in an action where the claim for damages or of the value of the chattels exceeds two hundred and fifty dollars, either party may demand a trial by a jury of twelve. In such a case the jury fee to be deposited shall be six dollars.

3. In a case provided for in the subdivision next preceding, if one of the parties has demanded a jury of six and has paid the fee required therefor, the other party may at any time before trial demand a jury of twelve, and upon making such demand must pay to the clerk a fee of three dollars, which shall be applied as provided in section 118.

§ 121. Jury term; trial jurors.

Jury terms shall be held as the board of justices shall from time to time direct. Trial jurors for such terms shall have the same qualifications and shall be selected, drawn and notified by the same authorities and in the same manner as trial jurors of the supreme court held in the county in which such terms are held; and all provisions of the judiciary law and of the code of civil procedure, as they may be amended from time to time, except such as are inconsistent with this act, are hereby made to apply to this court and to trial jurors therein. At least twenty days before the opening of any term the number of trial jurors to be drawn for such term shall be fixed by the board of justices, and due notice thereof shall forthwith be transmitted to the official directed by law to draw such jurors. So far as the commissioner of jurors, or other official charged with the duty of drawing jurors in each county shall find it to be practicable, each juror drawn shall be summoned to the district nearest to his residence or place of business. Such jurors shall be paid the same compensation as trial jurors in the supreme court held in the county in which they serve. All returns required by law to be made after adjournment of the term shall be made by the clerk of the district in which such term is held, except as provided in section 123 of this act. In all proceedings for the remission and enforcement of fines of jurors the justices of this court shall have the same power and authority as justices of the supreme court and judges of the county courts in the respective counties. The board of justices may, upon request of the commissioner of jurors or other official charged with the duty of summoning jurors, depute one or more officers of this court to assist in summoning such jurors.

§ 122. Special jury list; how such jurors summoned.

If requested to do so by the board of justices, the commissioner of jurors or other person charged with the duty of summoning jurors in each county within the city of New York, must, on or before the first Monday in September in each year, furnish to the clerk of one or more districts of said court within the county for which said commissioner or other officer acts, a list of not more than one hundred names of qualified trial jurors residing in such county. The clerk of the court who shall receive the jury list must write on a slip of paper the name, residence, place of business and occupation of each of the persons named on said list and place the same in a box to be called the "undrawn special jury box." Whenever there is an action or special proceeding to be tried with a jury at a time other than a regular jury term, the clerk in such district must upon the order of a justice as provided in the next succeeding section, and in the presence of a justice, draw the required number of said slips of paper from the undrawn special jury box and deliver the names to a marshal or to one or more of the officers of the court, with a written or printed notice directed to each juror, requiring him to attend at the time and at the court specified in the notice. The officer, upon receipt of the said notices, must immediately summon each juror by delivering the notice to him personally or by leaving it at his residence with some person of suitable age and discretion, and must thereupon make a return to the clerk of the court as to

the manner in which such service was made by him. After such panel of jurors so summoned has been discharged by the court the clerk must make like return as in the case of jurors summoned pursuant to the next preceding section, and such jurors shall be entitled to the same compensation and paid in the same manner as jurors summoned for a regular term. The slips containing the names of the jurors so summoned must be placed in a box to be called the "drawn jury box" until all the names have been drawn from the undrawn jury box, and as often as that happens the whole number must be returned to the undrawn jury box.

§ 123. Trials by special jury.

If in any action or special proceeding trial by jury is demanded at a time when no jury is in session and it appears to the justice presiding that the rights of a party may be prejudiced by delaying the trial until the next jury term, such justice shall order the clerk who has received the jury list provided in the last preceding section to summon, in the manner therein prescribed, such number of jurors as such justice may direct, to appear at the court where the action or proceeding is pending. When the jury is summoned to a court other than the one the clerk of which has the custody of the said jury list, the clerk of the court where the action or proceeding is pending, shall, upon the discharge of the jurors, forward to the clerk having the custody of the said jury list, such detailed information, certified by him, as will enable the said clerk to make a proper return as required by law.

§ 124. Submission of controversy upon agreed facts.

1. At any time after joinder of issue in an action or special proceeding, and before the case is called for trial, the parties, if of full age, may agree upon a written statement of the facts for submission to the court. The statement must be accompanied by a written submission and by the affidavit of one or more of the parties that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties.

2. The controversy is submitted by filing the statement, submission and affidavit in the office of the clerk in the district where the action or proceeding is pending; and subsequent proceedings are subject to all the provisions of this act, except that an order of arrest, a warrant of attachment, a warrant of seizure, a requisition to replevy or an execution against the person cannot be granted therein.

3. The action or proceeding must be tried by the court upon the statement alone; and the statement, submission, affidavit and the judgment rendered or final order made, and any orders or papers necessarily affecting such judgment or order, shall constitute the record. If the statement of facts is not sufficient to enable the court to decide the controversy, the court may permit the filing, within a fixed time, of an additional or supplemental statement, in default whereof the court must dismiss the submission without costs to either party.

TITLE VII.

Judgment and execution.

Article 1. Judgments.
2. Execution.

ARTICLE FIRST.

Judgments.

Sec. 125. Judgments.
126. Dismissal for neglect to prosecute.
127. Judgment for or against any of the parties; severance of action.
128. Judgment when defendant liable to arrest.
129. Vacating and amending judgments and orders; opening defaults and granting new trials.

§ 125. Judgments.

Within the limits of jurisdiction defined in this act, the court shall have power to render any judgment that is consistent with the case made by the pleadings and embraced within the issues. A judgment dismissing the action may be rendered either on the merits or without prejudice to a new action, as the case requires, and the court shall make a proper note thereof. A decision as prescribed in an action tried without a jury in the supreme court shall not be required. All proceedings on the part of the party against whom judgment has been rendered, or who is required to pay the costs of any motion, except to review or vacate such judgment or order requiring payment of costs, are stayed without further direction of the court until the payment thereof.

§ 126. Dismissal for neglect to prosecute.

When an action has remained for more than six months upon the calendar for actions reserved generally, it may be dismissed by the court upon application of the defendant on notice; or, if the action has remained upon said calendar for more than one year, it may be dismissed by the court of its own motion.

§ 127. Judgment for or against any of the parties; severance of action.

The court shall have power to render judgment for or against one or more plaintiffs and for or against one or more defendants, to determine the ultimate rights of all the parties and to render judgment accordingly; but unless the court otherwise directs, a controversy between defendants shall not delay a judgment to which the plaintiff is entitled. When there are two or more defendants and a several judgment is proper, the court shall have power to render judgment, or to require that the plaintiff take judgment against one or more of them, and to direct that the action be severed and proceed against the others as sole defendants.

§ 128. Judgment when defendant liable to arrest.

When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it must be so stated in the judgment and entered in the docket. The clerk must in any transcript issued by him insert the words "defendant liable to execution against his person," and a like note must also be made

in the docket of a judgment by a county clerk where such a transcript is filed with him.

§ 129. Vacating and amending judgments and orders; opening defaults and granting new trials.

1. Upon proof by affidavit or otherwise that a judgment has been taken or a final order made without service of summons or process, the judgment or final order must be vacated and set aside by the court in the district where it was entered.

2. A motion to open a default and to vacate and set aside a judgment entered thereon must be made with due diligence and upon good cause shown and in no event more than one year after entry of the judgment; except that where the summons was served as prescribed in section 23 of this act, such motion must be made in no event more than two years after entry of the judgment. Upon granting such a motion the court must set the case down for trial. If a judgment taken by default or any part thereof has been collected or otherwise enforced and the defendant is successful upon the trial, such restitution may be compelled as the court directs; but title to property sold to a purchaser in good faith under execution issued upon the judgment shall not be affected.

3. A motion to set aside the verdict of a jury and to vacate, amend or modify a judgment rendered upon a trial by the court with or without a jury, and for a new trial, must be made at the close of the trial or within twenty days after the entry of the judgment.

4. A motion for a new trial upon the ground of fraud or newly discovered evidence must be made with due diligence and in no event later than one year after the entry of the judgment; and unless the court otherwise directs, it may be made upon affidavits without making and settling a case.

5. A new trial may be limited to the questions with respect to which the verdict or judgment is found to be wrong, if such questions are separable. If a verdict or judgment is set aside solely because the damages are excessive or inadequate, it may stand in all other respects and the new trial may be limited to the question of damages.

6. Upon opening a default, amending, modifying or vacating a judgment or order, or setting aside the verdict of a jury and granting a new trial, the court may impose such terms and conditions as may be just.

ARTICLE SECOND.

Execution.

Sec. 130. When and how issued.
131. Issuance and filing of transcript and effect thereof.
132. Proceedings against joint debtors.
133. Docketing judgment in another county.
134. Execution against marshals.
135. Execution; requisites.
136. Execution against the person.
137. The same—as affected by joinder of causes of action.
138. Renewal of execution.
139. Judgment and execution in favor of wage earners.
140. Time limit of execution.
141. Liability of marshal to execution creditor.
142. Return of execution and satisfaction of judgment.

§ 130. When and how issued.

An execution may be issued upon a judgment either by the clerk of the court in the district where the judgment was entered, within six years thereafter, the execution being directed to a marshal, or by the judgment creditor or his attorney after filing a transcript of the judgment with a county clerk as provided in section 131, the execution being directed to a sheriff. But no execution shall issue out of this court after a transcript has been issued, and no transcript shall be issued while an execution of this court remains outstanding, except a transcript showing that the judgment has been modified, vacated or set aside. When the execution is issued to a marshal the prospective fees of the county clerk and sheriff must be omitted. An execution issued to the sheriff upon a judgment in an action to establish a mechanic's lien shall authorize and direct the sheriff to sell the right, title and interest of the owner of the premises upon which the lien set forth in the complaint existed when the notice of lien was filed.

§ 131. Issuance and filing of transcript and effect thereof.

1. Upon application of a judgment creditor the clerk must deliver to him a transcript of the judgment, except as provided in the last preceding section. If the judgment is for the plaintiff in an action to establish a mechanic's lien, the clerk shall insert in the transcript an additional statement that the action was brought to establish a mechanic's lien and that the lien has been duly established and adjudged against the interest of the defendant in the property described in the complaint when the notice of lien was filed.

2. Upon presentation of the transcript and payment of the fees therefor, the clerk of the county in which the judgment was rendered must endorse upon the transcript the date of its receipt, must file it in his office and must docket the judgment as of the time of the receipt of the transcript, in a book kept by him for that purpose as prescribed by law; and if the judgment is for the recovery of a chattel which has been delivered to the unsuccessful party or for the value thereof, or for the establishment of a mechanic's lien, he must enter in the docket the particulars of the judgment as stated in the transcript.

3. Upon the docketing of a judgment as prescribed in this section

it shall be deemed a judgment of the supreme court and may be enforced accordingly. Nothing in this section shall be construed to prevent this court or a justice thereof from vacating, setting aside or modifying the judgment or staying the execution thereof.

§ 132. Proceedings against joint debtors.

An action, judgment and execution against one or more of several defendants alleged to be jointly indebted upon contract, shall be governed by the provisions applicable to like cases in the supreme court, including those whereby a plaintiff who has recovered judgment against one or more of such defendants may maintain an action and recover judgment against the others to charge their property with the sum remaining unpaid on the original judgment. When an execution upon a judgment against one or more of such defendants is issued out of this court, the clerk of the court shall make the same endorsements upon the execution and the same entries in the docket that a county clerk is required to make when execution is issued on a like judgment of the supreme court.

§ 133. Docketing judgment in another county.

The county clerk with whom a transcript is filed, must furnish to any person applying therefor and paying the fees, one or more transcripts of the docket of the judgment, attested by his signature. A county clerk to whom such transcript is presented must, upon payment of the fees therefor, immediately file it and docket the judgment in the appropriate docket book kept in his office in like manner as the judgment was docketed by the first county clerk. The judgment when so docketed has the like effect as it has in the county in which it was docketed upon the transcript from this court.

§ 134. Execution against marshals.

Execution on a judgment against a marshal or his sureties shall issue only to the sheriff after transcript filed with a county clerk as provided in this article, and must be made returnable to the county clerk.

§ 135. Execution; requisites.

The execution, when issued out of this court, must be directed to a marshal and subscribed by the clerk of the court in the district in which the judgment was rendered, and must bear date of the day of its delivery. It must state the names of the parties, the district where and the time when rendered, the amount of the judgment and the amount due thereon. It must require of the marshal substantially as follows:

1. If it is a case where the defendant cannot be arrested, it must direct the officer to collect the amount due on the judgment out of the personal property of the debtor and to pay the same to the clerk or to the party entitled thereto.

2. If it is a case where the defendant may be arrested, in addition to the foregoing it may direct the officer, if sufficient property of the defendant liable to execution cannot be found to satisfy the judgment, that he arrest the defendant and commit him to the jail of the county wherein the district in which the judgment was en-

tered is situate, until he pay the judgment or be discharged according to law.

3. When a defendant was served with summons otherwise than personally and did not appear generally, but his property has been duly attached under a warrant of attachment that has not been vacated, an execution on the judgment against him must require the marshal to collect the judgment only out of the property so attached.

4. In all cases it must further direct the officer to make proper return of the execution to the clerk of the court from which the execution issued, within twenty days from the time of the receipt thereof.

§ 136. Execution against the person.

If the execution directs the arrest of the defendant for want of sufficient personal property, and if there is not sufficient personal property subject to levy found by the officer, or if upon demand by the officer the defendant fails to produce sufficient property, the officer must immediately arrest the defendant. When arrested, the defendant must be conveyed to the common jail of the county wherein the district where the judgment is entered is situate, and there kept in custody until the execution, with costs, is paid, or he is discharged by due course of law.

§ 137. The same—as affected by joinder of causes of action.

When a cause of action for which a defendant may be arrested was united with a cause of action for which a defendant may not be arrested, an execution against the person of the defendant cannot be issued upon the judgment unless it appears that the judgment was rendered solely upon the cause of action for which he might have been arrested.

§ 138. Renewal of execution.

At the request of the judgment creditor an execution may be renewed before the expiration of the twenty days by the word "renewal" being written thereon with the date, and subscribed by the clerk of the court. Such renewal has the same effect as an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, others may be issued on like request from time to time until the judgment is satisfied.

§ 139. Judgment and execution in favor of wage earners.

In an action by a journeyman, laborer, or other employee whose employment answers to the general description of wage earner, for services rendered or wages earned, if the plaintiff recovers a judgment for a sum not exceeding one hundred dollars, exclusive of costs, and the action was brought within three months after the cause of action accrued, no property of the defendant is exempt from levy and sale on execution; and if the execution is returned wholly or partly unsatisfied, the clerk must, upon the application of the plaintiff, issue an execution against the person of the defendant for the sum remaining uncollected. A defendant arrested

in such a case must be actually confined in the jail and is not entitled to the liberties thereof, but must be discharged after having been so confined for fifteen days. After his discharge another execution against his person shall not issue upon the judgment, but the judgment creditor may enforce the judgment against his property. This section shall apply whether the defendant be male or female.

§ 140. Time limit of execution.

A defendant cannot be arrested nor can his property be sold on execution after twenty days from its issue or renewal, but property levied on within the twenty days may be sold after renewal.

§ 141. Liability of marshal to execution creditor.

A marshal is liable to an execution creditor for the amount of the execution in the following cases:

1. Where he suffers the twenty days to elapse without making a true return of the execution and filing the same with the clerk of the court, and paying to him or to the party entitled thereto the money collected thereon.

2. Where he willfully or negligently omits to levy on property of the defendant, or, if the defendant is liable to arrest, to arrest and imprison him within the twenty days, or, having arrested the defendant, fails to commit him to the county jail within the twenty days.

§ 142. [Am'd, 1916.] Return of execution and satisfaction of judgment.

1. Judgments of this court may be satisfied and discharged and the record thereof cancelled in the same manner as judgments of the supreme court, except as otherwise provided in this section.

2. If no execution has been issued to a marshal and no transcript of the judgment has been filed in the office of a county clerk, the judgment may be satisfied by depositing with the clerk of the court in the district where the judgment is entered the full amount due on the judgment, with interest to the date of deposit; whereupon the clerk must mark the record of the judgment satisfied.

3. When a transcript of a judgment has been filed in the office of a county clerk and no execution has been issued to a sheriff, the judgment may be satisfied by depositing with the said county clerk the full amount due on the judgment, with interest to the date of deposit, accompanied by a certificate of the sheriff of the same county, dated on the day of deposit, that no execution upon the judgment is in his hands; whereupon the said county clerk shall cancel and discharge the docket of the judgment.

4. When a judgment docketed in the office of a county clerk has been satisfied or discharged, the county clerk must issue, on payment of his fees, a certificate of the fact, and upon filing said certificate in the office of the clerk of any other county where the judgment has been docketed, the clerk of such county must enter satisfaction of the judgment accordingly.

Am'd by L. 1916, c. 508 (in effect May 11, 1916).

TITLE VIII.

Clerks and Marshals.

Article 1. Clerks.
2. Marshals.

ARTICLE FIRST.

Clerks.

Sec. 143. Duties of the clerk.
144. Destruction of records and papers.

§ 143. Duties of the clerk.

The clerk in each district shall:

1. Exercise the powers imposed and perform the duties conferred upon him by this act and the rules and the resolutions of the board of justices, and those usually appertaining to his office; and in the exercise of such powers and the performance of such duties, conform to the directions of the court.

2. Keep the seal of the court and affix it to such papers and documents as he may be required to certify.

3. Keep a docket book in such manner as the rules may prescribe, and all other records and proceedings of the court, and act as custodian of all documents, books and records.

4. Keep the office open for the transaction of business during the hours designated by the rules and resolutions of the board of justices.

5. Attend the sittings of the court, administer oaths, receive verdicts of juries, and, in a proper case, adjourn causes, or, when no justice appears, adjourn causes to the next judicial day.

6. Assume charge and control of, and be responsible for, the general conduct of the business of his office and for the faithful discharge of the duties of the deputy and assistant clerks and other officers connected with the court.

7. Collect and receive all the fees, and account for and pay the same into the city treasury monthly, under oath, on the first day of each and every month or within three days thereafter, which account shall contain the title of each case and the amount of fees received therein; and the salary of such clerk shall not be paid until he shall have so accounted and paid. He shall perform no service until he shall have received the legal fees therefor.

8. Deliver to his successor in office the official seal and all papers, books and records on file in his office.

§ 144. Destruction of records and papers.

The board of justices may by resolution direct the clerk of a court to destroy any records or papers deposited or filed in his office which may be considered as no longer necessary.

ARTICLE SECOND.

Marshals.

Sec. 145. Marshals to continue in office; appointment of their successors; vacancies.
146. Bond of marshal.
147. Action on marshal's bond.
148. Filing of transcript of judgment with city clerk; reducing bond.
149. Reducing bond on payment.
150. Mayor to compel renewal of marshal's bond; removal of marshal.
151. General powers, duties and liabilities of marshals.
152. Removal and suspension on charges.
153. Payment of money received by marshals.

§ 145. Marshals to continue in office; appointment of their successors; vacancies.

The marshals of the city of New York in office when this act shall take effect shall continue to hold office until the end of their respective terms. The successors of said marshals shall be appointed by the mayor of said city for terms of six years. No person shall be appointed a marshal in a borough of which he is not a resident. The removal of a marshal from the borough in and for which he was appointed shall vacate his office. If a vacancy in the office of marshal shall occur otherwise than by the expiration of a term, the person appointed to fill such vacancy shall hold office for the unexpired term of the marshal whom he succeeds.

§ 146. Bond of marshal.

1. No marshal shall be permitted to enter upon the duties of his office until he shall have given a bond as herein prescribed. The bond shall be executed by the marshal with two sufficient sureties, who shall be residents of the city of New York and each of whom shall be the owner of real estate therein of the value of double the penalty of the bond, which shall be the sum of three thousand dollars. The bond shall provide that the marshal and the sureties shall jointly and severally answer to the city of New York and any persons that may complain, for the true and faithful execution by such marshal of the duties of his office. The bond shall be submitted for approval to a justice of the court in the district in which the marshal was appointed; and such justice shall have power to require that the sureties justify before him within five days after the bond shall have been submitted, and shall approve or reject the bond within five days thereafter. When so approved, the bond shall be filed with the city clerk of the city of New York.

2. The bond must be executed, approved and filed within thirty days after the appointment of the marshal or he shall be deemed to have declined his appointment and another person shall be appointed in his place.

§ 147. Action on marshal's bond.

An action upon the bond of a marshal may be brought and prosecuted to judgment in this court, upon leave obtained from a justice of this court, according to the provisions relating to an action in the supreme court by a private person upon an official bond.

§ 148. Filing of transcript of judgment with city clerk; reducing bond.

Upon the filing with the city clerk of a transcript of a judgment on the bond of a marshal, the city clerk shall make a memorandum on the bond of the time when and the court whereby such judgment was rendered and the amount thereof, and he shall be entitled to a fee of fifty cents therefor, which the court rendering the judgment shall have power to include therein; and the bond shall be reduced by the amount of the judgment.

§ 149. Reducing bond on payment.

Whenever the sureties of the marshal shall pay the amount for which the action on the marshal's bond is brought, and the costs and disbursements incurred therein, or any part thereof, they shall be entitled to have such sum credited upon the bond upon presenting to the city clerk the affidavit of the plaintiff or his attorney in such action, acknowledging the payment; whereupon such clerk shall endorse the payment on the bond and the bond shall be reduced by the amount so paid.

§ 150. Mayor to compel renewal of marshal's bond; removal of marshal.

Whenever judgment shall be rendered on the bond of a marshal, or the bond shall be reduced as provided in the last preceding section, the city clerk shall report the fact to the mayor. If the amount of the judgment is equal to or greater than the amount of the bond the mayor shall direct the marshal to furnish a new bond; or, if the amount of the judgment is less than the amount of the bond, or in case of a reduction thereof, the mayor shall direct the marshal to furnish an additional bond in the penal sum of double the amount of the judgment or the reduction. If the marshal fails to comply with such direction within ten days after notice thereof, he shall be removed from office.

§ 151. General powers, duties and liabilities of marshals.

The authority of a marshal extends throughout the city of New York. Except as otherwise prescribed in this act or in the rules, every execution, order of arrest, warrant of attachment, requisition to replevy, warrant of seizure, or other mandate of the court shall be served and executed by a marshal, and all provisions of law relating to the powers, duties and liabilities of sheriffs in like cases and in respect to the taking and restitution of property, shall apply to marshals. Every marshal shall keep a record of his official acts in such manner as shall be prescribed by the board of justices.

§ 152. Removal and suspension on charges.

The mayor may remove any marshal for cause, provided that written charges are first filed with the mayor, and that the marshal be given due notice thereof and be afforded an opportunity to be heard; and the mayor may, in his discretion, suspend said marshal from the performance of his official duties pending a hearing upon the charges. Upon charges being preferred against a marshal by a justice of the municipal court, the mayor shall forthwith cause notice of suspension of the marshal to be served upon him, and the marshal shall thereupon remain suspended until the hearing and

determination of the charges. The mayor may, in his discretion, delegate to the secretary to the mayor the power and duty of hearing the evidence to be produced upon the said hearing, and in such case the said secretary shall have the power to issue subpœnas, administer oaths and take the evidence and shall submit the same to the mayor who shall forthwith make a determination thereon, which shall have the same force and effect as if the evidence had been taken before the mayor in person.

§ 153. Payment of money received by marshals.

Within five days after a marshal shall have collected or received any money upon any process of the court, he shall pay the same, less his lawful fees and disbursements, to the person entitled thereto, or to his attorney, or to the clerk of the court in the district from which such process was issued. Upon his failure to do so he may be proceeded against as for a contempt. The clerk of the court with whom such money is deposited shall pay the same on demand to the person entitled thereto or to his attorney.

TITLE IX.

Appeals.

Sec. 154. Judgments and orders appealable.
155. Review of intermediate orders.
156. Time to appeal.
157. Notice of appeal.
158. Supplying omissions; amendments.
159. Stay of execution pending appeal.
160. Exception to and justification of sureties.
161. Settlement of case and return on appeal.
162. Death of party.
163. Remittitur and return of papers.

§ 154. Judgments and orders appealable.

A party aggrieved may appeal to the supreme court, except when the judgment or order or final order was rendered or made upon his default from

1. A judgment in an action;
2. A final order in a special proceeding;
3. An order granting or denying a new trial;
4. An order granting or denying a motion to open a default and to vacate a judgment entered thereon;
5. An order granting or denying a motion to vacate a judgment or a final order upon the ground that the judgment was rendered or the final order made without service of summons or process;
6. An order granting or denying a motion to discharge a defendant from arrest, or an order granting or denying a motion to vacate or modify a warrant of attachment or a requisition to replevy or a warrant of seizure;
7. An order sustaining or overruling an objection taken to a pleading as prescribed in sections 88 and 89 of this act, provided that leave to appeal be granted either by the justice who made the order or by a justice of the appellate court;
8. An order which the court had not the power to make.

§ 155. Review of intermediate orders.

An appeal taken from a judgment or final order brings up for review an intermediate order which is specified in the notice of appeal and necessarily affects the judgment or final order and has not already been reviewed upon a separate appeal.

An order made after judgment or final order is deemed to have been made in the action or special proceeding within the meaning of this section.

§ 156. Time to appeal.

An appeal must be taken within twenty days after the entry of the judgment or order or final order. The right to review an intermediate order is not affected by the expiration of the time within which a separate appeal therefrom might have been taken.

§ 157. Notice of appeal.

An appeal is taken by filing with the clerk of the court in the district where the judgment, order or final order is entered, a written notice of appeal, subscribed by the appellant or by his attorney,

and the clerk shall give notice thereof to the respondent or his attorney in the manner prescribed by the rules.

§ 158. Supplying omissions; amendments.

Defects or omissions in the proceedings necessary to perfect an appeal or to stay execution of the judgment, final order or order appealed from may be supplied, or amendment of such proceedings may be granted, by the appellate court in like manner as though the appeal were taken from a judgment, final order or order of the supreme court.

§ 159. Stay of execution pending appeal.

1. The appellant may stay execution by filing with the clerk and serving, as hereinafter provided, a written undertaking executed by one or more sureties approved by a justice of the court, to the effect that if the appeal is dismissed, or if judgment is rendered against the appellant in the appellate court and an execution issued thereon is returned wholly or partly unsatisfied, the sureties will pay the amount of the judgment or the portion thereof remaining unsatisfied, not exceeding a sum specified in the undertaking, which must be at least one hundred dollars, and not less than twice the amount of the judgment; or, if the judgment is for the recovery of a chattel, that the sureties will pay the value of the chattel together with costs and the damages, if any, awarded by the judgment. If execution has been issued, the service upon the sheriff or marshal of a copy of the undertaking, certified by the clerk or accompanied by an affidavit showing that it is a copy thereof and that the original has been duly filed, stays further proceedings under the execution, subject to the provisions of the section next following.

2. In lieu of an undertaking, the appellant may stay execution by depositing with the clerk a sum of money equal to the amount of the judgment, with interest thereon for one year, and fifty dollars in addition.

§ 160. Exception to and justification of sureties.

The respondent or his attorney may, within five days after notice by the clerk of the filing of the undertaking, serve upon the appellant or his attorney a written notice that he excepts to the sufficiency of the sureties. Within five days thereafter, the sureties, or other sureties in a new undertaking to the same effect, must justify on at least three days' notice, before the court in the district in which the judgment was rendered. The court must endorse upon the undertaking or a copy thereof its allowance or rejection of the sureties. If the sureties fail or refuse to justify after service of the notice of exception, the respondent may proceed as if no undertaking had been executed.

§ 161. Settlement of case and return on appeal.

1. When an appeal has been taken as herein prescribed, the stenographer's original transcript of minutes must be furnished to the clerk within ten days after the fees therefor have been paid. Immediately upon receiving such minutes the clerk shall cause notice

of that fact to be sent to the attorney for the appellant, or to the appellant if he has not appeared by attorney. The appellant or his attorney shall then procure the case to be settled on a written notice of at least three days to the clerk and to the attorney for the respondent or to the respondent if he has not appeared by attorney, returnable before the justice who tried the case. The clerk must thereupon make a return to the appellate court, which must contain the summons or precept, pleadings, evidence and judgment or final order and all other necessary papers and proceedings, and have annexed thereto the opinion of the court, if any, and the notice of appeal. The justice before whom the case was tried shall within five days from the date of the submission to him of the case on appeal, settle the case and endorse his settlement on the return. The clerk must thereupon cause the return to be filed with the clerk of the appellate court. After a justice is out of office he may settle the case in any action or proceeding tried before him and may be compelled by the appellate court so to do.

2. Where no testimony was taken and a settlement of a case is not required, the return shall be made by the clerk forthwith upon filing the notice of appeal. Such return shall contain the judgment, order or final order appealed from and all the original papers upon which the judgment, order or final order was rendered or made, duly authenticated by the certificate of the clerk having the custody thereof, or copies thereof duly certified by such clerk, and shall have annexed thereto the opinion of the court, if any, and the notice of appeal.

3. Upon an appeal from an order granting or denying a motion for a new trial, upon the ground of fraud or newly discovered evidence, the stenographer's minutes of the trial shall be included in the return of the clerk and the provisions of subdivision one of this section shall apply to such an appeal.

§ 163. Death of party.

When a party dies before an appeal has been taken, or when a party to an appeal dies before the appeal is heard, the proceedings after his death shall be governed by the provisions applicable to similar cases in the supreme court, and an order substituting the proper representative of the decedent as a party may be made on application by the survivor or by such representative, on notice.

§ 163. Remittitur and return of papers.

The judgment or order of the appellate court must be remitted for enforcement to the court below; and the clerk of the appellate court shall return to the clerk of the court in the district from which the appeal was taken, all the papers upon which the appeal was heard.

TITLE X.

Costs and fees.

Sec. 164. Sums allowed.
165. No costs on plea of bankruptcy.
166. When defendant entitled to increased costs.
167. Costs allowed by court.
168. Costs in action by working woman.
169. Taxation of costs and disbursements.
170. Disbursements allowable.
171. Review of taxation.
172. Costs upon appeal; amount.
173. Fees payable to the clerk.
174. Employee's action; no fees.
175. No fees or costs in state and city actions.
176. Witnesses' fees.
177. Stenographer's fees.
178. Marshals' fees.

§ 164. Sums allowed.

In all actions there shall be allowed to the prevailing party, if he shall have shown that he has appeared by attorney, the following sums as costs:

1. To the plaintiff. Where, upon issue joined and after trial, the plaintiff recovers judgment: For fifty dollars and under one hundred dollars, ten dollars; for one hundred dollars and under two hundred dollars, fifteen dollars; for every additional one hundred dollars or fractional part thereof, five dollars.

2. To the plaintiff. If the defendant interposes a counterclaim in excess of plaintiff's claim and the plaintiff recovers judgment, costs shall be allowed on the amount of the counterclaim at the same rate as if it were the amount of the plaintiff's recovery. If the counterclaim is less than the plaintiff's claim, costs shall be governed by plaintiff's recovery.

3. To the plaintiff. Where the plaintiff recovers judgment upon the defendant's failure to answer, costs shall be allowed at one-half of the rates prescribed in subdivision one of this section.

4. To the plaintiff. For each necessary defendant served with the summons by a person other than a marshal, one dollar.

5. To the plaintiff. Upon settlement after service of summons and before trial, plaintiff shall be entitled to costs at the rates prescribed in subdivision three of this section, determined by the amount of the settlement.

6. To the plaintiff. Upon settlement during or after trial and before entry of judgment, plaintiff shall be entitled to costs at the rates prescribed in subdivision one of this section, determined by the amount of the settlement.

7. To the defendant. Where the defendant recovers judgment after trial, costs shall be awarded to him at the rates prescribed in subdivision one of this section, based on the plaintiff's demand in the summons, but if the defendant recovers judgment in excess of the amount claimed by the plaintiff in the summons, costs shall be based on the amount of the recovery of the defendant.

8. To the defendant. Where the defendant recovers judgment on the plaintiff's failure to appear, costs to be awarded to the defendant shall be one-half of those provided in subdivision seven of this section.

9. To the defendant. Where the plaintiff discontinues before trial, costs to be awarded to the defendant shall be the same as those provided in subdivision eight of this section; and where the plaintiff discontinues during the trial such costs shall be the same as those provided in subdivision seven of this section.

10. To either party. Where no provision for costs is otherwise made, the court, in its discretion, may award a sum not exceeding ten dollars.

11. If the action is for the recovery of a chattel or the foreclosure of a lien, the amount of the costs shall be governed by the value of the chattel or the amount of the lien as determined in the judgment or claimed by the adverse party, as the case may be.

12. The costs provided for in this section shall in no event exceed the sum of seventy-five dollars.

§ 165. No costs on plea of bankruptcy.

Where the defendant recovers judgment upon the defense of bankruptcy, he shall not be entitled to costs.

§ 166. When defendant entitled to increased costs.

The provisions applicable to increased costs to a defendant in the supreme court shall apply to this court, except that the costs recoverable shall be the amounts prescribed in this title and, in addition, one-half thereof.

§ 167. Costs allowed by court.

The court may, in its discretion, in addition to the other terms and conditions in this act provided, impose costs not exceeding ten dollars, in the following cases:

1. Upon granting or denying a motion.
2. Upon sustaining or overruling an objection taken to a pleading as prescribed in sections 88 and 89 of this act.
3. Upon allowing an amendment to a pleading.
4. Upon adjournment of a trial.

§ 168. Costs in action by working woman.

In an action brought to recover a sum of money for wages earned by a female employee, or for materials furnished by her in the course of her employment or in or about the subject-matter thereof, or for both, the plaintiff may, in the discretion of the court, be allowed the sum of ten dollars as costs irrespective of any other costs which she may recover; provided, however, that if the amount of damages recovered is less than ten dollars, she may be allowed the sum of five dollars as such additional costs.

§ 169. Taxation of costs and disbursements.

Costs, and in addition thereto, fees paid to the clerk and the prospective fees of the county clerk and the sheriff, must be taxed by the clerk forthwith upon rendition of judgment and inserted therein. Other taxable disbursements shall be taxed by the clerk on two days' notice to be given by the party entitled thereto to the adverse party. The clerk shall also tax costs allowed by the appellate court and shall enter all items of costs and disbursements in the docket book. All disbursements taxable on notice must be verified by

affidavit. The clerk must examine all items presented to him for taxation, and, before allowing any disbursements, must be satisfied that the items were necessarily incurred or that the services for which they are charged were necessarily performed.

§ 170. Disbursements allowable.

A party to whom costs are awarded shall be allowed his necessary disbursements as follows:

1. All fees paid to the clerk or a marshal, including jury fees.
2. The legal fees of witnesses.
3. The legal fees paid for a certified copy of a deposition or other paper recorded or filed in any public office, necessarily used or obtained for use on the trial.
4. The reasonable compensation of commissioners for taking depositions.
5. Prospective charges for filing a transcript with the county clerk and the sheriff's fees for receiving and returning an execution.
6. Such other reasonable and necessary expenses as are prescribed by law or taxable by express provision of law.

§ 171. Review of taxation.

Within ten days the clerk's taxation may be reviewed by the court upon two days' notice. The order must disallow any items wrongfully included in the judgment or add any items wrongfully omitted therefrom, and direct that any sum so disallowed be credited upon any execution or other mandate issued to enforce the judgment. Unless a motion for review of the taxation is asked for, the clerk's taxation cannot be questioned on appeal.

§ 172. Costs upon appeal; amount.

Costs upon an appeal may be awarded by the appellate court in its discretion, and if awarded shall be as follows:

To the appellant upon reversal, not more than thirty dollars.

To the respondent upon affirmance, not more than twenty-five dollars.

To either party upon modification, not more than twenty-five dollars.

§ 173. Fees payable to the clerk.

There shall be paid to the clerk the following sums as court fees in an action, and there shall be no others:

1. Upon filing summons with proof of service thereof, one dollar.
2. Before or at the beginning of the trial, as a trial fee, one dollar.
3. On filing notice of appeal, two dollars.
4. For issuing an order of arrest, a warrant of attachment, a requisition to replevy, or a warrant of seizure, one dollar.
5. For entry of judgment upon confession, one dollar.
6. On demanding a trial by a jury of six, three dollars; by a jury of twelve, six dollars.
7. For certifying a copy of a paper on file in the clerk's office, ten cents for each folio of one hundred words, except a return on appeal.

All fees shall be prepaid before the service shall be performed.

§ 174. Employee's action; no fees.

When the action is brought by an employee against an employer for services performed by such employee, the clerk shall not demand or receive any fees whatsoever from the plaintiff or his attorney, if the plaintiff shall present proof by his own affidavit that his demand is less than fifty dollars, that he is a resident of the city of New York, that he has a good and meritorious cause of action against the defendant and the nature thereof, that he has made either a written or a personal demand upon the defendant or his agent for payment thereof and that payment was refused; provided that if the plaintiff shall demand a trial by jury, he must pay to the clerk the fees therefor.

§ 175. No fees or costs in state and city actions.

In an action brought in the name of the people of the state of New York by the attorney-general, or in the name of the city of New York or of any department, board or officer thereof, by the corporation counsel of the city of New York, for the recovery of a penalty, no fees shall be required to be paid by the plaintiff to the clerk and no costs shall be taxed against the plaintiff; but in case such plaintiff recovers judgment, the costs and taxable disbursements shall be included therein, and if collected shall be accounted for.

§ 176. Witnesses' fees.

Witnesses in an action or a special proceeding or before a commissioner or justice of this court taking a deposition, are entitled to a fee of fifty cents for each day's attendance.

§ 177. Stenographer's fees.

In all cases of appeal from an order, final order or judgment, where a transcript of the stenographer's minutes of the testimony given on trial or hearing becomes a necessary part of the return on appeal, the stenographer's fees for making up such transcript shall be ten cents for every one hundred words actual count, and shall be paid in the first instance by the appellant and be taxable by him as a disbursement on the appeal.

§ 178. Marshals' fees.

Fees shall be allowed to marshals as follows:

For serving a summons, precept, order of arrest, requisition to replevy, warrant of seizure or warrant of attachment, on each defendant served, one dollar.

For a copy of a warrant of attachment served on a person other than the defendant and for the making of an inventory of the property attached, fifty cents.

For levying an execution or selling under an attachment, five cents for every dollar collected to the amount of one hundred dollars, and two and a half cents for every dollar collected over one hundred dollars.

For every mile, over one mile, one way only, when serving an order of arrest, requisition to replevy, warrant of seizure, warrant of attachment or execution, six cents, to be computed from the

clerk's office of the court out of which the mandate was issued to the place where it was executed;

For accompanying a party to obtain security ordered by the court, one dollar for each hour actually consumed;

For taking the defendant into custody on an order of arrest, execution or commitment, two dollars and fifty cents;

For serving a subpœna, fifty cents;

For every levy actually made by virtue of an execution, one dollar;

For executing a warrant in a summary proceeding to recover possession of real property, one dollar, and the same fees for traveling to execute the same as are herein allowed for executing other mandates;

For advertising for sale any property by virtue of an execution, one dollar;

For each day's necessary attendance at such sale, one dollar.

The said marshals shall perform all other services required of them by law, without any fees or compensation, and no other fees, charges, or compensation shall be allowed to, demanded or charged by them.

TITLE XI.

Definitions; construction and effect of act.

Sec. 179. Definitions.
180. Presumption of regularity.
181. Saving clause.
182. Construction.
183. Sections of code not applicable.
184. Laws repealed.
185. Short title of act.
186. When to take effect.

§ 179. Definitions.

The following words used in this act shall have the meaning attached to them in this section, unless otherwise apparent in the context:

1. The word "attorney" means a duly licensed attorney of the supreme court of this state.

2. The word "district" means a district of the municipal court of the city of New York.

3. The word "clerk" means the clerk, deputy clerk or assistant clerk or their successors.

4. The word "rules" means the rules duly adopted by the board of justices.

§ 180. Presumption of regularity.

The provisions of this act shall be liberally construed in furtherance of justice. The presumption of regularity shall attach to the proceedings, judgments, orders and final orders of this court, and every fair intendment shall be made in favor of its jurisdiction.

§ 181. Saving clause.

This act shall not be retroactive nor shall it create a vacancy in any office or employment.

§ 182. Construction.

A reference, in laws not repealed, to provisions of law incorporated into this act and repealed, shall be construed as applying to the provisions so incorporated. In the term "hereinafter prescribed," or words equivalent thereto, used in sections of the Greater New York charter relating to this court, which are unrepealed, the reference shall be deemed to extend to this act.

§ 183. Sections of the code not applicable.

The provisions of sections 3207 to 3214, inclusive, and section 3218, of the code of civil procedure, shall not apply to actions or proceedings in this court.

§ 184. Laws repealed.

The laws or parts thereof specified in the schedule hereto annexed and all acts amendatory thereof or supplemental thereto, in force when this act takes effect, are hereby repealed.

§ 185. Short title of act.

The short title of this act shall be the New York city municipal court code.

§ 186. When to take effect.

This act shall take effect on the first day of September, 1915.

SCHEDULE OF LAWS REPEALED.

Laws of	Chapter	Section
1902	580	All
1903	144	All
1903	156	All
1903	282	All
1903	431	All
1904	93	All
1904	264	All
1904	598	All
1904	625	All
1904	682	All
1904	735	All
1905	73	All
1905	228	All
1905	513	All
1906	214	All
1907	220	All
1907	220	All
1907	304	All
1907	425	All
1907	451	All
1907	603	All
1907	664	All
1908	22	All
1908	431	All
1908	495	All
1909	468	All
1910	153	All
1910	401	All
1910	538	All
1910	539	All
1910	540	All
1910	541	All
1910	542	All
1911	73	All
1912	468	All
1913	386	All
1913	690	All
1913	692	All

OF THE GREATER NEW YORK CHARTER.

Section	Section	Section
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1351	1358	1374
1352	1359	1378
1353	1360	
1354	1361	1384
1355	1362	1425
1356	1363	1427

CITED CASES

Relating to the Municipal Court Code of New York City.

N. B. This list comes down to the following Reports (and pages thereof) inclusive, viz., 217 N. Y. 569; 171 App. Div. 224; 94 Misc. 196; 158 N. Y. Supp. 320. The cases that were decided under the former Municipal Court Act (L. 1902, c. 580) have been distributed in this List under the corresponding sections of the new Municipal Court Code (L. 1915, c. 279). The Tables prefixed herein to the Municipal Court Code show which sections do thus correspond. The extent to which these former decisions are now applicable will require a careful comparison of the old and the new sections.

§ 1.—App. Div.: 146-350. Misc.: 59-151; 61-108; 73-363; 80-232. N. Y. Supp.: 158-28, 32.

§ 2.—App. Div.: 97-569. Misc.: 80-234.

§ 3.—Misc.: 80-233.

§ 4.—N. Y.: 202-158. App. Div.: 146-351.

§ 5.—Misc.: 80-232.

§ 6.—subd. 1.—(Contract). App. Div.: 92-224; 96-183; 102-266; 126-813; 127-191; 162-479 (aff'd 212 N. Y. 595). Misc.: 46-476; 52-289; 55-270, 307; 58-196; 59-63; 72-33; 84-88; 86-4; 93-509. N. Y. Supp.: 86-1059; 92-60; 150-224; 158-86.

(Fine or penalty).—App. Div.: 120-215 (aff'd 190 N. Y. 568). Misc.: 52-496.

(Mechanic's lien).—App. Div.: 141-775. Misc.: 51-620; 56-674; 59-496; 67-137; 87-180.

(Lien on chattel).—App. Div.: 99-569.

(Fraud).—App. Div.: 95-178; 121-799. N. Y. Supp.: 145-58.

(Injury to person or property).—App. Div.: 89-496; 95-178; 110-707 (aff'd 187 N. Y. 388); 115-607; 122-384; 125-559; 127-198; 129-527; 134-575; 136-690. Misc.: 47-676; 48-644; 49-468, 518; 53-289; 61-60; 68-321; 76-479; 88-335; 92-197, 719. N. Y. Supp.: 94-637; 97-1034; 125-610; 151-947; 155-499; 157-846.

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(Dispossess proceeding).—Misc. 42-80, 382; 59-641; 68-547; 92-315. N. Y. Supp.: 99-478; 150-559.

(Marshal's bond).—Misc.: 42-39.

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§ 9.—Misc.: 46-440.

§ 10.—App. Div.: 97-571. Misc.: 80-233.

§ 12.—App. Div.: 152-693. Misc.: 46-294; 59-519. N. Y. Supp.: 137-570.

§ 14.—Misc.: 59-497.

§ 15.—N. Y.: 205-517. App. Div.: 82-542, 628; 97-577; 112-441; 121-196; 127-40, 143; 131-173; 134-203, 223; 136-872; 139-297; 156-462; 152-693. Misc.: 42-529; 43-27; 45-387; 52-497; 53-50; 55-196; 56-671; 58-197, 552; 59-490; 60-99; 61-373; 62-268; 64-67; 75-479; 76-486; 84-391; 85-61; 88-554; 89-488; 90-498. N. Y. Supp.: 84-255, 537; 108-126; 115-161; 123-448; 125-25; 127-570; 147-53; 152-225; 157-298, 780, 905; 158-28, 33.

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RULES OF THE MUNICIPAL COURT OF THE CITY OF NEW YORK.

Rules of the Municipal Court of New York City.

(Adopted July 13, 1915, to go into effect September 1, 1915.)

(Amended to May, 1916.)

Rules 1 to 26, in effect September 1, 1915.
Rules 27 to 32, in effect October 23, 1915.
Rule 33, in effect March 1, 1916.
Rule 34, in effect January 19, 1916.

RULE I.

When court open. — Court shall open at 9 o'clock in the forenoon. At least one of the justices shall be in attendance until 4 o'clock in the afternoon. On Saturdays one justice shall be in attendance between the hours of 10 o'clock in the forenoon and 12 o'clock noon in each borough in a district to be designated by the board of justices for the transaction of such business as may be determined by a justice of this court. During the months of July and August, court shall be held on such days as the justice presiding in each district may designate.

RULE II.

Call of calendar; in what part. — In a district where more than one part has been established the trial calendar shall be called, and precepts in summary proceedings, orders to show cause and notices of motion shall be returnable in part one. The call of the calendar shall precede the transaction of any other business. Motions shall be heard immediately after the call of the calendar.

RULE III.

Daily trial calendar. — The clerk in each district shall prepare a daily trial calendar which shall be posted in the clerk's office two days in advance. Causes shall be placed on the trial calendar according to their dates of issue. Adjourned causes shall be placed on a subsequent trial calendar in the order in which they have been adjourned.

RULE IV.

Order of causes on trial calendar. — Causes shall appear on the trial calendar in the following order:

(*a*) Causes in which judgments on default in pleading must be rendered on application to the court.

(*b*) Actions for wages.

(*c*) Other actions in which the amount claimed does not exceed fifty dollars.

(*d*) Summary proceedings to recover possession of real property.

(*e*) Hearings on objections taken under §§ 88 and 89 of the Municipal Court Code.

(*f*) Causes marked for a preference by the court on a preceding day.

(*g*) Actions on a written instrument for the payment of money only.

(*h*) Causes, not hereinabove enumerated, appearing for the first time on the trial calendar.

(*i*) Adjourned actions in causes not hereinabove enumerated.

RULE V.

Order in which causes will be tried. — Causes shall be tried in the order in which they appear on the calendar unless otherwise directed by the court; and in a district where more than one part is held, the justice calling the trial calendar shall assign causes for trial to a disengaged part in the order in which they appear on the calendar.

RULE VI.

Application to court for judgment by default; placed on calendar for what day. — Where the plaintiff can recover judgment upon the defendant's default in pleading only upon application to the court, the clerk, providing the plaintiff appears in person, shall place the cause upon the calendar on a day not less than three nor more than five days after the expiration of the time within which the defendant might have appeared, and shall notify the plaintiff by mail of the date. Where the plaintiff has appeared by attorney the clerk shall place such cause upon the trial calendar for a day to be fixed by the attorney in a notice to be filed with the clerk, such date, however, to be not less than three days from the filing of the notice unless otherwise directed by the court.

RULE VII.

How defendant to appear. — Where the defendant does not appear by attorney, he must at the time of answering give his address in writing to the clerk.

RULE VIII.

Filing of summons, or summons and complaint, with clerk; effect of not doing so. — If the summons, or the summons and complaint, is not filed in the office of the clerk as provided by subdivision 3 of § 22 or by § 23 of the Municipal Court Code, the defendant may within the time limited for joining issue, on complying with subdivision 3 of § 78 of the Municipal Court Code, file the copy of the summons, or of the summons and complaint served upon him, together with an affidavit of such service. Upon the request of the defendant the clerk must thereupon dismiss the action and in a proper case tax costs on such dismissal, or the defendant may have other appropriate relief.

RULE IX.

Calendar of causes reserved generally. — There shall be in each district a calendar of causes reserved generally on which calendar the clerk, unless otherwise directed by the court, shall place any cause after the same shall have been three times on the trial calendar. Any cause may be placed on such calendar by consent, or upon stipulation of the parties. Causes may be restored to the trial calendar on three days' notice, or on consent of the parties, for a day to be fixed by the court. Before an action shall be dismissed by the court pursuant to § 126 of the Municipal Court Code the clerk shall give such notice to the parties as the court may direct.

RULE X.

Extension of defendant's time to move or answer. — The defendant's time to move or answer pursuant to subdivision 5 of § 78 of the Municipal Court Code shall not be extended by an ex parte order for more than three days, and when said time shall have been extended by stipulation or order for three days or more, no further time shall be granted by order, except upon notice to the adverse party of the application for such order.

RULE XI.

Consent giving court further time to render judgment or order. — A consent giving the court further time to render judgment or decide a motion as provided in § 119 of the Municipal Court Code must be in writing or noted upon the minutes of the trial.

RULE XII.

Motions; on notice, and ex parte. — (*a*) Motions may be brought on for hearing on not less than three days' notice unless otherwise directed by the court.

(*b*) Ex parte applications may be made to and granted by any justice. The affidavit shall state whether any previous application has been made for such order, and if made, to what justice and what order or decision was made thereon and what new facts, if any, are claimed to be shown.

RULE XIII.

Papers in actions to be submitted to clerk, and to be sent by him to the justice. — All papers in actions or proceedings shall be submitted to the clerk of the district in which such actions or proceedings are pending and it shall be the duty of the clerk to forward such papers promptly to the justice to whom they are to be submitted.

RULE XIV.

Attorney's endorsement on summons, etc., deemed an appearance. — The endorsement of the name and address of the attorney on the summons, pleading or any other paper filed in an action shall be deemed an appearance within the meaning of § 164 of the Municipal Court Code.

RULE XV.

Papers on appeal to Appellate Term. — All copies of papers which are to be included on the return on appeal and prepared by the appellant as provided by rule 4 of the rules of the Appellate Term, for the hearing of appeals from the City Court of the City of New York and from the Municipal Court in the Boroughs of Manhattan and the Bronx, shall be furnished by the appellant to the clerk at the time of filing the written notice provided for in § 161, subdivision 1, of the Municipal Court Code.

RULE XVI.

By whom case settled, in case of death or disability of trial judge. — In case of the death or disability or prolonged absence from the city of a justice the case on appeal may be settled by the justice presiding in part one in the district in which the judgment was entered with the same force and effect as if he had tried the case.

RULE XVII.

Precepts in summary proceedings; when filed. — Precepts in summary proceedings must be filed at least one day before the return day thereof, unless by direction of the court they are made returnable on the same day as issued, or the day after.

RULE XVIII.

Secretary of Board of Justices to preserve papers, records, etc. —It shall be the duty of the secretary of the Board of Justices to safely keep in his possession, as public records, all papers, documents or records which he is required by law or by the rules or resolutions of the Board of Justices to keep, which records shall be open for public inspection.

RULE XIX.

When office of clerk open and employees to attend. — The office of the clerk shall open at 8:45 o'clock in the forenoon of each day and shall remain open for the transaction of business until 4 o'clock in the afternoon, excepting Saturdays, when the office shall close at noon, and the months of July and August, during which months the office shall close at 2 o'clock in the afternoon. The clerks and other employees shall report for duty promptly at the places to which they are assigned at 8:45 o'clock in the forenoon of each day and shall be in attendance until the close of the office or such later time as may be required to complete the business of the day, or as the court may from time to time direct.

RULE XX.

Duties of deputies, assistants, interpreter, stenographer, etc. — (*a*) The duties of the deputy clerks, assistant clerks, and other employees shall be designated by the clerk in conformity with the statutes and the rules of this court and subject to the approval of the justices of the district to which they are assigned or a majority of them.

(*b*) The attendants shall while on duty wear such uniforms and badges as may be prescribed by the Board of Justices. The interpreter shall wear an official badge during the sessions of the court.

(*c*) The stenographer shall be in attendance during the sessions of the court and at such other times and places as the justice to whom he is assigned may direct.

(*d*) It shall be the duty of the attendants to maintain order in and about the court and the offices thereof and perform such other duties in connection with the work of the court as the justices shall require.

(*e*) The clerk shall each month, at such time and in such manner as required by law and the rules of the finance department of the City of New York, pay all moneys received by him for the use of or on behalf of the city during the preceding month to the Comptroller of the City of New York. A summary of such receipts and a detailed statement of the business of the court for the preceding month shall be filed with the secretary of the Board of Justices not later than the fifth day of the following month.

(*f*) The clerk in each district shall keep account of the moneys received by him and from day to day shall deposit such moneys in such bank as the Comptroller of the City of New York may designate.

RULE XXI.

Books kept by clerk in each district. — The clerk in each district shall keep the following books and make therein the entries hereinbelow directed:

(*a*) Books to be known as the current docket books. Each page in each book shall be numbered in a series of consecutive numbers for each year and shall be devoted to one action. On the page so numbered the clerk shall enter the title of the action with the names of the plaintiff and defendant and attorneys in full, and in chronological order the dates of filing the summons and pleadings, and the verdict, judgment, or other disposition of the action as of the date of rendering thereof; also all orders in the action, and the date of the appeal, if any, together with the disposition thereof. Specific entries shall be made of the judgment, the costs and disbursements as taxed and the prospective disbursements together with the execution, if issued, or transcript, if given, and any other matter affecting the judgment. All entries shall be made in the action on the same page of the docket, except in actions where the entries are so voluminous as to require one or more additional pages, in which case the entries shall be continued under the same number upon other pages of that, or a subsequent docket book, references thereto being noted at the end of the first and all additional pages.

(*b*) An alphabetical index of all actions entered in the current docket books during any year shall be indexed in the name of the plaintiff, or where there is more than one plaintiff in the name of the plaintiff whose name first appears on the summons. The serial number of the action as it appears in the current docket book shall be entered opposite the name indexed.

(*c*) An alphabetical index of all judgments entered in the current docket books, on which an execution is issuable. The judgments shall be indexed in the name of the judgment debtor; or where there is more than one judgment debtor, in the name of each judgment debtor. The name or names of the judgment creditor or creditors shall be entered opposite the name of each judgment debtor. The serial number and year of the action in which the judgment was rendered shall be entered opposite the name indexed.

(*d*) A docket book of summary proceedings in which shall be entered the date of the precept, the time of its return, the date of filing of other pleadings, the particulars of the final order, the date of the issuing of a warrant and to whom the same was issued, the return thereof and the particulars of such return. Such docket book shall contain an index of each proceeding to be entered in the name of the petitioner. The requirements as to indexing and numbering for actions shall not apply to summary proceedings.

RULE XXII.

Date of placing cause on calendar to be entered on general calendar. — It shall be the duty of the clerk to enter upon the general calendar provided for by § 95 of the Municipal Court Code the date on which each cause is placed upon said general calendar and the date upon which it shall first be placed on the trial calendar, together with the serial number of the cause.

RULE XXIII.

Each action to have a serial number in current docket book, and all papers filed to bear said number and the year. — The clerk shall upon receipt of the first paper of an action to be filed in his office stamp the same upon the front page with one of a series of consecutive numbers and the proper year and immediately make an entry in the current docket book as provided by rule 21. All papers thereafter to be filed in the action shall bear the same number and year as the first paper filed as aforesaid. Each number shall constitute a part of the title of such action. After the action shall have received a number the clerk is authorized to refuse to receive or file any paper upon which the number and year assigned thereto does not plainly appear. Whenever a paper appertaining to any action begun prior to the first day of September, 1915, is filed with the clerk, the clerk shall upon receipt of such paper stamp the same on the front page with a number, and the year, and shall make such entries in the current docket book for that year as if such paper were the first paper filed in the action, and the clerk shall stamp or endorse that number upon every paper in said action theretofore filed in his office, and shall make the proper entries in the docket book in the same manner as if such docketing had been begun with the first paper in such action.

RULE XXIV.

Practice as to numbering actions, when causes transferred from one district to another. — Whenever a cause of action and all papers relating thereto are transferred from one district to another, the clerk in the district to which the action has been transferred shall stamp the same with a serial number and the year, as if it were the first paper filed in his office and shall make proper entries in the current docket book, as if such docketing had been begun with the first paper in such action. Where an action shall be transferred from one district to another for trial only, the clerk of the district to which the cause shall have been transferred for trial shall not stamp the papers with any serial number nor make any entries in the current docket book, but shall make an appropriate minute upon the general or trial calendar and shall after the conclusion of the trial upon the rendering of the verdict or receipt of the justice's decision forthwith remit all the papers in the action to the clerk of the district from which the same has been transferred.

RULE XXV.

Notice by clerk of the filing of an appeal. — The notice of the filing of an appeal as provided by § 157 of the Municipal Court Code shall be given by the clerk immediately upon the filing thereof by mailing a prepaid postal card, to the attorney for the respondent, addressed to his office, or where the respondent has not appeared by attorney, to the respondent at his address. A minute of the mailing of such notice shall be entered in the current docket book.

RULE XXVI.

Stenographer's minutes; his fees for transcripts. — (*a*) The stenographer's minutes of the trial shall be transcribed and typewritten on

such paper and in such manner so as to conform with the rules in that respect which may from time to time be adopted by the Appellate Terms for the First and Second Departments, respectively.

(*b*) The fees of the stenographer for a transcript of his minutes pursuant to § 177 of the Municipal Court Code shall be deposited with the clerk of the district where the action or proceeding is pending, who upon filing of the transcript shall pay the amount deposited to the stenographer. The deposit must be made by the appellant within five days after the filing of the notice of appeal as provided by § 157 of the Municipal Court Code, and within ten days after such deposit the stenographer must file the transcript of his minutes with the clerk.

RULE XXVII.

Transfer of action to proper district; application therefor. — Where a demand for a transfer of an action to the proper district has been filed in accordance with subdivision 2 of § 17 of the Municipal Court Code the application for the transfer must be made to the court on notice to the plaintiff.

RULE XXVIII.

Service of summons upon co-defendants. — Where two or more defendants are joined in an action the plaintiff shall file the summons or the summons and complaint with proof of service upon the first defendant served as required by subdivision 3 of § 22 of the Municipal Court Code and shall file proof of service upon the other defendants within two days after service upon each of them.

RULE XXIX.

Entry of judgment by default against co-defendants. — Where the clerk is required to enter judgment forthwith upon the defendant's failure to answer pursuant to § 80 of the Municipal Court Code, the plaintiff may at any time before entry of judgment file with the clerk a request in writing not to enter judgment against one or more defendants specified in said request. Upon the filing of such a request entry of judgment shall be postponed until the filing of a further request to enter judgment.

RULE XXX.

When damages are assessed by clerk, when judgment is taken by default, plaintiff is to file statement of cause of action. — Where the clerk upon defendant's failure to answer must ascertain the amount due to the plaintiff before entry of judgment as required by § 80 of the Municipal Court Code, the plaintiff shall file a statement setting forth the facts constituting the cause of action. The statement must be made by the affidavit of the person specified in § 525 of the Code of Civil Procedure.

RULE XXXI.

How hearing brought on when notice of special appearance is filed. — Where a notice of special appearance is filed pursuant to subdivision 8 of § 78 of the Municipal Court Code the hearing shall be

brought on in the manner provided by § 95 of said code for bringing a cause on for trial.

RULE XXXII.

Notice of trial, when filed. — The notice of trial required by § 95 of the Municipal Court Code to be filed with the clerk, must be so filed at least three days before the date fixed for trial.

RULE XXXIII.

Each attorney to serve copies of papers upon opposing attorney. — Where both parties appear by attorney, copies of all pleadings, notices, demands and other papers in an action, which are required to be filed with the clerk, shall be served by the attorney filing the same upon the attorney for the adverse party, with notice of the date of filing, within one day of the date of such filing.

RULE XXXIV.

Security for costs. — The security for costs which plaintiff may be required to give, as prescribed in title 3 of chapter 21 of the Code of Civil Procedure, shall be in such amount as the court or a justice thereof may direct, but in no case less than $25. An order to give additional security may be made by the court on notice, from time to time, as provided in § 3276 of the Code of Civil Procedure.